letr
legal education and training review

IPS BAR STANDARDS BOARD Solicitors Regulation Authority

Literature Review

3. Legal education and conduct of business requirements

Introduction

1. The field of conduct of business regulation (COBR) within regulation is a considerable one, developed largely over the last three decades. The Index of All Codes website, maintained by the European Corporate Governance Institute, lists 32 COBR codes and reports that amend the codes in the UK alone. Many of these directly affect corporations and larger firms, but as Pattberg points out, they also influence many other commercial concerns, including smaller enterprises along the supply chain (Pattberg, 2006, p. 241).

2. The reasons for the rise of COBR as an arm of regulation are complex. As Chandler & Fry point out with regard to the piecemeal and reluctant introduction of accounting standards by the legal profession over the past century, regulation is often introduced only at moments of public pressure or crisis, in response to particular issues. But in spite of being targeted at particular issues, the intentions behind regulation are often multi-layered, and the subsequent effects of regulation are often difficult to foresee; and the same can be said for COBR.

3. To date there has been little literature that deals with the intersection of COBR and legal education. This is not to say that the subject is not an important one. Indeed it could be said that of the many recent developments in the regulatory field none go to the heart of the regulatory relationship more than the subject of COBR. In addition, the framework of analysis is often narrowly restricted to either legal profession practice or that of cognate professions. But as Mary Douglas has pointed out with regard to risk and justice, it is 'currently impossible to make sense of the concept of risk in the compartmentalised, individualistic frame of analysis normally employed' (Douglas, 1992, p. x), and the same could be said of the concept of COBR. In this section of the literature review, therefore, we shall range quite widely in the literature to present a view of COBR within the field of regulation, and explore possible future relationships between regulators and those involved in legal education in England and Wales.

4. The term 'conduct of business regulation' seems to originate primarily in the financial services and banking sector. In simple terms it describes all those 'rules and guidelines about appropriate behaviour and business practices in dealing with customers (Llewellyn, 1999, p. 11). In this literature (and increasingly in regulatory practice) it is distinguished from 'prudential regulation' that addresses the larger issues of financial institutions' stability, and the risks associated with systemic effects (i.e., externalities) on the financial sector as a whole (Llewellyn, 1999, p. 10; Pacces, 2000). COBR has also been used to describe the voluntary, self-regulatory, codes of conduct developed by businesses.[1]

The focus of COB regulation

5. In modern regulatory theory COB regulation is primarily justified as a means of limiting risks associated with the information asymmetries that accompany the delivery of (most) professional services. Where there is a knowledge or information gap that tends to favour the service provider, clients are exposed to the risks of both

[1] The "commitments voluntarily made by the companies, associations or other entities, which put forth standards and principles for conduct of business activities in the marketplace" (OECD 2001: 3)

adverse selection and moral hazard: they may choose a dishonest or incompetent provider, or the chosen provider may use its position to put self-interest (or the interests of another client) above those of that client.

6. As Llewellyn points out, COB regulation tends to focus on:

> mandatory information disclosure, the honesty and integrity of firms and their employees, the level of competence of firms supplying financial services and products, fair business practices, the way financial products are marketed, etc. Conduct of business regulation can also establish guidelines for the objectivity of advice, with the aim of minimising those principal-agent problems that can arise when principals (those seeking advice) and agents either do not have equal access to information, or do not have equal expertise to assess it. (Llewellyn, 1999, p. 11)

COB regulation thus incorporates most of the areas of traditional professional regulation: competence standards, confidentiality, conflicts of interest between (potential) clients, etc. The use of 'suitability criteria' is an important feature of much COB regulation in the financial services sector (Pacces, 2000). This may map onto traditional notions of (individual) fitness to practice and integrity, but may extend also into entity authorisation[2] and 'fitness to own' criteria – as with the regulation of ABSs. Moreover, in financial services, intermediaries may be required by regulations to refrain from recommending or performing on their investors' behalf transactions which are not "suitable" in terms of size and/or frequency, in the light of the customer's financial needs and objectives. Such criteria are also used to try to prevent 'churning' – a term used in financial services to describe excessive trading on a portfolio with the intention of generating commission. In the legal context churning involves 'working a file' in such a way as to maximise billable hours or otherwise generate unnecessary costs to the client, and has been a difficult practice to police.

7. COB regulation in the legal services sector presently involves a relatively complex regulatory matrix, comprising a mix of entity and individual regulation largely delineated by title. Regulation by title is the primary mechanism used to distinguish different professional jurisdictions, and is one aspect of regulation that clearly extends downwards into the setting of entry criteria and relatively content-heavy prescription of education and training.

8. Regulation by title involves an element of what we might call 'activity-focused' regulation – the regulation of reserved activities is an obvious example, but these are still largely delineated by (and, to an extent, used to justify) title, despite the fact that there is little coherent policy rationale behind the protection of at least some of those activities (Mayson, 2010). There are some partial exceptions, notably in terms of the co-ordination of conduct rules and standards (eg, under the proposed QASA regime) for advocacy, whereby regulation might more properly be described as activity-based.

9. A desire to move towards more entity and activity-based regulation, organised around defined risks, has recently been signalled by the Legal Services Board (2011). A proper system of activity-based regulation could bring with it a number of advantages and efficiencies: a reduction of regulatory co-ordination problems; greater rationality (insofar as it involves an element of risk-based standardisation),

[2] Eg, adherence to COB rules may be made a requirement of entity authorisation, eg, claims management businesses authorised by the Ministry of Justice must abide by the Conduct of Authorised Persons Rules 2007.

and with it, possibly some reduction in search costs for consumers.[3] On the supply side, regulation by title has been a blunt instrument. Regulation by title may serve as a means both of maintaining a higher quality of service, and, conversely, of obliging providers to 'gold-plate' service standards. By creating higher compliance-driven transaction costs it may make the offer by regulated service providers expensive or even uneconomic relative to unregulated competitors.[4] Another obvious area where regulation by title creates relatively high transaction costs is in respect of education and training itself. It might be argued that the requirement for uniformly high levels and long periods of training, much of which is relatively generic and not targeted towards activity-led needs, is excessive, at least in the context of certain activities and client groups.

10. Activity-based regulation might help reduce costs of regulation, and possibly also reduce what the LSB calls barriers to innovation for 'regulated' providers who want to compete effectively with unregulated competitors for unregulated work. However, there may also be some structural and political challenges in moving to a substantially activity-based system in conditions where frontline regulation is in the hands of title-based regulators, and where a principle of regulatory competition is enshrined in the Legal Services Act. Moreover, as the LSB also observes, 'there is asymmetry of information between many consumers and providers of legal services and title does provide a useful, if not perfect, signal to consumers about regulation and thus consumer protection' (Legal Services Board, 2011, p. 33). At present we note that, aside from the LSB consultation and responses, there is relatively little literature to provide guidance on these issues.

11. A move to greater levels of entity-based regulation could also have significant training implications. As the term implies, an entity focus makes the business increasingly responsible for applying the principles and achieving the outcomes of COBR across its workforce. It will thus create new training needs for those taking on compliance roles and building the ethical and compliance infrastructure necessary to meet the demands of outcomes-focused regulation (discussed below). The move to greater entity regulation also has the potential to encourage legal service providers to take their organisation's training needs more seriously. Following regulatory reform in New South Wales, data demonstrates that 'supervision of staff' was one of two areas in which the greatest number of Incorporated Legal Practices (ILPs) initially assessed themselves as non-compliant or only partially compliant with regulatory standards. Indeed 'some of the comments on the self assessment forms suggested that many practices, especially smaller ones, had never thought about systematising staff induction and training' (Parker, Gordon and Mark, 2010). In this regard we hypothesise that changes to the overarching regulatory infrastructure as well as the introduction of new forms of business organisation will create both new and increased demands for training at the vocational stage, and particularly for initial and continuing professional development.

[3] Though these might be offset, as noted below, by new informational problems if there were to be a radical departure from established titles.

[4] In practice the anti-competitive effect may not be so great because of market externalities – eg information asymmetries and lack of transparency as regards price across the sector – note for example the evidence that some non-admitted will-writers are charging as much as or more than some solicitors for their services.

The form of COB regulation

12. There is generally no prescribed form of COB regulation. To quote again from Llewellyn (1999: 48; see also Llewellyn, 1998):

> The skill lies not so much in the choice of instruments, but in how they are combined in the overall policy mix. It is not a question, for instance, of rules *versus* principles, but how the full range of instruments are used to create an overall effect. In this regard, much of the debate about regulation is based on false dichotomies. The various instruments can be used in a variety of combinations, and with various degrees of intensity.

13. Interestingly, despite Llewellyn's assertion, there has been some tendency in the UK over the decade from 1999-2009 to align COB regulation in practice more to either a risk- or principles-based approach. The rationale behind this move tends to be that over-extensive or too-detailed regulation:
    - increases compliance and hence transaction costs (Trebilcock, 2001; FSA, 2006)
    - lacks adaptivity and requires more constant oversight and review as highly detailed regulations may be more difficult to 'future-proof' (House of Commons, 2009, p. 15)
    - reduces incentives on the owners and managers of regulated firms to monitor and control themselves (Llewellyn,1999 p. 51)
    - discourages or reduces incentives for consumers to undertake appropriate due diligence
    - limits business owners' and managers' flexibility in deciding how best to meet their obligations and deliver services to the marketplace (FSA, 2006, p. 16)
    - limits business owners' and managers' ability to innovate and compete more effectively in delivering services (FSA, 2006, p. 16)

14. We can see this happening in the insurance industry, one that has driven the development of COBR – unsurprising, given the amount of economic data that has been gathered on the operation of insurance markets. Various reports give an indication of this. The FSA's *ICOB Review Interim Report* (2007), for instance, focusing on consumer experiences and outcomes in general insurance markets, (and in particular on unsuitable and expensive insurance purchases, as well as failure to purchase) summarises the approaches used in the development of COBR. These include the development of Market Failure Analysis tools (MFA), described as a form of microeconomic analysis 'typically involves identifying relevant markets, applying economic principles to them to form a view about how these markets are working and then seeking data to test whether that view is, or is not, likely to be correct' (FSA 2007, p. 12). The FSA also developed a form of research triangulation, targeting market-oriented questions from different angles to ensure validity and robustness of their results (FSA 2007, p. 13). These were largely quantitative research results based upon extensive datasets; though there was also qualitative research carried out into market behaviour.

15. All this research activity underpinned the FSA's re-designed approach to COBR that included:
    - a move towards high-level rules that focused on outcomes rather than processes, with the minimum necessary prescription
    - improvements in structure and presentation

- easing the regulatory burden for small firms. (FSA 2007, p. 16)

The latest update to the FSA's COB Sourcebook indicates that the industry approved this approach, and particularly the web-based updates of the Sourcebook based upon 'the FSA's assessment of specific responses from firms to changed requirements' (FSA 2010, 4). In other words, regulated firms welcomed an approach where the regulator acted in open, swift and transparent engagement with its members.[5]

16. Although it is questionable how far the financial crisis saw a failure in the form of regulation, rather than in regulator performance (see, eg, House of Commons, 2009; Masters 2011), regulators' attention has turned again to asking questions about the regulatory mix and ensuring that regulation is 'right-touch' rather than simply 'light-touch' (House of Commons, 2009, p. 14). Until recently the advice of the UK Better Regulation Task Force (2000) was that when presented with policy issues, regulators should first consider whether they should act, then consider self-regulation, and only then if the situation warrants, more hierarchical interventions.[6] This approach is also taken by the Regulatory enforcement and Sanctions Act 2008, which required regulatory authorities to which it applied to review their performance and remove unnecessary regulation. This accords with the Regulators' Compliance Code, a statutory code of practice that came into force in April 2008.[7] The Code relied upon the Arculus, Macrory and Hampton Reports on good regulatory practices, and the principles derived therefrom.[8]

17. Recently and in the light of the banking failures of recent years and subsequent recession, the Coalition Government proposed a new shape to financial regulation in the UK. The regulatory architecture is composed of a macro-prudential regulator, the Financial Policy Committee (FPC), a new prudential regulator, the Prudential Regulation Authority (PRA), a micro-prudential supervisor, and a conduct and markets regulator, namely the Financial Conduct Authority (Cmd 8083). Amongst the many changes is the move from the FSA's early 'nonzero failure' approach (which, in the current and still unresolved crisis appears hubristic to say the least) to one that emphasizes financial stability (Black 2011, p. 2). Prudential enforcement structures will change, but what is of interest is that the COB enforcement regime will probably change too. Black (2011, p. 10) observes that the recent FSA initiatives such as Treating Customers Fairly were constructed to ensure

> consumer protection by adopting reforms that go to the core of business structures, processes and cultures rather than rely on traditional "command and control" strategies: detailed rules backed by legal sanction. (Black 2011, 10)

and she commends these 'deep due diligence and ongoing assurance strategies' to conduct regulators.

18. Nor is this approach restricted to the UK. At a European level there are broadly similar approaches aimed at changing the culture and formation of regulation and

[5] See www.fsa.gov.uk/Pages/Doing/Regulated/newcob which contains case studies, Q & As, and examples of good and bad practice.

[6] As Scott puts it, 'regulatory reform programmes have nowhere led to a substantial reduction in governmental activity in regulation, nor more importantly, a qualitative change in the character of regulatory governance' (2008, 26).

[7] http://www.berr.gov.uk/files/file45019.pdf

[8] 'Regulation – less is more' March 2005 - www.berr.gov.uk/files/file22967.pdf; 'Regulation – less is more' March 2005 - www.berr.gov.uk/files/file22967.pdf; Regulatory Justice: Making Sanctions Effective, November 2006, www.berr.gov.uk/files/file44593.pdf.

regulatory regimes. The open method of coordination (OMC) is an example – a 'legitimizing discourse' operating at policy level, the key features of which are participation, problem-solving and the diffusion of knowledge and learning across countries (Radaelli 2003, p. 8). As Radaelli describes it, the approach seeks 'a balance between benchmarking and context-sensitive lesson-drawing' (Radaelli 2003 p. 12). Education became a focus of OMC from 2004 as the Bologna and Copenhagen processes made higher education a 'core object of the OMC process' (Gornitzka 2006, p. 27).

19. In this wider context, the main frontline regulators in England and Wales are moving towards more pragmatic forms of regulation. The FSA, LSB and SRA all characterise their preference for what is now being called outcomes-focused regulation (OFR) as a move towards an adaptive and pragmatic mix of regulatory forms and styles that will deliver 'right-touch' regulation (Turner Review, 2009; SRA, 2010; LSB, 2011). This accords with the three themes that the LSB has at the core of its vision for the legal services market, namely:
    a. consumer protection and redress should be appropriate for the particular market
    b. regulatory obligations should be at the minimum level to deliver the regulatory objectives
    c. regulation should live up to the better regulation principles in practice. (LSB 2011, pp. 6-7).

20. The evidence for this is beginning to be seen. In a recent Consumer Impact Report compiled by the Legal Services Consumer Panel, for instance, it was observed that OFR rulebooks are 'more consumer-friendly and have greater flexibility to respond to a diverse and changing market' (Legal Services Consumer Panel 2011, p. 5).

21. Amongst the larger legal professions, the Bar has been rather more ambivalent about the move to OFR. The BSB consulted in June 2012 on the development of a new Handbook and its proposals to move to risk-based supervision. The new Handbook will provide a consolidated set of COBR, revising the existing Code of Conduct and, for the first time, including rules and guidance for the regulation of entities, but excluding the Bar Training Regulations (as these are not COBR). The approach proposed remains predominantly rules-based, but with what the BSB refers to as more 'outcomes-focused rules' (BSB, 2012a). The intended approach was explained further in the BSB's consultation response in December 2012 (BSB, 2012b, 9):

    > outcomes are intended as justifications for and aids to purposive construction of the rules, but are not the basis for charges of misconduct. The intention is that charges would continue to be for breaches of Core Duties and/or rules. However, the outcomes will have an important role in the BSB's enforcement strategy. The presence, or otherwise, of an adverse impact on an outcome will be at the heart of any decision about whether to take enforcement action against a BSB-regulated person and at what level the penalty should be. The BSB therefore intends to be operationally outcomes-focused, while maintaining an element of prescription in rules that is of value to all parties.

    The BSB anticipates that both the new Handbook and its risk-based supervision model will be in place in 2014.

22. IPS takes a different but not dissimilar approach to that of the SRA. All members of CILEX are subject to a code of conduct, outlining general standards of behaviour. This code is less a set of COBR or OFR and more of a statement of governing

principles.[9] CLC has also moved to an OFR-led approach, specifying prescribed principles and outcomes, whilst preserving the power to lay down 'specific requirements' of its regulatees.[10]

23. OFR itself is less of a strict or doctrinaire approach to regulation, and involves a form of regulation and regulatory activity that tends to be:
    - less detailed than, or at least 'differently detailed' from, rules-based regulation[11]
    - (more) clearly structured/differentiated as between 'high level' principles, rules and guidance
    - more attuned to the level of risk represented by the type of service provider/activity/client (or some matrix of these)
    - more reliant on 'output regulation' (Trebilcock, 2001) and hence prescriptive as to the outcome to be achieved (not processes by which they are achieved)
    - proactive in identifying and monitoring risk rather than reactively handling non-compliance

24. An example of these qualities is given on the SRA webpage entitled 'Outcomes-focused regulation at a glance'.[12] In section 4.2 is a table comparing the 2007 Code with the OFR Code. Client care is described as follows:

Issue	Old approach – 2007 Code	New approach – new Code
Client care	Rule 2 – sets out a detailed and prescriptive list of the type of information that you must give to clients.	Chapter 1 – general outcomes, eg clients are in a position to make informed decisions about their matter. Indicative behaviours set out how you might go about this eg agreeing an appropriate level of service with the client. Allows greater flexibility, according to the needs of the client and the type of work you do, but there is also greater emphasis on the needs of the individual client, particularly those who are vulnerable.

Table 1: extract from 'Outcomes-focused regulation at a glance', Table 4.2.

[9] Available at: http://www.ilex.org.uk/ips/ips_home/for_ilex_members/code_of_conduct.aspx
[10] CLC Handbook available at http://www.conveyancer.org.uk/regulatory_arrangements.php
[11] It would be wrong to assume that OFR standards are necessarily more loosely defined. Within an OFR approach one could have a highly prescriptive, quantitative, outcome that closely prescribes regulatees' expected performance. An example would be the requirement imposed on rail operators to achieve a specified service level, below which financial penalties are imposed. This still leaves the regulatee free to decide how it achieves that outcome.
[12] Available at: http://www.sra.org.uk/solicitors/freedom-in-practice/OFR/ofr-quick-guide.page#ofr-2

COBR and legal education

25. There is no set of COBR for legal education directly, in the way that the SRA, for instance have set out OFR for solicitors. They do not exist for students or trainees and it would be hard to envisage a set that might encompass both educational and practice-based regulation even at the professional end of legal education. The current variety of traineeships, from very small High Street firms to global law firms, might also defeat any attempt to implement such a regime. Indeed, taken to a logical extreme in a system of OFR, much specific regulation of formal education could be said to be redundant, because formal education is ultimately a *process*, and only one of a number of potential processes by which the outcome of competence is achieved. As will become apparent we do not intend to follow that particular line of thinking, or at least not to that extreme. Two aspects do require comment however, as arising from the literature – COBR as educational content at various legal educational stages, and the function of COBR in the regulatory relationship between legal education providers and regulators.

26. There is clearly a role for COBR in continuing professional development. An inherent tension is identified in the literature (of which there is a very limited amount devoted to CPD in the legal professions) between CPD as accountability mechanism for the safeguard of the public, as regulatory mechanism (arguably, compliance with a CPD requirement for its own sake) and as an aspect of individual personal development. This is discussed further in section 5. The link between a COBR professional standard of competence, as output, and participation in COBR-mandated CPD activity, as input, is frequently assumed, rather than demonstrated through the CPD system itself. Ways in which COBR impact on legal continuing professional development, then, include:
    - accreditation of CPD providers (not universal, even in legal CPD systems): imposing COBR standards on educational institutions;
    - COBR as content of CPD activity (several legal CPD systems demand a minimum mandatory content involving study of their own codes and professional rules);
    - inter-relationships between competence, standard of service and compliance with a mandatory CPD participation threshold imposed by the regulator. This aspect is, for example, a key point in current consultations about the General Medical Council CPD scheme.

    COBR could quite easily form part of CPD content, therefore, given that the content is so close to the working lives of many lawyers. Edmonds sees this closeness as an essential element of CPD, characterized as a 'constant interplay between practice and education, with the two spheres in constant dialogue, each driving improvement and innovation in the other to the broader public good' (Edmonds 2010, p. 10).

27. COBR also has a role to play in professional legal education. If, as Edmonds argues, the market is now marked not just by 'increasing plurality, but a rather unique plurality in which there is *both* more commoditisation *and* more specialisation', then COBR is more important to forms of primary professional education in providing the scaffolding of best practice for students, trainees, apprentices (Edmonds 2010, 9). In the same lecture he posits a 'changed and earlier emphasis on the teaching of professional ethics and wider responsibilities to the client' (Edmonds 2010, p. 11); and COBR could be an essential toolset for critiquing and learning the ground of

professional ethics.

28. COBR may appear to have little to do with higher education, and legal education in particular at undergraduate stages, with the possible exception of specialist modules or programmes on the legal profession, where it clearly provides material for critique and analysis. There is, though, an analogy to the extent that both academic and professional learning environments can be over-engineered with learning outcomes, module handbooks, reading lists, information on assessments and the like. Helpful though much of this can be, it may diminish learner responsibility, curiosity and attention, and institutionalize the process and product of learning (Stenhouse 1983; Maharg 2007). Where guidance from regulators is overly constraining or unnecessarily complex or restrictive, it is clear that an approach that tends towards OFR would help to mitigate complexity and costs to both providers and learners.[13]

29. COBR does, however, have an educational parallel in the guidelines set out for providers of legal education. The BSB and the SRA currently regulate the accreditation of providers through an accreditation regime the terms of which, while not overtly COBR, do present as a form of educational regulation. The BSB, for instance, has set out guidelines for CPD providers. The document comprises advice on the administration of accreditation and 'Programme Components'. The components consist generally of objectives, eg under 'Skeleton Arguments' there is listed 'Clarity of Purpose', 'Logical structure and organisation', etc.[14]

30. The SRA has a more detailed Authorisation & Validation document that, together with a 97-page guide ('Information for Providers of Legal Practice Courses', as of September 2011) gives information for providers on LPC accreditation, monitoring the regulatory framework. In addition to explaining how the SRA QA framework works in practice the Information guide set out, at 2.10-2.13, the regulatory framework, which is clearly less prescriptive than earlier LPC QA frameworks. This is evident from the detail of the regulations. It is made clear, for instance, that the SRA do not seek to impose model assessment regulations on providers: instead, providers 'will need to draft their own assessment regulations in accordance with the SRA's assessment requirements' (Information 2011, p. 97).

31. If COBR has a minimal and variable effect on legal education at present, in the future, we suggest the concept will be much more important to the regulatory relationship between LSB and frontline regulators on the one hand, and between educational providers and learners on the other. We shall now explore some aspects of that relationship, starting with some general comments on law and regulation.

Law and regulation

32. While COBR has had a relatively recent history in legal practice, law and regulation has had a much longer relationship; and if we are to appreciate the wider context of

[13] This may apply to topics in legal education such as the reserved areas. As Mayson points out (and Edmonds (2011) agreed with him, the reserved areas are ripe for reform, and this is certainly the case in the mandatory use of them, for instance, in the LPC.

[14] Available from the BSB website at: http://www.barstandardsboard.org.uk/regulatory-requirements/for-chambers-and-education-providers/education-and-cpd-providers/

COBR it would be helpful to map out some of the features of this relationship. There are precedents for regulatory activity in the profession – increasingly in Common Law jurisdictions the law has been subjected to forms of regulation, the Uniform Commercial Code being one such (Whaley, 1982).[15] However regulation of professional life and commercial activity was another matter. It is true, as Maute proves, that there has been regulation of legal activity by what might be termed the 'state' since the medieval period (Maute, 2003); but recently the speed and scale of activity in the sector has increased almost exponentially, not least, as Flood points out, because of the 'deeply imbricated relationship of state and professions in providing the basis for governmentality' and allied to this, lawyers' potential access to political power and leverage (Flood, 2010, p. 4, citing Foucault (1979).[16] But regulation has increased also because the nature of legal service itself changed. Galanter & Roberts point to the change in the later nineteenth century from a profession composed predominantly of familial elitism, almost a kinship model of legal service, to a hierarchy based on partnership alone, which in the twentieth century moves into a bureaucratic phase where line management and ever-deeper control of aspects of work (characterized often as 'workflow') come to dominate (Galanter and Roberts, 2008; Nelson, 1988, pp. 7-11; Abel 2003).

33. Flood charts the rise of regulation on the large firm as government and policymakers became aware of the growing power and capitalized power of the law firm. As he puts it, 'anti-monopoly sentiment' in Europe allied to the growth of a consumer movement, resulting in part from dissatisfaction with the results of self-regulation in the legal profession led to first the Clementi Review (2004) followed closely by the Legal Services Act 2007 (Flood 2010, p. 17), in effect the removal of autonomous regulation from law firms large and small. As instruments of control and monitoring, regulatory codes and Conduct of Business regulations were implemented and prudential measures were adopted (Llewellyn 1999; Flood, 2010, pp. 17-18).

34. As Flood points out, though, the recent Smedley (2009) and Hunt (2009) Reports, instructed respectively by the City of London Law Society and the Law Society of England & Wales, went against the grain in that they advocated measures of self-regulation within existing organisations, either the firms or the Law Society (Flood 2010, 18). In part as a result of these Reports, and in part responding to the changing regulatory environment outlined briefly above, the SRA implemented in October 2011 outcomes-focused regulation, a new form of business regulation that took a different view of the regulatory relationship (Gibb, 2010; Suddaby, Cooper & Greenwood, 2007) and now creates in the law firm a responsibility for shaping its own regulatory culture. Flood describes the regulatory space created for large law firms where 'new modes of regulation' are developed:

> they have the capacity to produce internal regulatory structures that fit the state's purpose. Their position is augmented as the new regulations open up the legal market to alternative providers of legal services. (Flood, 2010, p. 23)

If large law firms are carving out a regulatory space for themselves, it could be argued that legal education providers and regulators similarly need to shape their regulatory space and the relationships that govern it; and a key element of this is the nature of the relationship between regulator and provider.

[15] Flood notes, quoting Abel (1989, 142), that codes were formulated in the US much earlier than in UK jurisdictions, with the ABA promulgating its first code in 1908 (Flood, 2010, 31, note 2).
[16] Flood deals with large law firms in this article, but many though certainly not all of his observations could be extended to other forms of legal entities.

Regulation of legal education: hierarchy and design

35. It is axiomatic that regulation involves relationships between regulator and regulated. Such relationships depend on a history of prior contact, the numbers to be regulated, form of regulation, and many other factors. Sometimes a regulator can have a relationship with a key or dominant player in the field. Ofcom's relationship with BT is a typical and oft-quoted example of this (Hall, Scott & Hood 2000), where the corporation heavily influenced the nature of the relationship because of the informational and knowledge asymmetries that its dominant position in the marketplace created. Or there may be a small number of key players, as in the regulation of power utilities; or a much greater number of regulated entities, as in the Financial Services industry. On either side there will be forms of expertise that the other side may not have. Hardwig (1985) has described the acknowledgment and acceptance of such expertise as 'epistemic dependence' – the situation where we can have reasonable belief that others (experts) have more knowledge than ourselves, and where we accept this situation in order to advance our own knowledge or intended actions.

36. Hardwig puts forward the notion of a community of knowledge that itself produces knowledge, taking Peirce's idea that 'the *community* of inquirers is the primary knower and that individual knowledge is derivative' (Selinger 7 Crease, 2006, p. 339). As a result of this Hardwig acknowledges the extent to which 'even our rationality rests on trust' – trust that we place in experts and their established positions. Whilst such a position appears to contradict the idea of the rational agent as one who thinks for herself, as Hardwig points out it is 'sometimes *irrational* to think for oneself… *rationality* sometimes consists in deferring to epistemic authority' (1985, 336). Trust is a critical element of the regulatory function; and trust is built upon relationship (Earle, 2010; Mayer, Davis & Schoorman, 1995; Webb 7 Nicolson, 1999; Willman, Coen, Currie & Shiner, 2003).

37. Hardwig's position has been criticized by Fuller, among others, for conceding too much, and particularly to experts. Fuller argues in his book *Social Epistemology* (1994) and elsewhere that we should not simply trust experts. We should seek to understand how experts shape and sustain their position as experts, and the motivations behind the maintenance of that position. In particular he urges us to investigate how experts create in clients the perception that expert attention is required – a perception that of course works in the expert's favour (Selinger & Crease, 2006, 326). His view is borne out by the literature on informational, knowledge and power asymmetries within society generally (Coleman, 1982), and the debate is played out in key legal regulatory documents such as the Legal Services Consumer Panel Report (2011), which noted that:

> a relatively small number of providers accounted for a large proportion of the Legal Complaints Service's caseload. Effective targeting of these providers by regulators, whether through education or enforcement, is an absolute must if consumers are to be protected, diligent providers safeguarded and overall case volumes reduced (41).[17]

[17] The point regarding enforcement of the regulation of legal services has been made by a number of commentators. In the field of regulation of international business, for example, Picciotto argues for an approach that includes 'a framework agreement, which would link binding standards for corporate social responsibility in

38. The debate has consequences for how we might view regulatory activity with regard to legal education. If regulators agree with Hardwig then they would seek to promote a community of practice among educational providers; and if they agreed with Fuller then they would seek to constrain the freedom of education providers to move beyond a highly restricted curriculum and mode of delivery. With regard to educational relationships Fuller's view would give rise to monitoring, audit by persons other than educationalists, and the creation of a competitive market, with market mechanisms in operation. The Hardwig view would lead regulators to emphasize communities of practice, sharing of resources and practices, and peer-review.

39. Our choices, though, may be much more nuanced than the binary approach of Hardwig or Fuller may seem to imply. More recently, others have mapped out in more detail how the concepts central to the regulatory debate play out within regulation. Colin Scott, for instance, has outlined a sophisticated position on the regulatory relationship when he defines at least four 'modalities of control' exercised by regulators, and he has investigated how these modalities play out in the regulatory relationship.

	Norms	**Feedback**	**Behavioural Modification**	**Example**	**Variant**
Hierarchical	Legal Rules	Monitoring Powers/Duties	Legal Sanctions	Classical Agency Model	Contractual Rule-Making and Enforcement
Competition	Price/Quality Ratio	Outcomes of Competition	Striving to Perform Better	Markets	Promotions Systems
Community	Social Norms	Social Observation	Social Sanctions – eg Ostracization	Villages, Clubs	Professional Ordering
Design	Fixed within Architecture	Lack of Response	Physical Inhibition	Parking Bollards	Software Code

Table 1. Modalities of Control (Murray & Scott 2002)

40. Scott observes that when governments consider a policy problem – unsafe food and passive smoking are two of the examples he considers – regulatory structures and processes have become the general approach to risk mitigation and behaviour modification. Scott advocates a different approach. Instead of replacing prior regimes with a regulatory agency, a 'more fruitful approach would be to seek to understand where the capacities lie within the existing regimes, and perhaps to strengthen those which appear to pull in the right direction and seek to inhibit those that pull the wrong way' (Scott 2008, p. 25). He quotes the UK Better Regulation Task Force guidance, issued in 2000 where, as we have seen, public policy decision makers are advised when considering regulatory change to consider self-regulation, and then 'if less costly alternatives were not viable, plan a more hierarchical form of intervention' (Scott 2008, p. 26). Observing that 'regulatory reform programmes

key areas, such as combating bribery and cooperation in tax enforcement, with traditional investor rights based on investor protection and liberalization rules (Picciotto, 2003/4, p. 131).

have nowhere led to a substantial reduction in governmental activity in regulation, nor more importantly, a qualitative change in the character of regulatory governance', Scott advises the use of what he calls 'meta-regulation', namely the idea that 'all social and economic spheres in which governments or others might have an interest in controlling already have within them mechanisms of steering – whether through hierarchy, competition, community, design or some combination thereof' (Scott 2008, p. 27).[18] Scott outlines two challenges to this approach – identification of the mechanisms at play, and creating ways to steer those that are not securing 'desired outcomes'.

41. What is useful about Scott's approach is the co-option of culture and prior history of community practice into the regulatory project, while acknowledging the need for change and creating the ways by which change can come about. It is a subtle approach precisely because meta-regulation is an alternative to a governmental response to crises that is becoming more common, namely 'mega-regulation' (Scott cites responses to the BSE and Enron crises as examples of this). Scott names the Legal Services Act as one area where meta-regulation may be appropriate. At the same time, though, Scott acknowledges that the local conditions of any economic activity, including professional activities, will need to be governed by a hybrid mix of the approaches outlined in Table 1 above.

42. He gives an example of his approach in action that illustrates his view of a multimodal approach to regulation, namely the regulation of roads and road traffic. In that field, as part of meta-regulation, he has been involved in a process of building 'a stakeholder group to include local authorities, insurers, and groups representing local authority managers, lawyers and risk managers' (Scott 2008, p. 30). In his inaugural lecture and elsewhere (eg Scott 2006) he constructs a view of the design element of his table of modalities (above). Laws are promulgated on parking, for instance, that determine the illegality of parking vehicles in particular locales, eg on a pavement. But road furniture is also designed and put into place such that it is impossible to park on a pavement – high kerbs and concrete bollards are designed obstructions that prevent drivers from breaking the law should they wish to. Parking is thus an activity governed by both hierarchy (legal sanctions) and design (kerbs and bollards). Both regulatory modalities operate to govern our behaviour. Hierarchy is often less visible in the world, and therefore design supplies an enforcement of hierarchy in an immediate locale. But while enforcement is thus strengthened, the agency of road users is weakened. In limiting our agency both approaches, but design in particular, restrict the space in which we can think for ourselves in ambiguous situations. They remove the need for ethical thinking.

43. Scott acknowledges Brownsword's similar and earlier argument against design, which is that designed features of a regulated environment such as concrete bollards effectively remove human free will from the regulated context. The same argument applies to internet environments where digital rights management (DRM) is effectively regulated by the code of the environment that allows users only certain actions with regard to downloading music or video, but not others. Here, one's choice of action is constrained by code – as Lessig points out, code is architecture and the comparison with concrete bollards or raised kerbs or bus lanes is a close one. As Brownsword observes, though (and Lessig's position is close to Brownsword's here), the invisibility of regulation operating through design

[18] Scott also cites Parker's definition of meta-regulation, 'the regulation of self-regulation' (Parker 2002).

diminishes accountability and agency; and the practice of ethical choice is thus much more constrained.

44. Fuller's scepticism about our epistemic dependence upon experts can be extended to Scott's conceptual arenas of hierarchy, competition, community and design. Take the design of road traffic management, for instance. All of Scott's examples, indeed much of the academic discussion of road management, takes place within a number of frameworks that have, until relatively recently, remained largely unquestioned. One such framework for traffic management and regulation of traffic management is the Buchanan Report of 1963, produced by Colin Buchanan and instructed by Ernest Marples of the Ministry for Transport in the Macmillan administration. Buchanan's proposals, including one-way streets, traffic restrictions and the separation of pedestrians from traffic by use of kerbs, barriers and other street furniture, set the template for decades of traffic management and urban planning in the UK; and it was influential abroad too (in the USA and New Zealand, for instance). The Report also, while broadly setting out alternatives, clearly signalled a move away from public service vehicles such as trams, and the need to service the demands of private vehicles.[19] The design templates Scott discusses operate within this framework. They do not critique the principles underlying the framework, merely enact the templated design. Scott can argue that design is curiously limited, and not a freestanding modality because 'responsibility, accountability, and agency can only be supplied through one of the three other modalities', and it is therefore 'merely an adjunct or technique of the other three'. This is because a design template is used only to represent a particular cultural attitude towards urban planning and the place of traffic within it.

45. However it could be argued that design is more of a protean concept than Scott or Brownsword allows it to be. Design can be used to enhance responsibility and accountability, and extend agency within the world; indeed it can do so by clearing a space, as it were, in hierarchy so that self-governance, often according to extra-legal norms, is possible in ways that it would not otherwise be within communities of practice. Casey & Scott (2011) have analyzed the ways in which such norms are legitimized within a regulated community, and how they can be sustained. For example they note that in one domain, namely supply-chain contracts

> effective participation in the standard-setting process and the ability of a technical standard to facilitate market access may be crucial to whether or not suppliers grant legitimacy the technical standard institutionalized within a supply-chain contract (Casey & Scott 2011, p. 92).

46. Legitimacy is often a contested notion between stakeholder interests, of course, leading to a "legitimacy dilemma". Casey & Scott observe, quoting Black, that it "is simply not possible to have complete legitimacy from all aspects of [the regulated] environment" (Black 2007, p. 8) – a dilemma that, in the domain of legal regulation, both the Smedley and Hunt Reports struggled with.

47. Investigating norms and design templates, however, is one way in which regulation may be made more effective. Traffic management, used by Scott in his work and

[19] One of the underlying metaphors for travel was the concept of roads as hydraulics: water moving through a pipe. The metaphor tended to minimize the psychology of pedestrians, vehicle drivers and intermediate travellers (cyclists, skaters, etc).

which we shall explore in more detail, is a useful example for the regulation of legal education because it gives us a case study of design and hierarchy in practice, specifically in the work of Hans Monderman, a Dutch traffic engineer.

48. Initially Monderman worked within the same design template embodied in the UK Buchanan Report. But in the small town of Oudehaske in Friesland, faced with urgent action required on road safety due to recent fatalities he abandoned a key principle of its road design, namely that vehicles are too dangerous to allow unenclosed into civic spaces, and therefore plenty of space should be designed around them and systems of precedence should be put in place, often giving them the dominating position on the road. By contrast, Monderman deliberately brought together vehicles (private and public service vehicles), cyclists and people in ambiguous contexts – traffic lights were uprooted, kerbs and road markings erased. By giving responsibility back to drivers and creating environments where drivers required to slow down because of the uncertainty of the context they found themselves in, his approach achieved speed reductions well below those normally brought about by chicanes and other traffic-calming measure (Monderman 1994) and he helped to renew civic space in Oudehaske.[20] He developed the approach in well over a hundred civic spaces in the Netherlands, and abroad in the UK and elsewhere.

49. One of the key issues in the new design was the psychology of driver perception. With conventional signage, drivers may pay more attention to them than the safety context (especially in the presence of speed cameras). When signs were removed, drivers required to pay attention to the relationship between how they drove and the immediate space around them. The new environment made space for the crucial part that eye-contact plays in road encounters as an indicator of intention, for instance, and the role that taken-for-granted safety technology such as traffic lights play in decreasing road user attention and increasing risk-taking. It also draws upon the literature of risk compensation theory (Adams 1995).[21]

50. If drivers had to become more aware in the new environment, so too did cyclists and pedestrians. Monderman used landscape, line of sight, desire lines, public art and novel road surfaces to re-orient all road users. Above all, he integrated traffic with civic spaces, achieving much more democratic spaces in towns, yet spaces that were still ruled by hierarchy – traffic laws were adapted, not abolished. He called this new environment 'shared space' (Monderman, Clarke & Hamilton-Baillie, 2006). As Hamilton-Baillie points out, Monderman is only one of a number of advocates of this approach to traffic regulation. Others include Alan B. Jacobs (1985; Jacobs, Macdonald & Rofé 2001), whose key perspectives Hamilton-Baillie summarizes as including close observation of modern street planning, which according to him was too often based on traffic assumptions rather than real research; and the integration of pedestrians and vehicular traffic (Hamilton-Baillie, 2008).

[20] It is interesting that Monderman was a driving instructor as well as an engineer and planner. Being an instructor rather than just a road user would have given him the opportunity to observe how driving novices become socialized to the culture and semantics of urban driving as they learn to drive, and how they adapt to an environment designed to diminish responsibilities beyond the interior of a car.

[21] Adams (2010, 15) provides some indication of the complexity of the approach to the field, for instance in his comments on the effects of antilock braking systems (ABS) on accident statistics:

> When introduced, their superiority persuaded many insurance companies to offer discounts for cars with antilock brakes. Most of these discounts have now been withdrawn. The ABS cars were not having fewer accidents, they were having different accidents. Or perhaps they were having fewer accidents, but no fewer fatal accidents; the evidence from various studies is less than conclusive.

51. Monderman's initiatives not only dovetailed with existing Dutch traffic and transport policy, but also helped to improve aspects of its design (Kraay & Slangen 1994). In other words his work helped regulators to regulate the environment and create a new framework for urban planning. Aspects of it are still controversial: while the UK's Dept for Transport has published a recent comprehensive study in favour of shared spaces (2001, MVA 2009; 2010a; 2010b), others dispute these findings (Moody & Melia, 2011). The collaborative approach has, however, been adopted in other fields. Examples include the construction of Terminal 5 at Heathrow Airport. Casey & Scott cites Deakin & Koukiadaki's analysis of the approach taken by the client, BAA plc, who put into effect collaborative innovations such as risk pooling between subcontracts and learning mechanisms for '"effective diffusion of information, the use of frameworks, benchmarks and measurement and the operation of integrated teams working"' (Deakin & Koukiadaki, 2010, p. 108). As Casey & Scott describe it, 'the construction contracts were transformed, to some extent, from an instrument of hierarchy to an instrument of mutual learning' (Case & Scott 2011, p. 94).

52. In these examples design becomes much more of a meta-level activity that involves research and the transformation of norms, responses, inhibitions and practices. Design activity is thus used not only to rethink the 'architecture' but also to redesign the form and function of regulatory design. It may be, therefore, that the best position with regard to the regulatory relationship lies not in a choice between Hardwig and Fuller, but in a combination of community and monitoring, where the focus of regulatory activity moves from hierarchy and COBR (which is still present but backgrounded) to community-building, norm-strengthening and culture-transforming.

53. There are a number of useful general points that this literature exemplifies:
    1. The shift in legal regulation from closely detailed regulation to OFR is paralleled in other regulatory domains and activities – in insurance and financial services generally, and in other domains such as the regulation of traffic management.
    2. Regulatory activity, rather than changing behaviour directly, may well simply ratify what was already 'established public opinion' (Adams 2010, 7, citing Ross 1976).
    3. Risk compensation theory points to the need for flexibility and a targeted approach to regulation; and to giving responsibility to the actors in the regulated field to regulate their own behaviour, subject to monitoring (more on this below).
    4. COBR is a useful tool to illustrate best practice rather than to regulate directly the activities of regulated agents – an approach already begun with OFR.
    5. 'Shared space' is a regulatory concept that could be applied to legal education, where regulators emphasize the mutual learning that can be leveraged between providers.

54. In the field of legal education there are already calls for this type of approach to regulation and COBR. SRA's recent relaxation of its guidance code to providers could move towards community-building (Maharg 2011a), but much more could be achieved in terms of a coherent strategy across the various regulated spaces in the

educational continuum. Research in other professions has shown the need for such a continuum to be recognized as a key element of the process of professionalism. Papadakis et al., for instance, set out to determine if medical students who demonstrated unprofessional conduct in medical school were more likely to be disciplined by their State Board. Their study set out possible correlative factors, including gender, grade point average, Medical College Admission scores, school grades, National Board of Medical Examiner Part 1 scores and negative excerpts from evaluation forms. The study subjects were alumni graduating between 1943 and 1989. They revealed correlations between unprofessional behaviour at medical school, and practitioners who had been disciplined by their profession. As they reported:

> We found that UCSF, School of Medicine students who received comments regarding unprofessional behavior were more than twice as likely to be disciplined by the Medical Board of California when they become practicing physicians than were students without such comments. The more traditional measures of medical school performance, such as grades and passing scores on national standardized tests, did not identify students who later had disciplinary problems as practicing physicians. (Papadakis et al. 2004b, p. 249; see also 2004a, pp. 1100–1106)

55. This is not the only study to produce such results. Other studies have focused on the part that professionals can play in being role models for students. Kenny *et al*. outline the practical consequences of a new emphasis on professionalism as character formation (Kenny, 2003, pp. 1203–10). Misch has argued for the appointment of what he calls 'humanism "connoisseurs"' to the medical curriculum, namely staff specially trained to give feedback on qualities such as empathy, compassion, integrity and respect, 'while evaluating physicians' behaviors as an integrated, cohesive whole' (Misch, 2002, pp. 489–95). Such initiatives are useful when one bears in mind the LSB's concerns whether 'initial qualification requirements are sufficient to ensure competence throughout the career of a lawyer, particularly in keeping up with changed practices.' As the LSB point out 'ongoing training and quality assurance is an important strand of the 'regulatory toolkit' for the regulation of conduct of business.' COBR, however, is only one tool amongst many to achieve a coherent and more effective educational continuum. More important for regulators may be the pro-active creation of educational 'shared spaces' – communities of practices across educational providers and across educational stages – and the development of a shared language of reform and transformation (LSB 2011, 24; see also Maharg 2007, citing Squire & Shaffer; Maharg 2011).

The risks of risk-based regulation

56. At point 4 above we mentioned that risk compensation theory points to the need for flexibility and a targeted approach to regulation. There is much to recommend this approach. To date, both HEFCE and QAA has taken the view that if QA is to apply to all, then cyclical programmes of review are necessary to ensure implementation of quality standards. The recent White Paper, 'Higher Education: Students at the Heart of the System (BIS, 2011a) proposes that risk-based regulation be introduced to English Higher Education, led by HEFCE, in association with QAA, the Office for Fair Access (OFFA) and the Office of the Independent Adjudicator (OIA). The implementation of the proposal is mapped out in more detail in a related document, 'A New, Fit-for Purpose Regulatory Framework for the Higher Education Sector' (BIS,

2011b). Risk-based regulation is more targeted in its approach than QAA's current processes, focusing on those sectors of the regulatory landscape where risk is potentially greatest. It would seem to be a more focused, streamlined approach to the problems of improving and sustaining quality standards.

57. However in a report written for the Higher Education Policy Institute (HEPI) Roger King summed up the problems with this approach:

> While at the level of abstract general principles it is hard to cavil with a regulatory approach that seeks to be selective, focused, and proportionate, and which promises to relieve a number of institutions of unnecessary central control and bureaucratic impositions, risk-based regulation can be a risky business, not least for the regulators. Risk-based regulation principles are set to provide major operational challenges, particularly for HEFCE and for QAA. Nor is it clear that the principles of commercial risk-based competitiveness sit easily with established democratic beliefs of equality before the law and associated ideas of fair treatment and accountability, based on bureaucratic impersonality, the application of the same rules and processes to all, and standardization. (King, 2011, 2-3)

58. The organizational challenges of designing and implementing risk-based regulation, too, are not trivial. The transparent allocation of organizations to 'relational categories' (King 2011, p. 4) along with the evidence required for the task means that regulators would need to be more knowledgeable about a range of governance issues. The problem here is that, as King points out, research has shown that 'assessors are especially poor in estimating the value of the internal control systems of the organizations they supervise'; and that there was wide variation in the standards adopted by assessors, and in their mode of operation (King 2011, pp. 4-5, citing Rothstein & Downer, 2008; King, Griffiths & Williams, 2007).

59. King points out, rightly in our view, that further risk to regulatory reputation arises from the nature of higher education and related institutions. These are, as King puts it, '"loose-couple" organizations' (King 2011, p. 6), not least because of the essential nature of the professional tasks that they carry out; and as such, regulators have less capacity to control risk arising from their activities. The White Paper makes it clear, too, that new providers will be scrutinized more than established providers. There is a strong possibility that the demarcation between elite institutions, with their intake of AAB students, and other institutions will be strengthened, and the elite institutions 'will remain largely free from the competitive pressures introduced for others in the new system' (p. 10). There may also be a tension here between the perceived role of HEFCE as champion of the consumer/student, and the light-touch approach to established organizations; and may lead to complacency and higher risk-taking by these institutions. Moreover, as King points out, it is not entirely clear if the proposed risk-based regulation of quality fits with the cyclical review processes envisaged by the Bologna Process; and sparse QA processes may well impact adversely on the global reputation of English Higher Education (pp. 7, 9).

60. Are there alternatives to current QA processes and the option of risk-based regulation? There are, and we shall describe an example when we deal with related issues in chapter eight of the Literature Review.

Themes arising from debates

61. It is part of the nature of the literature in this section that the debates are largely dealt with in the preceding sub-sections of this part of the literature review; and therefore this summary will be brief. There are three key debates arising from COBR and legal education generally, discussed below.

Regulatory change of focus

62. It is a curious feature of regulatory activity that when it has too high a profile, it can, in effect, infantilize those being regulated, so that the attainment of regulatory achievement ('excellent' course, rather than 'satisfactory', for instance) becomes the aim, not the achievement of high educational standards in themselves. As Richard de Friend points out, this was the case with the BVC. The Wood Report pointed to the expense of the course, content that did not challenge students and was neither realistic nor was it aligned to contemporary Bar practice, a very low pass level and low standards of teaching. And yet, as de Friend rightly points out, 'over the last ten years the BVC has been subject to almost constant external scrutiny'. In the ten years prior to the Wood Report the content had been prescribed as recently as 2000 by the Elias Working Party; other, major aspects of the course had been reviewed successively by Bell (2005), Neuberger (2007) and Wilson (2008); standards and quality had been monitored on the basis of course providers' annual reports and by Bar Council (now BSB) appointed external examiners and panels (de Friend, 2010).

63. Part of the explanation is that there was a failure not of regulatory control, but of regulatory model: top-down control paradoxically removed the crucial responsibility from providers and teachers to think about their own developing educational professionality in its widest sense.

OFR as COBR

64. If OFR is conceived as different from rules-based prescriptive regulation because it is differently detailed, and more clearly structured as to principles, rules and guidance, then the implications for curriculum development are considerable. Providers will have more flexibility to design; and design will become a key activity for all providers, in the way that it currently marks out the most successful and innovative providers at present. Conceptualizing OFR as COBR may lead to an increase in innovation, not just in learning design and use of technology, but in the relationship of work-based learning to formal education, and in many other areas of legal education, legal policy and legal practice. In turn, this may require the drafting of guidelines, similar to medical educational guidelines discussed in chapter eight of the literature review.

OFR as shared space

65. Part of the problem for any regulator wishing to change or transform practice is dealing with terraform, with the landscape of habits, cultural attitudes, social and economic relationships created by prior regulation and expectations. We have described in the literature review of this section some approaches that may help to change the landscape.

66. The use of OFR, as a form of COBR, will have considerable consequences for the educational market, if it is defined as a form of 'shared space'. Currently most providers of formal education operate silo-based programmes of study, where sharing is not the norm. There may be little discussion between local undergraduate QLDs and LPC and BPTC. The sharing of resources between institutions and alumni on an ongoing basis is something we know almost nothing about in the literature, possibly because little of such sharing takes place. The economic basis for market competition between providers would appear to be unchallenged. But as Benkler (2006) points out, and adapting his argument, there are four observations we can make about such economics. The first is that the market position is overstated – higher education is 'replete with voluntarism and actions oriented primarily toward social-psychological motivations rather than market appropriation' (2006, p. 461). Second, encouragement of silo economics benefits some (eg providers) at the expense of others (eg students, general public). Third, and as Benkler puts it, 'the basic technologies of information processing, storage and communication have made nonproprietary models more attractive and effective than was ever before possible' (p. 462). We shall discuss this more in chapter 8. Fourth, there are effective models of peer-production in the market already. In an era where Wikipedia and SourceForge flourish against all odds, regulators may want to consider the issue of collaboration between institutions. The growing importance of OER and OEP, together with economic pressures to reduce the costs of education for students and others may help to create shared spaces for legal education.

67. In turn, this will mean a redefinition of the position of the regulator that, hitherto, has allowed such market forces to be played out. OFR as COBR therefore may help to initiate a new relationship between regulator and educational providers.

References

Abel, R. (2003). *English Lawyers Between Market and State: The Politics of Professionalism*. Oxford: Oxford University Press.

Adams, J. (2010) Managing transport risks: what works? Paper for Risk Theory Handbook. Available at: http://www.john-adams.co.uk/papers-reports/

Bar Standards Board (2012a) *Bar Standards Board Consultation Paper: New Handbook and Entity Regulation,* June 2012. Retrieved from https://www.barstandardsboard.org.uk/about-bar-standards-board/consultations/closed-consultations/new-bsb-handbook-and-entity-regulation/

Bar Standards Board (2012b) *BSB New Handbook and Entity Regulation & Supervision and Enforcement: Consultation Report,* December 2012. Retrieved from https://www.barstandardsboard.org.uk/media/1438535/handbook___entity_regulation_consultation_report_dec_2012.pdf

Benkler, Y. (2006). *The Wealth of Networks. How Social Production Transforms Markets and Freedom.* New Haven, CT and London: Yale University Press.

Better Regulation Task Force. (2000). Alternatives to State Regulation. London: Cabinet Office.

Black, J. (2011). Constitutionalizing self-regulation. *The Modern Law Review*, *59*(1), 24-55.

Casey, D., Scott, C. (2011) The crystallization of regulatory norms. *Journal of Law and Society*, 38, 1, 76-95.

Clementi, D. (2004). Review of the Regulatory Framework for Legal Services in England and Wales: A Consultation Paper. Dept for Constitutional Affairs.

Code of All Codes, http://www.ecgi.org/codes/all_codes.php
Coleman, J. (1982) *The Asymmetric Society*. Oxford, Blackwell.
de Friend, R. (2010). The Wood Review: Tough love for the BVC. *The Barrister*, 43. Available at: http://www.barristermagazine.com/archive-articles/issue-43/the-wood-review-tough-love-for-the-bvc.html
Deakin, S., Koukiadaki, A. (2010). Reflexive approaches to corporate governance: the case of Heathrow Terminal 5, in *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*, eds O.D. Schutter and J. Lenoble, Oxford, Hart Publishing, 97-114.
Dept for Business, Innovation and Skills (BIS). (2011a). Students at the Heart of the System. White Paper. Available at: http://discuss.bis.gov.uk/hereform/all-documents/
Dept for Business, Innovation and Skills (BIS). (2011b). A New, Fit-for Purpose Regulatory Framework for the Higher Education Sector. White Paper. Available at: http://discuss.bis.gov.uk/hereform/all-documents/
Douglas, M (1992) *Risk and Blame: Essays in Cultural Theory*. London, Routledge.
Earle, T.C., (2010). Trust in risk management: A model-based review of empirical research. *Risk Analysis, 30*(4), 541-74.
Financial Services Authority (2007) *ICOB Review Interim Report: Consumer Experiences and Outcomes in General Insurance Markets.* London, http://www.fsa.gov.uk
Financial Services Authority (2010) *Conduct of Business Sourcebook (COBS) Post-Implementation Review: Final Statement on Findings.* London, http://www.fsa.gov.uk/pubs/other/cobs_pir.pdf
Flood, J. (2010). From ethics to regulation: the re-organisation and re-professionalisation of large law firms in the 21st century. Available at: http://www.johnflood.com
Foucault, M. (1979). Governmentality, *Ideology and Consciousness*, *6*(5)
Fuller, S. (1994) The constitutively social character of expertise, *International Journal of Expert Systems*, 7, 1, 51-64, 143-78.
Galanter, M., Roberts, S. (2008). From kinship to magic circle: The London commercial law firm in the twentieth century. *International Journal of the Legal Profession, 15*(3),
Gibb, F. (2010). Solicitors to be freed from red tape for a 'grown-up relationship' with regulator, *TimesOnline*, 30 March 2010. Available at:
http://business.timesonline.co.uk/tol/business/law/columnists/article7081491.ece
Gornitzka, Å. (2006). The Open Method of Coordination as Practice – A Watershed in European Education Policy? Working Paper, ARENA, Centre for European Studies, University of Oslo.
Hall, C., Scott, C., Hood, C. (2000). *Telecommunications Regulation. Culture, Chaos and Interdependence inside the Regulatory Process.* London: Routledge.
Hamilton-Baillie, B. (2008). Shared space: reconciling people, places and traffic, *Built Environment,* 34, 2, 161-81.
Hardwig, J. (1985). Epistemic dependence. *The Journal of Philosophy, 82*(7), 335-49.
Hartling, L. (2010) Problem-based learning in pre-clinical medical education: 22 years of outcome research. *Medical Teacher*, 32, 1, 38-35. http://informahealthcare.com/doi/abs/10.3109/01421590903200789
House of Commons (2009). Themes and Trends in Regulatory Reform: Ninth Report of Session 2008-09, [Vol. 1]: [Report, together with formal minutes]. London: HMSO.
Information for Providers of Legal Practice Courses (2011). Solicitors Regulation Authority. Available at: http://www.sra.org.uk/documents/students/lpc/LPC-information-pack-Sept2011.pdf
Jacobs, A.B. (1985). *Looking at Cities.* Cambridge MA: Harvard University Press
Jacobs, A.B., Macdonald, E., Rofé (2001) *The Boulevard Book: History, Evolution, Design of Multiway Boulevards*. Cambridge MA: MIT Press.
Kenny, N.P. (2003). Role modeling in physicians' professional formation: reconsidering an essential but untapped educational strategy, *Academic Medicine, 78*(12), 1203–10.

King, R. (2011). The risks of risk-based regulation: the regulatory challenges of the higher education White Paper for England. HEPI Report.

King, R., Griffiths, P., and Williams, R. (2007). Regulatory intermediation and quality assurance in higher education: the case of the auditors. *Oxford Review of Education*, 33, 161-74.

Kraay, J.H., Slangen, D. (1994). Dutch approaches to surviving with traffic and transport. *Proceedings of the Third International Conference on Safety and the Environment in the 21st Century: Lessons from the Past, Shaping the Future*, November, Tel Aviv, Israel, 11-23.

Legal Services Consumer Panel (2011) *Consumer Impact Report 2011*. Available at: http://www.legalservicesconsumerpanel.org.uk/publications/corporate_documents/index.html

Legal Services Board (2011) Enhancing Consumer Protection, Reducing Regulatory Restrictions. A discussion document about how the LSB will assess the boundaries of legal services regulation and connected regulatory decisions. Available at: http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/enhancing_consumer_protection_reducing_restrictions_final_28072011x.pdf

Legal Services Board (2011) Putting Consumer and Public Interests at the Heart of Legal Services Regulation. Final Business Plan 2011/12

Llewellyn, D. (1998). A prospectus from the FSA: its approach to regulation, *Journal of Financial Regulation and Compliance*, December.

Llewellyn, D. (1999). The Economic Rationale for Financial Regulation. London: Financial Services Authority, Occasional Paper Series in Financial Regulation.

Maharg, P. (2007). *Transforming Legal Education. Learning and Teaching the Law in the Early Twenty-First Century.* Aldershot: Ashgate Publishing.

Maharg, P. (2011). Sea-change. *International Journal of the Legal Profession*, *18*(1-2), 139-64.

Masters, B. (2011) Regulator's 'light touch' led to failure. *Financial Times*, December 12, 2011. Available at: http://on.ft.com/vrPlUW.

Mayer, R.C., Davis, J.H., Schoorman, F.D. (1995). An integrative model of organisational trust. *The Academy of Management Review*, 20(3), 709-34.

Mayson, S. (2010). The Regulation of Legal Services: Reserved Legal Activities – History and Rationale. Legal Services Institute, Strategic Discussion Paper.

Maute, J.L. (2003). Alice's adventures in wonderland: preliminary reflections on the history of the split English legal profession and the fusion debate (1000-1900A.D.). *Fordham Law Review, 71,* 1357-72.

Misch, D. (2002) Evaluating physicians' professionalism and humanism: the case for humanism 'connoisseurs', *Academic Medicine, 77*(6), 489–95.

Monderman, H. (1994). An exploration of a more fundamental view on traffic structure. *Proceedings of the Third International Conference on Safety and the Environment in the 21st Century: Lessons from the Past, Shaping the Future*, November, Tel Aviv, Israel, 390-06.

Monderman, H. Clarke, E., Baillie, B.H. (2006). Shared space: the alternative approach to calming traffic. *Traffic Engineering & Control*, 47, 8, 290-92.

Moody, S., Melia, S. (2011). Shared space – implications of recent research for transport policy, *Transport Policy,* 18, 5, 12-19. Available at http://eprints.uwe.ac.uk/16039/

Murray, A., Scott, C. (2002). Controlling the new media: hybrid responses to new forms of power. *Modern Law Review*, *65*(4), 491-516.

MVA Consultancy, (2010a). Designing the Future: Shared Space: Operational Research. [Online:] www.dft.gov.uk: Department for Transport.

MVA Consultancy, (2010b). Designing the Future: Shared Space: Qualitative Research. [Online:] www.dft.gov.uk: Department for Transport.

MVA Consultancy, (2009). DfT Shared Space Project Stage 1: Appraisal of Shared Space. [Online:] www.dft.gov.uk: Department for Transport.

Nelson, R.L (1988) *Partners with Power: The Social Transformation of the Large Law Firm*. Berkeley: University of California Press.

OECD (2001), *Codes of Corporate Conduct: Expanded Review of Their Contents*. Paris: OECD.

Pacces, A.M. (2000). Financial intermediation in the securities markets law and economics of conduct of business regulation. *International Review of Law and Economics 20*(4), 479–510

Papadakis, M.A., Loeser, H. and Healy, K. (2004a). Early detection and evaluation of professionalism deficiencies in medical students, *Academic Medicine, 76*(11), 1100–6.

Papadakis, M.A., Hodgson, C.S., Teherani, A.P.D. and Kohatsu, N.D. (2004b). Unprofessional behaviour in medical school is associated with subsequent disciplinary action by a state medical board. *Academic Medicine, 79*(3), 244–49.

Parker, C. (2002). *The Open Corporation: Self-Regulation and Democracy*. Melbourne: Cambridge University Press.

Parker, C., Gordon, T., Mark, S. (2010). Regulating law firm ethics management: An empirical assessment of an innovation in regulation of the legal profession in New South Wales. *Journal of Law and Society*, *37*(3), 466-500.

Pattberg, P. (2006). The influence of global business regulation: beyond good corporate conduct. *Business and Society Review* 111, 3, 241-68.

Picciotto, S. (2003/4). Rights, responsibilities and regulation of international business. *Columbia Journal of Transnational Law*, 42, 131-53.

Radaelli, C.M. (2003) .*The Open Method of Coordination: A New Governance Architecture for the European Union?* Swedish Institute for European Policy Studies, Stockholm, 2003:1. Available at: www.sieps.su.se.

Ross H.L. (1976) The Scandinavian myth: the effectiveness of drinking and driving legislation in Sweden and Norway. *Evaluation Studies – Review Annual*, vol 1, London, Sage.

Rothstein, H. and Downer, J. (2008). Risk in Policy-Making: Managing the Risks of Risk Governance King, R. (2011). The Risks of Risk-based Regulation: The Regulatory Challenges of the Higher Education White Paper for England. Unpublished report, Higher Education Policy Institute. Available at: http://www.hepi.ac.uk/455-2002/The-risks-of-risk-based-regulation--the-regulatory-challenges-of-the-higher-education-White-Paper-for-England.html

Scott, C. (2006). Spontaneous accountability. In *Public Accountability. Designs, Dilemmas and Experiences*, ed Michael W. Dowdle, Cambridge Studies in Law & Society, Cambridge University Press: Cambridge, 174-194.

Scott, C. (2008) Regulating Everything. UCD Geary Institute Discussion Paper Series, Inaugural Lecture, 26 February.

Selinger, E., Crease, R.P., eds (2006). *The Philosophy of Expertise*, New York: Columbia University Press.

Stenhouse, L. (1983) *Authority, Education and Emancipation*. London: Heinemann, Educational Books.

Shaffer, D.W. and Squire, K.D. (2006) The Pasteurization of Education. International Conference of the Learning Sciences (Bloomington, IC LS). Available at http://epistemicgames.org/cv/papers/pasteurization_for_ICLS.pdf.

SRA (2010) *Delivering Outcomes-focused Regulation: Policy Statement,* November 2010, available at http://www.sra.org.uk/solicitors/freedom-in-practice/ofr/delivering-ofr-policy-statement.page

Suddaby, R, Cooper, D & Greenwood, R "Transnational Regulation of Professional Services: Governance Dynamics of Field Level Organizational Change", *Accounting, Organizations and Society*, vol 32, 333, 2007.

Trebilcock, M. (2001). Regulating legal competence. *Canadian Business Law Journal*, *34,* 444-59.

Turner Review, The (2009). A Regulatory Response to the Global Banking Crisis. Financial Services Authority.

Webb, J., Nicolson, D. (1999). Institutionalizing trust: Ethics and the responsive regulation of the legal profession. *Legal Ethics, 2*, 148-168

Whaley, D.J. (1982). Symposium. Origins and evolution: Drafters reflect upon the Uniform Commercial Code. *Ohio State Law Journal, 43*(3), 535-36.

Willman, P., Coen, D., Currie, D., Siner, M. (2003). The evolution of regulatory relationships: regulatory institutions and firm behaviour in privatized industries. *Industrial and Corporate Change*, *12*, 1, 69-89.