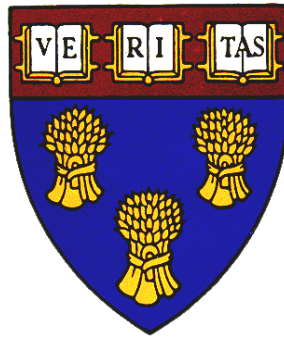


HARVARD LAW SCHOOL
PROGRAM ON THE LEGAL PROFESSION



SIMPLE QUESTIONS
MULTIPLE ANSWERS

**Keynote Address to the FutureEd 2 Conference
at Harvard Law School**

A Blue Paper

By Chris Kenny

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FOREWORD

The Harvard Law School Program on the Legal Profession was founded in 2004 to:

- ❖ Conduct, sponsor and publish world-class empirical **research** on the structure, norms and evolutionary dynamics of the legal profession;
- ❖ Innovate and implement new methods and content for **teaching** law students, practicing lawyers and related professionals about the profession; and
- ❖ Foster broader and deeper connections **bridging** between the global universe of legal practitioners and the academy.

This manuscript by Chris Kenny is part of a new “blue paper” series of substantial essay, speech and opinion pieces on the legal profession selected by the Program for distribution beyond the format or reach of traditional legal and scholarly media channels. You may also view video of this speech on our website at law.harvard.edu/programs/plp/pages/future_ed_conference.php. We thank you for your interest and look forward to your feedback.

INTRODUCTION AND ACKNOWLEDGEMENTS

Let me first thank the Program on the Legal Profession at the Harvard Law Faculty and New York Law School for their initiative in launching the FutureEd programme as a whole and for inviting me to speak to this conference in the middle of it.

David Wilkins and his colleagues have long had a worldwide reputation, both for the timeliness and relevance of the subjects they choose to study and for the imagination they show in the means and networks they deploy to address them. FutureEd is no exception to that rule.

It is timely because of the challenge to business models in legal education caused not just by short-term economic factors, but by a range of longer-term trends which we are looking at today; and imaginative in its format of an ongoing decentralised think tank, all of whose members are generating their own imaginative proposals for partnership and action. I'm delighted to be able to make some small contribution to the process.

SIMPLE QUESTIONS, MULTIPLE ANSWERS

Legal Services Board

First, a few words about the Legal Services Board, for those of you who have not been following the process of legal services reform in England and Wales. We are, I believe, a unique body, both in our remit and our modus operandi. We were established by the Legal Services Act 2007 and exist to oversee the operation of eight separate legal self-regulatory bodies, in effect to act as the guarantor that their regulatory practice operates in the public interest, rather than the professional interest alone. I want to stress that, in doing so, we are completely independent of both the government and the profession. We stand 100% independent of both in our decision-making: contrary to what you may hear in some quarters, the Board is by no stretch of the imagination an organ of the state.

The Act gives us specific regulatory objectives, concerning the rule of law, access to justice, the public and consumer interest, public legal education, promotion of competition and promotion of key professional principles. These objectives both guide our programme of work and act as touchstones against which we measure the proposals which we generate and which are put to us for endorsement by others. Interestingly, the objectives are shared with all the so called Approved Regulators, whom we oversee. Thus, the legislation gives both a vision and a toolkit for regulation, and sets up a mechanism that helps to minimise conflict between oversight and frontline regulation by ensuring common goals are in place.

In our first year of operation, we have given weight to three particular goals:

- ❖ **Driving competition** – we have led the process of developing the regulatory framework for Alternative Business Structures, with a view to having the first ABS firms opening their doors in October 2011;
- ❖ **More effective consumer redress** – we have led the creation of the Office for Legal Complaints, whose Legal Ombudsman Service opened for business on 6 October, 2010;
- ❖ **Independent regulation** – as a key first step in our oversight role, we have worked with those frontline regulators who previously combined regulatory and representative functions to ensure that there is clear separation between them, and remove any doubt in the public mind about the independence of regulation. That has meant reviewing governance arrangements to ensure a clear lay majority in decision-making and avoid any fettering of discretion – either directly by restricting the role of regulators, or indirectly by denying

them the level or nature of resource to enable them to do their jobs. We have recently completed the process of agreeing action plans with each of the bodies we oversee to move them into full compliance with what the statute and our rules require over the course of the coming year.

Legal Services Board and Legal Education

So that has been a hefty agenda and one that, in the short-term, has left questions of legal education somewhat to one side. But the Board cannot ignore them. We have another regulatory objective:

“[to encourage] an independent, strong, diverse and effective legal profession”

I like to say on platforms that each of those adjectives is equally important, but that they are also inter-related, both with the other three and with the other regulatory objectives as a whole. For example, if the profession is not diverse, if it does not look more like the society that it seeks to serve, then it is unlikely to command the confidence of large parts of the population who may therefore not attain the access to justice that they deserve. That’s hardly the model for a strong profession. Likewise, if the profession isn’t properly independent, then its desire and ability to uphold the rule of law will be significantly compromised – at least in appearance and probably in reality as well.

It’s clear that effective legal education has a key role to play in achieving that objective: in terms of admission to the profession, the skills, attitudes and values which it imparts and, increasingly importantly and looking beyond the academy, maintaining those objectives through the lifetime of practice.

And indeed our Act recognises this vital role by giving the Board a duty which is at once very specific and very open:

“The Board must assist in the maintenance and development of standards in relation to the education and training of [authorised] persons”

Note the emphasis there on a role of partnership and facilitation, not regulatory control. I will come back to that in my later remarks.

If the role is clear, why have we done comparatively little in this area so far? There are a number of reasons. First, as I have already noted, we have been busy elsewhere in our first 18 months of operation. So, prioritisation is a valid reason. One can, however, only pursue the urgent at the expense of the important for so long.

Second, within our team of 34, we do not have anybody with a direct background in legal education. That makes us admirably unhindered by prior preconceptions. But, as the Board’s CEO, I wouldn’t mind being hindered by a little more prior knowledge! However, what that means is that the importance of partnership working in this area for us in future cannot be overstated.

Finally, we are conscious that this is an area of some complexity, one where questions are easier to frame than answers. However, it’s also an area where, as this conference shows, it is possible to frame partial answers and take action to implement them and then refine in the light of experience. It is in that spirit that I turn to the bulk of my talk, which seeks to refine some of the challenges for educators and regulators alike in looking at the future of legal education.

Defining the Questions

At one level, the questions are deceptively simple:

- ❖ **Education for what?** What does the legal services market place look like now and how will it evolve in the future? What can we deduce about the skills and competences needed to equip new entrants to work effectively now – and to equip new and existing practitioners alike to keep pace in a world where change will continue to accelerate?
- ❖ **Education for whom?** Where does the diversity agenda fit? And what are the different customers of legal education calling for – students, employers and society as a whole?
- ❖ **Education by what means?** As the proposals for this conference show, technology enables wholly new ways of teaching law. How might these develop over time?

I want to reflect on each of these areas in turn and then think about whether, considering them all, legal educators should be reduced to nervous wrecks in the face of overwhelming pressure or feel that there are boundless new opportunities out there to explore.

I will argue the case for being at the optimistic end of the spectrum, but only if we ensure that, in pursuing new opportunities, we make sure that a variety of touchstones are properly preserved. This is one area where the proverbial baby cannot be thrown out with the bathwater.

Education for What?

If I were to answer the “Education for What?” question in a single sentence, it would be for a world in which boundaries are collapsing. Let me run through a number of areas where apparently immutable lines in the sand are being washed away by the waves.

Globalisation – conflicting national jurisdictions are a very live public issue in the UK, even as we speak, as fans of Liverpool Soccer Club struggle to work out how a court in Texas can somehow get involved in ruling on a takeover the High Court in London has already ruled to be legitimate! Such clashes will become more common place as business becomes ever more global. And we also need a generation of lawyers able to deal with multinational bodies of law, whether in the European Union, international trade or human rights. And that means a generation able to meet the cultural challenges of dealing with clients and consumers from multiple backgrounds as well.

Divisions of labour within the market are changing rapidly as well, as a result of globalisation and economic pressures. We are seeing corporate counsel choosing to “in-source” work directly, as a means of reducing cost. We’re also seeing work being outsourced directly by general counsel to outsourcers in emerging markets, cutting out the middle man in corporate firms entirely.

But division of labour is changing within the profession as well. There is an old and stale debate about “fusion” between solicitors and barristers in the UK. It’s not one in which we propose to dabble. We’d rather let the market decide. And it is doing so. More solicitors than ever before are exercising rights of advocacy in higher courts. And barristers are taking up the opportunities of their new freedom to serve the public directly in some areas. In terms of serving the public directly, firms are also asking whether more transactional work calls for the level of qualification – and cost – which it has attracted in the past or whether, with proper supervision, work might be better and more effectively done by legal executives or other staff within the firm.

And that, in the England and Wales context, at least, gets round to the collapsing barrier between the law and other professional services and the law and outside investors. The more outside investment becomes a force, the more pressure there will be to produce better value for clients by challenging ingrained methods of working. That means driving efficiencies within firms, and building partnerships beyond them. That might mean with insurers and other financial institutions at the top of the market or with a local accountant or surveyor on the High Street. In either case, it means looking at the client need holistically – and looking at the entire workforce needed to meet it holistically as well.

Different Workforce Aspirations

That is easy to say, but difficult to do. The demands of and on the workforce of a decade from now will be rather contradictory. And their aspirations will be similarly diverse.

On the one hand, as more work is commoditised and offshored, there will be a real premium on genuinely expert, genuinely specialist value-adding advice. On the other, a commoditised workforce needs proper training as well, not least in recognising the boundaries of its own competence.

And “Main Street” needs to be served as well as the global market. As a colleague noted earlier today, much work will still be done for individual clients and the followers need to be educated just as much as the leaders.

There are important questions here about the boundary of responsibility between educators and firms, who must be obliged to educate their own staff – but are there not also opportunities for educators to find ways of addressing that in-house market as well? In other words, we have another collapsing barrier – between initial undergraduate education, vocational education and ongoing professional development – one which both challenges certainties, but also presents opportunities.

We are also likely to see students with different goals. We have heard already in this conference about the desire of many students to build working in a different jurisdiction into their career plan at some point. But we are also seeing increasing numbers for whom partnership is not everything, some who are prepared to trade off higher returns for a better work/life balance and perhaps lower risk. I personally think it likely that Alternative Business Structures will accelerate this trend: new firms that gain a reputation for “good employer” practices are likely to build a strong brand within the labour market, quite as much as within the legal services market.

Accelerating Changes in the Environment

So educators need to respond to a market in which there will be a greater need for a greater variety of skills and skill levels, and a greater variety of aspiration levels within the workforce. But there are other factors at work apart from globalisation and individual aspirations for which future lawyers need to be equipped.

I will not say much about technology, other than to note the pervasive presence of Web 2.0 in the proposals for this conference. The challenge is not simply for educators to utilise the opportunities that presents for them in their practice, but to enthuse students to consider how best to use those skills in their own practice – and not to be afraid of using Web 3.0 and 4.0 when they come along too.

One factor that will drive that will be the expectations of purchasers for value. General counsel, governmental purchasers and individual clients alike will all be more demanding of their legal service providers – and that in turn generates an agenda for relationship management skills as well as for different more differentiated products from the sector.

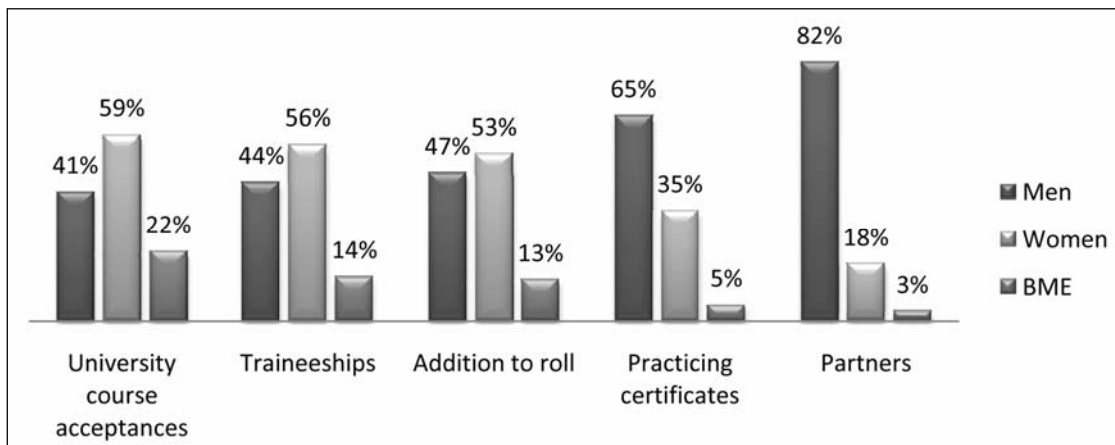
Looking more widely, we will also, I think, continue to see greater willingness to challenge authority – whether in the business world or in the public sphere. At one level, that’s great news for the profession: more work and work of a kind that resonates with the fundamental values of many individual lawyers. But the profession is also part of the status quo that is likely to find itself challenged. You could see our Legal Services Act as one manifestation of that challenge. We’re unlikely to see that kind of change confined to one jurisdiction alone.

More Diverse Lawyers for a More Diverse Citizenry

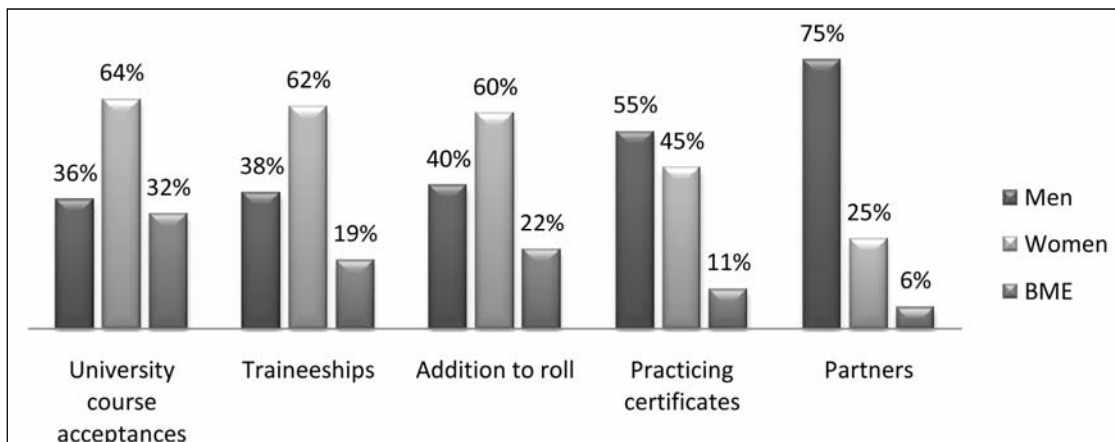
One area where we can expect social pressure is in the field of diversity. I note that Steve Zack from the ABA and I have talked in almost identical terms about the importance of the makeup of the profession matching that of the society which it serves. Where are we on that measure? It’s a mixed picture.

The charts below show the make up of the Solicitors’ profession in England and Wales in 1999 and 2009 respectively.

Solicitors, 1999 (Source: The Law Society of England and Wales)



Solicitors, 2009 (Source: The Law Society of England and Wales)



They show a strong record of inclusivity at initial recruitment level, but a profession that becomes increasingly monochrome and mono-gendered in the upper echelons. And, particularly worrying, while there has been progress in the decade between the two slides, it's rather slow. In other words, there seem to be problems of progression and retention which go beyond the simple issues of different cohorts of different levels of diversity slowly progressing through the profession and making it more representative.

What does that mean for educators? First, some deserved self-congratulation for progress made and perhaps the opportunity to teach some within the profession about where and how more might be done to make progress. Second, however, it underlines the need for watchfulness about their own practice and care about what is being taught about the nature of practice to help drive the diversity seen in academia into the profession itself.

Who is the Customer?

Of course, diversity goes wider than questions of gender and race. In the UK, questions of social mobility have recently been foregrounded, by both the new coalition administration as well as its predecessor.

This brings us into questions about the need for educators to recognise students as consumers of education. Proposals at the conference question the length and hence the cost of professional education as one response to this issue and perhaps this is an area where progress can be made by being more imaginative about the boundaries between the different stages of professional education. It's certainly an issue likely to come to fore in the UK in the light of difficult policy challenges about student support and funding.

There are also links with the fascinating research presented by Berkeley colleagues about the development of aptitude testing to assess the scope to develop the skills of effective lawyering. If this work can be successfully developed, it perhaps points towards the holy grail of a selection mechanism which can be genuinely diversity neutral, including addressing relative educational disadvantage, whilst also protecting those who really do not have the potential to progress from incurring significant levels of debt. It would be interesting to see how this methodology could be applied at other career stages, rather than simply the decision to admit.

There is also a clear need for educators to get closer to the profession. The conference has heard a variety of worries about the relevance of education when it comes to "soft" or "professional" skills and a variety of responses in terms of placements, capstone courses and even shifts in the third year of the degree to wholly vocational training. We certainly can't live for long with the perception of one participant that "medical education produces doctors, but legal education produces law professors." There clearly needs to be greater partnership then in specifying and meeting needs for competences and skills in a way that does not compromise either the core intellectual or ethical requirements of training.

That in turn, of course, highlights the fundamental truth that society as a whole is in some sense the ultimate customer of legal education. The objectives of defending the rule of law, the broader public interest and access to justice are ones in which the entire population has a stake and, to some extent, academics have an important role as wider public advocates to ensure that education is not reduced to a mere agency function for either students or employers. But I would contend that this broader public accountability is far more likely to be met by defining educa-

tional requirements through a process of dialogue with the industry, students, regulators and consumer bodies rather than the academy somehow seeking to be the unique keeper of the faith.

Education—By What Means?

As the proposals for the conference show, there is an opportunity for similar dialogue about the “How?” of legal education, as well as the “For what and for whom?”

There is clearly a great deal of interest in distance learning – and it seems to me regrettable if actual or perceived regulatory restrictions are getting in the way of a method which is increasingly delivering results in other areas of professional education. “Blending” of courses between distance/web and more traditional methods seems to be gaining momentum, as does collaboration in teaching between institutions both nationally and, in the “Law without Walls” proposals, internationally as well. Collaboration with practitioners via the Legal On Ramp proposals, allowing corporate counsel to be involved in teaching and supervising some elements of courses, also seems to be a valuable initiative.

What is particularly interesting is the diversity of approaches among those interested in technology. Some proposals are focussed on using technology better in aid of existing courses, others see it primarily as a driver of cost efficiency and access, and then there are those who are taking the opportunity to teach in a wholly different way by generating digital environments.

What all the proposals seem to me to illustrate is that legal education is facing exactly the same challenges of collapsing boundaries as is the profession itself. Let me illustrate a few of these.

We are clearly seeing the boundary between legal and business education becoming more permeable, with a focus on professionalism (with a small p) in service delivery being taught alongside Professionalism, with a capital P, in terms of ethics and doctrine. That represents not only a shift in boundaries between disciplines, but also a shift in the balance of what is taught as between the academic and vocational stages of education.

Within teaching, we seem to be seeing greater fluidity between clinical and academic approaches, with the former expanding from being focussed purely on pro bono type issues to give a far more realistic insight into real questions of case and risk management and cost control as well, on a broader range of cases.

As I discussed earlier, the boundary between educators and industry – and between what is taught to students and what is taught in firms – is also becoming more fluid. It may be that American educators, with their stronger tradition of alumni links, have a head start here compared to their counterparts in the UK, but I have no reason to doubt that we will be immune from the trend.

And, finally, a related point. I wonder if we are not seeing a collapse of the boundary between what is essentially still an apprenticeship model in many ways within the industry, and the culture of lifelong learning which is seen in other sectors. It seems unlikely that simply placing a bald requirement for x hours of undefined continuing professional development, done at the initiative of the individual practitioner alone, will look like a credible management development strategy for many firms in the future.

Education – Crisis or Opportunity?

So, I hope that the answer to the question of whether these changes – in the commercial environment, in the student body and in potential teaching methods – are a cause for alarm or delight is clear from what I have said so far.

We are heading into a world which is more plural. Alternative Business Structures will have some part in driving this, but many other pressures are heading in the same direction. And we're going to need a greater diversity of educational approaches for a more plural sector. So, to pick up the title of the conference, we are going to see new business models – plural – for law schools.

I think that we are likely to see increasing differentiation, not simply by reputation of faculty members or the institution as a whole, but by the precise product offered – academically or vocationally focussed, for example. There will be differentiation by the market addressed – we may see more firm specific courses, matching the rise of the Executive MBA, but we might also see more education explicitly addressed at those looking to make a success in the small firm market.

As students are encouraged to think earlier in their school career about their own learning styles and grow up with greater expectations of being taught in different ways, we will certainly see differentiation and competition in teaching methods. That, in turn, implies a degree of competition based on cost and duration. Not unrelated to that, we may also see competition for students based on the route of access chosen, especially if aptitude testing lives up to the potential that some have suggested.

And we're also likely to see competition and differentiation based on plurality itself, on the partnerships built between different subject faculties within institutions, between different institutions and between institutions and the outside world.

All of this seems energising – to teachers, students and the wider legal services sector. But letting a thousand flowers bloom hasn't always led to success! Are there babies which might be thrown out with the bathwater?

Touchstones

Professional ethics is one key touchstone. There is a passionate debate at the moment about whether this should be included in undergraduate courses in the UK, on which the Board has not taken any view. But ethical literacy is clearly a sine qua non for any practitioner, and it is hard to argue against its regular inculcation.

I do want to add one word of caution, however. Undoubtedly, the most jaw-dropping comment I have heard in my 20 months in this job was a comment from a practitioner at a conference last year that "You have to understand that we lawyers are more ethical than the general population because we are trained in it". I lose count of the ways in which that comment is both wrong-headed and deeply offensive. It is easily rebutted – let's just count how many degrees in moral philosophy Torquemada and his fellow inquisitors had – but it does highlight a real danger.

Ethical training is all about giving practitioners a practical toolkit they can use to protect their own integrity and to build public trust. It's not about building a wall of professional exclusivity to protect moralising self-righteousness. Deference to the professions is crumbling and using ethics as a way of restoring it is self-defeating, not least in leading to a distrust of the ethical code itself.

Ethical training is clearly closely related to ensuring the maintenance of clear standards of conduct. As regulation in the UK moves to a model which is more outcome focussed – and, I would contend as a result more ethically focussed by looking at the spirit of regulation rather than the letter of rules – it is vital that education at all stages reinforces norms of acceptable behaviour.

Increasingly, we will see a shift towards defining educational outcomes as well, a trend noticeable in a number of the proposals for this conference. Those outcomes for the individual are, I think, increasingly going to be expressed in terms of competence, rather than just knowledge alone. And that means that we need increasingly to develop a body of knowledge that can relate teaching methods and course design to the acquisition and maintenance of such competences. That is easy to say and very difficult to do – not least because the competences needed for the world of 2030 and beyond may be very different from those needed today. But it must be worth the endeavour to seek to define them and measure practice against them.

And finally, I do wonder if there needs to be an educational equivalent of the regulatory objectives which I discussed at the beginning of this talk – some explicit touchstones about the rule of law and its place in society against which ethical, doctrine and skills requirements can be benchmarked and tested. The objectives we have seem to be serving us well so far and may be worthy of wider application, but there may be lessons to be incorporated from broader standard setting in higher education as well.

The Role of Regulation

It is worth a footnote about the role of regulation in all this. I start by looking back to what I said about the explicitly facilitative role entrusted to my Board in our founding statute. Is that the right tone for the professional regulator in relation to education and training generally? This does not seem to be an area where a focus on tick-box compliance is remotely helpful, particularly if we are moving into an era which needs to be marked by more diversity and more experimentation.

Instead we may all need to focus on developing regulatory capability that focuses on helping define outcomes and measure if they are being achieved. We also need to ensure that there remains a proper measure of mutual learning, as well as competition, between different providers in pursuit of the broader public good. That doesn't mean that there will never be the need for tough regulatory intervention to protect standards and students alike when experiments fail – as they no doubt will on occasion – but I believe that it is both possible and necessary to retain the power to intervene strongly when needed without deflecting from a broadly facilitative approach.

Conclusion

So, in conclusion, I may have done no more than prove my initial hypothesis that the questions are easier to frame than the answers. But I remain positive. This event shows that there is a broad consensus on what the issues are and a wide range of creative approaches to grappling with them. Now is the time to generate multiple answers and to be comfortable with that multiplicity. Professional bodies, the sector as a whole, educators and regulators all have a role in building that multiplicity and working together, challenging each other, to make that multiplicity of approach ever richer in the public interest.

ABOUT THE AUTHOR

Chris Kenny is the chief executive of the Legal Services Board (LSB), an independent body that oversees the regulation of lawyers in England and Wales. He leads the senior management team, and serves as a member of the Board. Mr. Kenny led the creation of the LSB before becoming its chief executive in 2009.

Mr. Kenny spent the early years of his career in the Department of Health, rising to be the Principal Private Secretary to the Secretary of State, and in the UK Treasury, where he worked to introduce economic reform in Russia and Eastern Europe. Mr. Kenny held two directorships at Oftel, an independent regulator for the communications industry in the UK and spent three years as Director of Life Insurance and Pensions at the Association of British Insurers.

He has also held various non-executive positions in the not-for-profit sector and is currently an independent member of the Board of Ombudsman Services, which provides independent redress to customers of the energy, telecoms, and surveying industries. He is a fellow of the Royal Society of Arts and a rugby league enthusiast.



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