Legal Education & Training Review: A Five-Year Retro/Prospective.

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The Legal Education and Training Review final report on the regulation of legal services education and training was published n June 2013. Five years later, members of the research team reflect, in this article, on subsequent developments in the relationship between regulator and regulated. They explore the links between outcomes focused regulation (OFR) and the hierarchies within the regulatory space and between the OFR-driven focus on competence and its impacts on assessment for qualification and continuing competence thereafter. Finally, they extend the concept of shared space to include the relationship between regulators who commission research and researchers who carry it out. The paper concludes that the project has attracted international interest and informed other projects. Although there is already clear impact in England and Wales, the full significance of the report in the canon of seminal reports into legal education will emerge over the next decade.

Keywords: LETR; competence; regulation; meta-regulation; shared space

Introduction

The Legal Education and Training Review (LETR) research team published their report (the Report)[1] and literature review (the Literature Review)[2] in the summer of 2013. The overall regulator, the Legal Services Board, issued statutory guidance to the legal

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1 Julian Webb and others, 'Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales' (2013) <http://letr.org.uk/the-report/index.html> accessed 23 July 2018.

2 Julian Webb and others, 'Legal Education and Training Review Research Phase Literature Review' (Legal Education and Training Review 2013) <http://letr.org.uk/literature-review/index.html> accessed 23 July 2018.

professions the following spring,[3] and, five years later, at the kind invitation of the Association of Law Teachers and Leeds Beckett University, the research team reconvened. In this article we take the opportunity to reflect on developments since publication of the Report, focusing on key points that represent changes in the relationships between the regulator and the regulated. We need to point out now less frequently than we used that the remit of the LETR investigation, commissioned by regulators, was confined to *regulation* of legal education. It was also a review of education for and in legal practice ('Legal services education and training' (LSET)) which meant covering all the legal professions, including those without any particular interest in the undergraduate law degree or GDL.

The relationship between regulator and regulated in England and Wales had, however, fundamentally shifted as a result of the Legal Services Act 2007 (LSA), itself a product of a sequence of reports attacking exclusivity and monopoly within the legal professions.[4] The environment of the LETR research phase was, then, one in which

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3 Legal Services Board, 'Statutory Guidance on Legal Education and Training' <http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/20140304_LSB_Education_And_Training_Guidance.pdf> accessed 23 July 2018.

4 Office of Fair Trading, 'Competition in Professions' (Office of Fair Trading 2001) <http://webarchive.nationalarchives.gov.uk/20140402142426/http:/www.oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf> accessed 23 July 2018; Department for Constitutional Affairs, 'Government Conclusions Competition and Regulation in the Legal Services Market A Report Following the Consultation "In the Public Interest?"' (Department for Constitutional Affair 2003) <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/consult/general/oftreptconc.htm> accessed 23 July 2018; David Hunt, 'The Hunt Review of the Regulation of Legal Services' (Law Society of England and Wales 2009) <http://www.nzls.org.nz/catalogue/opac/DigitalContent/Legal_Regulation_Report_FINAL.PDF;jsessionid=59C098BA43C679461703712227096824?parenttreeid=f4cb742268ce4c4984e1d382ea50d5f4&sessiondepth=1&k=18> accessed 29 July 2018; David Clementi,

competition between and amongst professions, regulators and education providers was already febrile. This competition was enshrined in the LSA;[5] visible in practice as multiple professions exercised rights to conduct litigation, conveyancing and advocacy; and the status of lawyers as having any particular claim to expertise over unregulated specialists threatened.[6] The relationship between the undergraduate law degree and qualification into the legal professions was already attenuated, with none of the regulated legal professions, including solicitors and barristers, demanding one as a condition of entry. Nor are any of the regulated professions, with the exception of the patent attorneys, in fact, graduate only. Government emphasis on apprenticeships was perhaps therefore less of a disruptor to the hegemony of the universities than might have been imagined, but plays very strongly to the British legal culture that the real place of learning for legal practice remains, the workplace. Most significantly, both for the LETR research and for subsequent developments, such as the SRA's Solicitors Qualification Examination (SQE), was a shift in regulatory approach for the professions

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'Report of the Review of the Regulatory Framework for Legal Services in England and Wales' (Ministry of Justice 2004) <http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/> accessed 23 July 2018. The agenda is ongoing: Ministry of Justice, 'Legal Services: Ensuring Regulatory Independence and Removing Barriers to Competition' (Ministry of Justice 2016) Cm 9304 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/535499/legal-services-removing-barriers-to-competition.pdf> accessed 23 July 2018.

5 See also Julian Webb, 'Regulating Lawyers in a Liberalized Legal Services Market: The Role of Legal Education and Training, (2013) 24 Stanford Law & Policy Review 533.

6 Legal Services Board Consumer Panel, 'Regulating Will-Writing' (Legal Services Board Consumer Panel 2011) <http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/consumerpanel_willwritingreport_final.pdf> accessed 24 July 2018, para 1.34.

as a result of the LSA, with representative functions split from regulatory functions, and a shift in regulatory model, from command and control to outcomes focused.

Regulatory space

As we pointed out in the Report,[7] outcomes-focused regulation (OFR) is an element of risk-based regulation, where the regulator 'identifies the risks that need to be managed in respect of certain activities, and designates the outcomes that must be achieved in order to manage or vitiate those risks'.[8] Even before the LSA, the Smedley Report had pointed out the need for culture change, requiring a shift from 'investigation, scrutiny and punishment' to 'education, information, training, expert advice and promotion of standards'.[9]

The key issue was how OFR was to be implemented within a legislative regulatory structure. The usual top-down hierarchical approach worked against the grain of a regulatory regime that was no longer rules-based only. If, for example, outcomes were to be specified, controlled and overseen by the regulator only, then the regulatee's space for agency, responsibility and self-determination would be compromised even more than in a rule-based regime – a situation that leads to game-

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7 Op cit, n 1, 3.44ff.

8 And as we pointed out, OFR are derived from general principles of good regulation, and the eight regulatory objectives specified in s.1 LSA 2007, discussed in chapter 2 of the Literature Review: op cit, n 2.

9 Nicholas Smedley, 'The Smaller Approved Regulators: An Assessment of Their Capacity and Capability to Meet the Requirements of the Legal Services Act 2007, with Analysis and Recommendations' (Legal Services Board 2011) <http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/20110622_sar_report_final.pdf> accessed 24 July 2018. Quoted in the Report, n 1, 3.46.

playing and systemic avoidance. To mitigate the problems, the LETR research phase addressed the issue of regulatory relationship, treating the SRA as one actor amongst many, and adopted, amongst other approaches, what was called in the Literature Review a 'shared space' approach.[10]

The shared space approach is really one element in the running debate on the power of regulatory and licensing agencies – do they have too much power and too little accountability?[11] Or is it the reverse? In the Report, we agreed with Colin Scott's solution to this debate, which was

> […] NOT to give agencies more power and less accountability, but rather to recognise and work with the various organisations, capacities and forms of control within particular regulatory regimes to promote learning about how regimes work so to secure better understanding not only of policy solutions but also of policy problems.[12]

Part of Scott's solution entails being sensitive to 'meta-regulation', that is to say, 'the regulation of self-regulation'. It involves identifying the 'mechanisms of regulation at

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10 See op cit, Literature Review, chapter 3 for in-depth discussion; and op cit, Report, *inter alia*, 1.19, 4.106-24; 4.144; 6.48; 6.158.

11 And the synergy of legal regulation and traffic regulation should surely call to mind the Yale legal realist parking studies: FSC Northrop, 'Underhill Moore 's Legal Science: Its Nature and Significance' (Yale Law School 1950) Paper 4375 <http://digitalcommons.law.yale.edu/fss_papers/4375/> accessed 24 July 2018. Nor is the synergy mere analogical thinking. As the work of Schlegel and Leiter attests, and the work, too, of the New Legal Realism movement, interdisciplinary analyses of the effects of regulatory conduct are critical tools with which we can hold to account the nature and extent of regulatory power.

12 Colin Scott, 'Regulating Everything' (University College Dublin, Geary Institute 2008) Inaugural Lecture WP/24/2008 <http://irserver.ucd.ie/bitstream/handle/10197/1821/gearywp200824.pdf?sequence=1> accessed 24 July 2018.

play', and then steering them in order to secure 'desired outcomes' (27). This could be a description of our approach in LETR.

Sharing: who shares what and why?

In the LETR research phase, therefore (and without losing sight of the regulators' statutory requirement to regulate), we shifted the emphasis from quality assurance to quality enhancement, focusing on innovation, imagination and change for a democratic society. We viewed regulators as part of a hub of creativity, shared research, shared practices, and the guardian of the debates around that hub. In so doing, they would initiate cycles of funding, research, feedback and feedforward. They would be responsible for an archive of educational research, particularly the research into educational technology.[13] We also envisaged regulators as participating in interdisciplinary, inter-professional trading zones. And so we crafted Recommendation 25 in the report, which, like all the recommendations, was woven into the fabric of the full set:

> **Recommendation 25**
> A body, the 'Legal Education Council', should be established to provide a forum for the coordination of the continuing review of LSET and to advise the approved regulators on LSET regulation and effective practice. The Council should also

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[13] As we pointed out in the Report and some of us have observed on a number of occasions since, the Literature Review was one of the unique aspects of the LETR Report. But like all such literature reviews it was a snapshot, and needed to be regularly updated. To date this has not been done. Indeed there was an even greater missed opportunity, for regulators to step in and assume some of the roles of the UK Centre for Legal Education, which was shut down in 2011 by the HEA along with all other subject centres, and which now exists only as an archive site.

> oversee a collaborative hub of legal information resources and activities able to perform the following functions:
> –Data archive (including diversity monitoring and evaluation of diversity initiatives);
> –Advice shop (careers information);
> –Legal Education Laboratory (supporting collaborative research and development);
> –Clearing house (advertising work experience; advising on transfer regulations and reviewing disputed transfer decisions).

The recommendation was dismissed by the SRA in its initial response to LETR. Had it been implemented, we envisaged that as a consequence there would be more agency for learners at every level. The Council could have been a useful platform to encourage practitioners to give back to learning and teaching institutions the benefit of their accumulated experience and wisdom. Law schools could be encouraged to share much more than they do at present – collaborative formations such as the Glasgow Graduate School of Law[14] and the Oxford Institute of Legal Practice are prominent examples; but there are many instances where law schools could share information, practices and results of pedagogic innovations, nationally and internationally. Professions, law schools, students and legal tech companies could converge in more innovative clusters, such as the US Institute for the Future of Law Practice.[15] And regulators themselves could share much more than they do. A good example of this is the Prairie Law Societies in Canada (ie Manitoba, Alberta and Saskatchewan provinces), where one regulator may face many of the same problems as

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14 Discussed in Paul Maharg, 'Sea-Change' (2011) 18 International Journal of the Legal Profession 139.

15 Institute for the Future of Law Practice, 'Home' (*Institute for the Future of Law Practice*, 2018) <https://futurelawpractice.org/> accessed 24 July 2018.

its neighbour and where it makes sense to collaborate closely on problems, processes and solutions.[16]

Regulators have of course liaised internationally. There is an International Conference of Legal Regulators, set up in 2012.[17] Laurel Terry attended that meeting and wrote a perceptive account of it. She identified four possible goals for the then new international conference:

1. Co-operation and information sharing on specific cases
2. Clearinghouse for information about regulators' practices and tools
3. Exchange of information on policy issues and projects
4. Development of common policies or practices[18]

She noted that when she put these goals to conference the first three were accepted and the last, predictably, proved divisive and was rejected.

What we were arguing for, in effect, was more experimental regulation that would encourage responsibility and creativity, and engagement with the forms of

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16 See, e.g. Law Society of Alberta, Law Society of Saskatchewan and Law Society of Manitoba, 'Innovating Regulation: A Collaboration of the Prairie Law Societies' (Prairie Law Societies 2015) Discussion Paper <https://www.lawsociety.sk.ca/media/127107/INNOVATINGREGULATION.pdf> accessed 24 July 2018.

17 International Conference of Legal Regulators, 'International Conference of Legal Regulators' (*International Conference of Legal Regulators*, 2018) <https://iclr.net/conference/netherlands2018/> accessed 24 July 2018.

18 Laurel S Terry, 'Creating an International Network of Lawyer Regulators: The 2012 International Conference of Legal Regulators' (2013) 82 Bar Examiner 18. It is interesting to note the broad parallels between points 1-3 and LETR recommendation 25. It is even more interesting to remember that the international conference of regulators accepted these points as legitimate activities for the international conference, but the SRA felt otherwise when it came to implementation within the jurisdictions of England and Wales.

innovative regulation being developed in other areas such as environmental and social policy, food safety and climate change. Zeitlin put it well:

> The crucial point that distinguishes such experimentalist architectures from conventional hierarchical governance is their contestability, whereby local actors have the autonomy to report problems with existing rules and explore alternatives, while the organizational centre is obliged to take account of such local experience in reconsidering and revising the rules.[19]

This is real shared space, where contestation, contingency, historical awareness and sensitivity to relationship is acknowledged and then is put to work for the benefit of the community. What we proposed five years ago in the Report is now ever more urgently required in the regulation of legal education in England and Wales. Indeed we would argue it is needed globally in legal education. The touchstone for legal educators in England and Wales is the SQE.[20] Will the SQE as currently constructed help our students to bridge academic into professional learning, help them be responsible lifelong learners, help them be ethical practitioners, help law schools co-operate with each other, engender and sustain educational and professional innovation, encourage social mobility and diversity in legal education and in the profession? On the basis of our Report we would answer that the SQA will encourage none of these.

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19 Jonathan Zeitlin, 'EU Experimentalist Governance in Times of Crisis' (2016) 39 West European Politics 1073, 1073.

20 Solicitors Regulation Authority, 'FAQs - Solicitors Qualifying Examination' (*Solicitors Regulation Authority*) <http://www.sra.org.uk/sra/policy/training-for-tomorrow/resources/sqe-questions-answers.page> accessed 24 July 2018.

Professionalism and competence

One of the most profound shifts affecting both curriculum design and (latterly) regulation, has been the move to reconceptualise professional education through the lens of 'competence'. Competence itself describes the threshold of ability required for a given task or function, and it is commonly regulated through an approach called outcomes-based education (OBE), which is not the same as, but has particular synergies with the move to more outcomes-focussed regulation (OFR).[21] Competence-based education has its origins in developments in occupational and workplace training, starting in the US in the 1970s.[22] A form of competence-based approach has been embedded in the English vocational training system since the 1990s. This means that curriculum and assessment are directed to the achievement of specified competences, which are framed as outcomes describing what the learner should be able to do by the end of a period of study or training, or in the workplace. The LETR, and before it the Law Society Training Framework Review signalled the need for a relatively holistic approach to OBE, developing 'day one outcomes' for the end of vocational training that would provide a benchmark for different stages of education and training, thereby providing a degree of coherence to the whole.

The positive potential of a competence-based approach is worth highlighting here. First, it can be used to focus usefully on the actual needs of the learner. This can be a strong corrective to curriculum drift. Secondly, it follows that, rather than require students to undertake a high degree of (expensive) 'just in case' learning, it is argued

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21 For an overview, see, e.g., Maureen Tam, "Outcomes-Based Approach to Quality Assessment and Curriculum Improvement in Higher Education," (2014) 22 Quality Assurance in Education 158,.

22 See H.R. Cort and J.L. Sammons, "The Search for Good Lawyering: A Concept and Model of Lawyering Competencies," (1980) 29 Cleveland State Law Review 397.

that a competence focus enables professional qualifications to address more directly the 'just in time' requirements associated with what junior lawyers actually do.[23] This may also enable a better balancing of and complementarity between stages of legal education and training. Thirdly, a competence approach may also serve quite subtly as a limit on regulation. If, as the Report asserted, the primary regulatory function is to assure competence, then there is an obligation on regulators to think carefully about both the range of outcomes specified and the standard set for competence, otherwise there is a risk of overreach. Lastly, competence-based education can encourage experimentation and facilitate shared space and experimentalism, with varied and flexible modes of delivery, as the focus of regulation shifts from the *process* of delivering a specific course or programme, to the means by which candidates demonstrate that the *outcomes* have been met.

The question is can we be reasonably confident that these benefits will be attained by the SQE? This seems unlikely at present. Critics of competence-based approaches have long raised concerns about the ability of competence frameworks to capture the richness of high level professional learning,[24] and highlighted risks of both

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23 See, e.g., Webb, op cit, n.5, 569; Productivity Commission, 'Access to Justice Arrangements, Vol. 1' (72, September 2014) 249–50 <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf> accessed 29 July 2018.

24 Barrie Brennan, *Continuing Professional Education in Australia: A Tale of Missed Opportunities* (Springer, 2016) 122–8; Caroline Maughan, Mike Maughan and Julian Webb, 'Sharpening the Mind or Narrowing It? The Limitations of Outcome and Performance Measures in Legal Education' (1995) 29(3) The Law Teacher 255. Contrast too the relative richness of the LETR 'internal' formulation of competence with the more narrowly functional 'external' approach taken by the SQE.

under- and over-inclusiveness. All of these problems may flow from the current design of the SQE.

First, the breadth of the knowledge component (particularly in the SQE 1) continues to lock training into a model of preparation for general practice that no longer exists. Combined with breadth assessment through primarily multiple choice questions, and we have a model that can be said to assure baseline competence in only the most rudimentary sense. Secondly, while many of the core professional skills (research, oral and written communication, advocacy) are constants, newer capabilities are becoming critical. The Report highlighted commercial and social awareness (which is, at least in the commercial context, captured by the new outcomes), but capacities such as a proper understanding of legal tech, project management, and 'design-thinking' are all examples of 'new' areas of competence currently being emphasised in practice.[25] Should they, or any of them be included among the growing list of core competences? And if so, how, and where? There is an obvious risk here that the regulator is playing a game in which it is always at least a step behind. Thirdly, there is little to suggest that the SRA has done anything to address, particularly through its assessment design. the impoverished focus

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[25] Richard E Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press, 2017). The Law Society of New South Wales *FLIP Report* (pp.77-8) has similarly highlighted seven areas of proficiency "necessary for success in future law practice": technology; practice skills; business skills; project management, internationalisation and cross-border practice; interdisciplinary experience, and resilience, flexibility and ability to adapt to change: see Law Society of New South Wales, 'Report of the Commission of Inquiry into the Future of Law and Innovation in the Profession' (The Law Society of NSW, 2017) 112 <http://lawsociety.com.au/ForSolictors/Education/ThoughtLeadership/flip/index.htm> accessed 29 July 2018.

on ethics and professionalism, and particularly the need for a broader education in professional values highlighted by the Report.

CPD as a regulatory space

Outcomes and competence have also become watchwords for CPD. Both the BSB[26] and the SRA[27] have moved away from 'inputs', 'sanctions'[28] or hours-based systems towards outputs-based 'benefits'.[29] This was, however, part of the zeitgeist. CILEx had already made the change[30] and the accountants had done so long before[31] following a global trend. By 2013, 70% of a sample of 54 professions used an outputs model, with 89% requiring evidence of planning and reflection, of which a third required evidence

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26 Bar Standards Board, 'Established Practitioners Programme' (*Bar Standards Board*, 2016) <https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/continuing-professional-development-from-1-january-2017/established-practitioners-programme/> accessed 25 July 2018.

27 Solicitors Regulation Authority, 'Continuing Competence' (*Solicitors Regulation Authority*) <http://www.sra.org.uk/solicitors/cpd/tool-kit/continuing-competence-toolkit.page> accessed 24 July 2018, para 6.60.

28 CA Madden and VA Mitchell, 'Professions, Standards and Competence, a Survey of Continuing Education for the Professions' (University of Bristol, Department for Continuing Education 1993).

29 Ibid.

30 CILEx Regulation, 'CPD Handbook' <http://www.cilex.org.uk/membership/cpd> accessed 24 July 2018.

31 Institute of Chartered Accountants of England and Wales, 'Continuing Professional Development (CPD) Regulations' (*Institute of Chartered Accountants in England and Wales*, 2005) <https://www.icaew.com/membership/regulations-standards-and-guidance/training-and-education/continuing-professional-development-regulations> accessed 25 July 2018. The approach is evaluated, positively, in Hilary Lindsay, 'Patterns of Learning in the Accountancy Profession Under an Output-Based Continuing Professional Development Scheme' (2012) 21 Accounting Education 615.

of changes in working practice and a quarter "evidence of client outcomes".[32] Lawyers, generally, remain off-trend, clinging to inputs systems. Alberta,[33] New Zealand[34] and Scotland[35] are notable exceptions.

Education should be more interested in learning than in attendance figures. Regulators are also, in fact, interested in learning as least insofar as it assures minimum competence and avoids negligence. This can produce dissonance. The post-LETR rush to adopt competence statements has encouraged regulators to endorse the ability to assess personal strengths and weaknesses, to reflect on performance and to confess and learn from mistakes; whilst sometimes simultaneously employing CPD systems that ignore (and so devalue) those precursors to learning.

As a regulatory space, CPD is suspended in a tension field between regulators, employers and employees. These actors have different perspectives on the role of CPD[36] and very different bargaining positions.

An inputs system places the regulator in charge: of the number and format of permitted activities; often of the educational providers and of enforcement. It enables lawyers to bask in the comfort that, in Monderman's terms "as long as you [comply

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32 Professional Associations Research Network, 'CPD' (*Professional Associations Research Network*, 2015) <https://www.parnglobal.com/about-our-research/continuing-professional-development> accessed 24 July 2018.

33 Law Society of Alberta, 'Continuing Professional Development' <https://www.lawsociety.ab.ca/lawyers-and-students/continuing-professional-development/> accessed 24 July 2018.

34 New Zealand Law Society, 'CPD Requirements' (*New Zealand Law Society*, 2018) <https://www.lawsociety.org.nz/for-lawyers/regulatory-requirements/continuing-professional-development/cpd-requirements> accessed 24 July 2018.

35 Law Society of Scotland, 'CPD' <https://www.lawscot.org.uk/members/membership-and-registrar/cpd/> accessed 24 July 2018.

36 Andrew Friedman, *Critical Issues in CPD* (PARN 2005), 8.

with these very tightly defined rules], nothing can happen to you". Beneath this is, however, an informal and negotiated structure of authority. Scott has suggested that wealth, with information and organisational capacity "often confers informal authority" in a regulatory space.[37] Employers hold the CPD purse-strings. They determine what activity, if any, they will pay for and whether they will release work time.[38] Individuals collude in 'ticking the box'to achieve paper compliance and avoid sanction. Learning clearly *can* result, although there is no requirement that it should and, as a result, support for transfer of learning from classroom to workplace[39] is not an integral component. An hours-based model does, however, afford leverage for at least a token opportunity for learning.

The LETR data showed that lawyers nevertheless valued CPD as a reliable indicator of continuing competence.[40] The mere existence of a CPD scheme has symbolic value. It is perceived as enhancing public trust in the profession because it is a manifestation of defensive regulatory control.[41] If professionals are dragged to the

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37 Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] Public Law 283, p 336

38 Pamela Henderson and others, 'Solicitors Regulation Authority: CPD Review.' (Solicitors Regulation Authority 2012) <http://www.sra.org.uk/sra/news/wbl-cpd-publication.page> accessed 24 July 2018. Examples included only free CPD being allowed (paras 140, 256, 257, 239) even if irrelevant to the individual (paras 268, 269) and problems in releasing time (para2 60ff).

39 J Gold and others, 'Continuing Professional Development in the Legal Profession: A Practice-Based Learning Perspective' (2007) 38 Management Learning 235, 237-238.

40 Op cit, n 1, table 2.12.

41 See the 2006 Institute of Continuing Professional Development report cited in the Literature Review, identifying "A need for professional bodies to be "seen to be responding appropriately to the public perception that they oversee the competencies of their members": op cit, n 2, Chapter 5, para 5.

educational water then the regulator is right to sanction them for being out of date or misunderstanding the ethical code (where there is a mandatory ethics component). Outputs systems also demonstrate regulatory control but there is a risk, discussed below, that they are seen as 'softer' than rules-based inputs models. However, if CPD has *only* symbolic value, it becomes no more than a tax paid in course fees and sacrifice of billable time. Learning is still a by-product and compliance for compliance' sake is endorsed. Such negotiation as there is, is unofficial, between employers, employees and education providers in a space that is shared, but shadowy.

Inputs based CPD (low trust) is obviously at odds with (ostensibly high-trust) OFR. That said, as we have seen, it can be pragmatic to retain a minimum requirement.[42] The BSB and CILEx Regulation have done so for junior lawyers, and the SRA for solicitor-advocates.[43] An outputs system in principle shifts responsibility to the learner within the regulatory space, rewarding their learning whilst balancing business objectives and the regulator's need for compliance. The space occupied by outputs focussed CPD schemes is, however, a compromised one, and one in which the sharing is more illusory than it might appear.

First, there is a problem in determining compliance: learning is internal and often invisible; attendance is visible. Consequently such schemes can be viewed by lawyers as easier to pervert. However, individuals can reliably document overt changes in practice and employers can measure reductions in complaints. Regulators can do so

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42 Pamela Henderson and others, op cit, n 40, p 93.

43 The five hour minimum for solicitor-advocates in SRA Higher Rights of Audience Regulations 2011, regs 9.1 and 9.2 was not repealed with the general CPD rules in November 2016 (possibly inadvertently). The Scottish and New Zealand systems also have a minimum.

too: for example, the FE teachers' scheme considered by Boon and Fazeli in comparison with the SRA scheme only counted hours which "[led] to a tangible impact on practice". [44] In legal practice, evidencing impact to an external regulator problematically trespasses on client confidentiality and privilege.

What happens, therefore, is that things that are easier to document are harnessed to serve the regulatory agenda. Friedman et al, in a 2009 study of 54 organisations, found that 41% of outputs schemes required evidence of reflection and 48% matched to competences (usually set by the members themselves).[45] Both approaches are visible in the new model legal CPD schemes.

We used the term 'cyclical'in the Report to describe reflective approaches. Solicitors, for example, are expected to reflect retrospectively on their performance ("evaluative reflection"[46]) to identify learning needs, plan to address them and later evaluate whether the needs had been addressed.[47] Critical reflection,[48] which looks to the future, questions norms and can be transformational is not necessarily recognised by

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44 Andrew Boon and Tony Fazeli, 'Professional Bodies and Continuing Professional Development: A Case Study' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2540039 <https://papers.ssrn.com/abstract=2540039> accessed 25 July 2018, 9.

45 A Friedman, W Hanson and C Williams, 'Professional Standards Bodies: Standards, Levels of Compliance and Measuring Success. A Report for the Financial Services Authority' (PARN 2009) <http://www.fsa.gov.uk/pubs/other/parn.pdf> accessed 25 July 2018, p 36. Cited in the Literature Review, chapter 5, para 83.

46 Anne Brockbank and Ian Mcgill, *Facilitating Reflective Learning in Higher Education* (2 edition, Open University Press 2007), p 127. Terminology is inconsistent: the BSB uses "reflect" for evaluation of what has been learned: Bar Standards Board, 'Continuing Professional Development (CPD) Guidance for Barristers' (Bar Standards Board 2016) <https://www.barstandardsboard.org.uk/media/1800835/cpd_guidance_for_barristers.pdf> accessed 25 July 2018, 5.

47 Solicitors Regulation Authority, op cit, n 33.

48 Anne Brockbank and Ian Mcgill, op cit n 52, 127

the regulator, even if it is valuable to the individual. Employers may not want employees to aspire beyond their current role and, for solicitors, the employers' obligation, set by the SRA, is to acquire and maintain minimum competence.[49]

Some legal outputs-based schemes also use competences as a benchmark. We have already noted that where outcomes are controlled and imposed by the regulator, the responsibility of the individual is depressed.[50] Perhaps for that reason, whilst the Alberta list includes prescribed competences it also has an "other" category permitting lawyers to personalise their activity.[51] Although this list overlaps with the national point of qualification competence statement,[52] they are not identical.

The SRA has, by contrast, elected to use its point of qualification competence statement, discussed above[53] as a key tool as it "defines what you must be able to do to

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49 "[T]rain individuals working in the firm to maintain a level of competence appropriate to their work and level of responsibility": Solicitors Regulation Authority, 'SRA Code of Conduct 2011' <http://www.sra.org.uk/solicitors/handbook/code/content.page> accessed 25 July 2018, outcome 7.6. For the consequences, see Jane Jarman, 'Why Is Outcome 7.6 Frightening Lawyers?' [2015] *Law Society Gazette* <https://www.lawgazette.co.uk/practice-points/why-is-outcome-76-frightening-lawyers/5049794.article> accessed 13 February 2018.

50 The BSB established practitioners scheme is more consciously future oriented than the SRA one and allows barristers to identify their own "learning objectives" Bar Standards Board, op cit, n27.

51 Law Society of Alberta, 'CPD: Competencies' (*Law Society of Alberta*, 2017) <https://www.lawsociety.ab.ca/lawyers-and-students/continuing-professional-development/background/cpd-competencies/> accessed 24 July 2018.

52 Federation of Law Societies of Canada, 'National Entry to Practice Competency Profile for Lawyers and Quebec Notaries' <http://flsc.ca/wp-content/uploads/2014/10/admission4.pdf> accessed 25 July 2018.

53 Solicitors Regulation Authority, 'Statement of Solicitor Competence' (*Solicitors Regulation Authority*, 11 March 2015) <http://www.sra.org.uk/competence/> accessed 25 July 2018.

deliver a proper standard of service".[54] This is problematic. First, presumably to avoid complaints by practitioners of being required to keep up to date in irrelevant areas of law, the legal knowledge element has been removed from the competence statement for CPD purposes. Second, the statement necessarily omits the kind of activities that are confined to more senior lawyers such as practice management, marketing, people management. Some of the things, it might be noted, that appeared in LETR recommendation 9.

Finally, in terms of shared space, although the SRA competence statement was designed collaboratively; the guidance for its use seems more anxious to align with the employer than the individual:

> The Competence Statement is a generic document, and you will need to apply it to your particular practice area, level of experience and individual role. Employers may want to consider how the content of our Competence Statement aligns with internal competence frameworks, performance development frameworks, appraisal systems and any structured organisational training plans.[55]

Boon and Fazeli fear that this model places too much power in the hands of the employer to prescribe rigid and static notions of competence.[56] Where a CPD scheme is under the overwhelming control of a competence statement – which was not what LETR recommendation 9 envisaged – there is clear potential to depress the otherwise personally liberating autonomy offered by an outputs-based scheme that is inherently

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54 Solicitors Regulation Authority, 'Reflecting on Your Practice: How to Identify Your Learning and Development Needs' (*Solicitors Regulation Authority*) <http://www.sra.org.uk/solicitors/cpd/tool-kit/identify-learning-development.page> accessed 25 July 2018.

55 Ibid, n 59.

56 Op cit, n 50, p 13.

more educationally valid. So the regulatory space is at least as dominated by the regulator and the employer as in the inputs-based schemes. What are on the face of it the useful developmental scaffolds of planning templates and competence frameworks can be used to oppress, to limit ambition and to hold to account. It is not necessary or desirable that they should, but a combination of regulatory and employer objectives still means that they can. Space is more obviously shared, but as ever, the devil is in the implementation, where the individual's ability to be responsible, imaginative, and human might not be as large as they hope.

In relation to both competence and CPD, then, the balance between actors can be fragile, or negotiated. As a research project commissioned by one group of those actors, so as to inform policy, with other actors as its informants, the LETR research phase showed how space is shared between policy and research.

Sharing space: research

Working on the LETR research phase helped us to learn more about the context in which we were working, if we did not know these things already. We were reminded that Research and Policy were uneasy bed-fellows. Unfortunately research may not be able to manage without funding, often from policy makers? But can policy makers manage without our research? It is certainly wise to note what policy makers may want from the research and how they might use/misuse what is said, twisting the findings to what they already wanted to do. Then it is useful to remember what we as researchers want. Usually to find out some semblance of truth or accuracy on an item of contention. All of this sets up major conflicts of interest, power, funds and reputation. There was the possibility of bullying, about finishing times etc. if not completely about content and the way it was reported.

So why does policy want research? It can provide a basis from an apparently independent body. It can help in understanding complex situations and issues. It can give them somebody to blame if it does not turn out as they wish. Or they can ignore the findings and hush them up, having fulfilled the responsibility to consult.

There are many ignored messages in the Report. One relates to the research on how solicitors spend their time. We made a comparison between 1992 and 2012.[57]

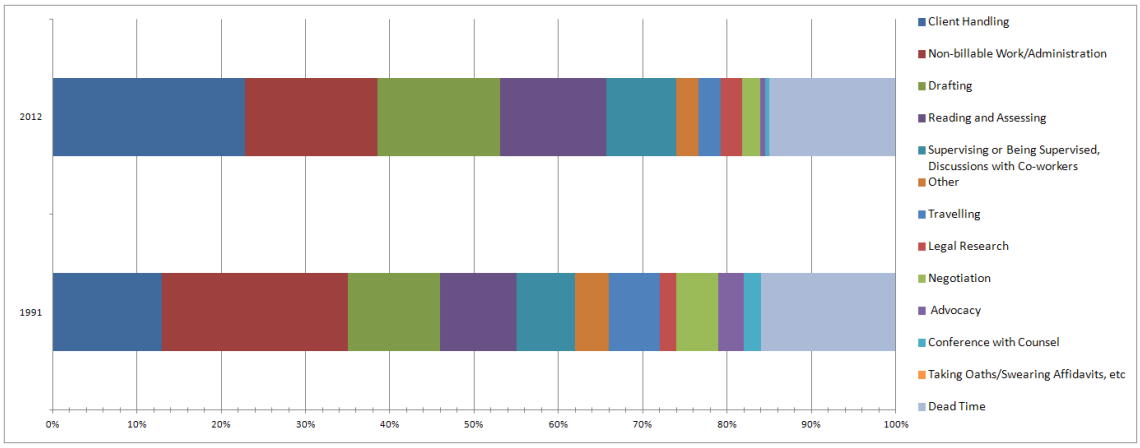

Fig 1:Proportions of time solicitors spent on different activities in 2012 compared with the 1991 study (The Report, Fig. 2.6.)

It was surprising to see the relative "ineffability", lack of change, in the proportions of "legal work" during a period of immense change in society, the nature of work, the explosion of digital influence in work generally and especially in law. Does this mean that there is something unchangeable in law or lawyers? And if not, we need to consider more the difficulties of organising, planning, teaching and engendering change. We cannot simply rely on the market, even if other attempts to change through the market actually worked!

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[57] Op cit, n 2, paras 2.79-2.83.

There is much more to see and learn from the LETR research phase, both the Literature Review and the Report. It can stand some deeper mining.

Conclusion

What we have discussed here are some of the issues we covered in the LETR investigations and are those that each of us chose to give an individual focus to in our panel presentation. They reveal how a complex project was situated in the professional regulation space, and how the authority structures that initially defined the remit of the project have responded in changing, or not changing, balances between the regulator and the regulated. Those of us involved in the Report can attest to the interest internationally drawn by it, which has led us to further investigations and insights, working with each other, and with other researchers.[58] Maharg worked with regulators in Victoria who were attracted by the SRA's QLTS solutions to the problems of foreign lawyer qualification, and who were interested in taking LETR approaches to that problem. His report used many of the themes of LETR. Ching, Maharg, Sherr and others worked with the Law Society of Hong Kong to produce a report on a possible common entry examination. Webb later was part of a wider review into legal education generally in Hong Kong, and again followed many of the themes and approaches taken in the earlier LETR Report. Ching worked with academic and professional colleagues in the English-speaking CARICOM nations on a detailed review of a multinational system of professional legal education first established more than forty years ago.Webb has

[58] For a full reference list of this work, see <http://paulmaharg.com/wp-content/uploads/2018/06/LETR-Ching-Maharg-Webb.pdf> accessed 20 August 2018

worked with the Law Admissions Consultative Committee in Australia, and in Singapore liaised with the Singapore Academy of Law on the LIFTED Initiative.

The Law Society of Ireland commissioned a report that was explicitly asked to report along the methodological lines of LETR (though with quite different foci). Maharg and Ching produced a 300 page comparative analysis, which also included what is, to date, the fullest historical and internationally comparative account of professional legal education in Ireland.[59] As a body of researchers we are fortunate enough to have been given the opportunity to make a considerable difference to the thinking about the history and future of professional legal education in England, Wales and elsewhere Even five years on, this is not yet a dead LETR; evidence of impact continues to emerge, and there is much material in the Report which has been barely considered. Perhaps we need a ten or possibly a 20-year retrospective before we can fully assess the historical importance of LETR in the field of legal education reports? We look forward to reconvening, perhaps like Marley's ghost, on those anniversaries too.

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[59] For details of this work see our online bibliography of 62 items produced for the LETR Conference at <http://paulmaharg.com/wp-content/uploads/2018/06/LETR-Ching-Maharg-Webb.pdf> accessed 20.8.18.

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