

## **An Overture for Well-Tempered Regulators:**

### **Four Variations on a LETR Theme**

#### **Variation 2 *improvvisando*<sup>1</sup> - access and flexibility: Jane Ching**

We began our empirical investigations with a very clear directive, in the Legal Services Act 2007 (LSA) itself: “encouraging an independent, strong, diverse and effective legal profession”. Questions of the size, shape, age, gender and ethnicity of the “legal profession” are littered throughout the LETR research data, of which only a small proportion could find its way into the final report. I met mature students and aspirants aggrieved at “Hollyoaks recruitment”; focus on distant A levels<sup>2</sup> and assessment centres that were inaccessible to those with childcare responsibilities. But I also met younger entrants who wished someone had told them that prior experience was valued and, in their eyes, preferred. I met those who felt trapped by an inability to complete all the stages of pre-qualification activity in an army of paralegals by default, who were virtually inarticulate with rage that “[I] might not look like you, but [I] can maybe perform like you”,<sup>3</sup> and driven to apologise for themselves and their upbringing:

“Your CV looks good, but you don’t speak enough languages. You haven’t travelled”.

“.. I can’t afford to travel places, I’m trying to pay debts? ... I’m sorry I couldn’t go to Cambodia.”<sup>4</sup>

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<sup>1</sup> To improvise.

<sup>2</sup> School grades at the age of 18.

<sup>3</sup> LETR data.

<sup>4</sup> LETR data.

We raised, and had deep concerns about, the use, in some of the legal professions, of unpaid or low-paid internships as a price of entry. More recently the Junior Lawyers Division has expanded our knowledge in this area, and on the cause for concern. Even when there is payment for these pre-pre-qualification exercises, they are not in the areas of social need and this is defining choice and in its turn the future make up of “the legal profession”.

“I would have loved to have gone into legal aid or human rights work, but the placements and job are usually unpaid. I therefore applied for commercial vac schemes.”<sup>5</sup>

These tacit routes, of internship and preliminary paralegal work, need to be acknowledged for what they are: virtually compulsory parts of the qualification process for at least some of the legal professions - but underground and at present largely outside the control of the regulators. We face the risk that, because of this, some areas of legal practice become an area of philanthropy.

“[Y]ou’re going to get a divergence in terms of the social background of people who can afford to do criminal pupillages. [T]he public face of the Bar ...who are doing the criminal work or the family work ... are going to be from the most privileged backgrounds.”<sup>6</sup>

There were many pleas by entrants for more information about qualification routes into “the legal profession”, met by sometimes equally desperate pleas by academics and careers advisors for ways of managing students’ expectations without squashing their hopes.<sup>7</sup> In the USA, one possible solution has been found by taking the question of information out of the

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<sup>5</sup> Junior Lawyers Division, ‘Early Career Work Experience Survey’ (Law Society of England and Wales 2014) <<http://juniorlawyers.lawsociety.org.uk/files/Junior%20Lawyers%20Division%20Report.pdf>> accessed 8 February 2015.

<sup>6</sup> LETR data.

<sup>7</sup> See more recently Childs P, Firth N and de Rijke H, ‘The Gap between Law Student Career Aspirations and Employment Opportunities’ (2014) 48 *The Law Teacher* 51.

hands of the regulator.<sup>8</sup> We hoped to promote the provision of reliable information as a shared activity between regulators and others in the (rejected) recommendation 25 of the *Report*. A primary problem is, of course, that there still *is* no simple answer to what constitutes the “legal profession” in England and Wales. One only has to look at the worthy attempt by Skills for Justice to represent all the professions and their qualification routes,<sup>9</sup> or recall the days spent compiling Annex 1 to Chapter 5 of the *Report*, to fear that there is, to the outside and the aspirant, an incomprehensible tangle. In addition, competition between regulators is, if anything, increasing.<sup>10</sup> The Chartered Institute of Legal Executives (CILEx), ahead of the game in respect of diversity<sup>11</sup> and, at least arguably, flexibility and variety of routes and entry and exit points,<sup>12</sup> now makes the hard point very explicitly:

THINGS CILEX STUDENTS SPEND THEIR WAGES ON INSTEAD OF PAYING OFF STUDENT  
DEBT.<sup>13</sup>

The current situation is not sustainable, consistent or transparent, and it is not fair. But it is a consequence, and remains a risk when what is focused on is the route, and the process, and ever more nuanced improvisation of pre-requisites, and on ever more creative means of regulatory capture.

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<sup>8</sup> Law School Transparency, ‘LST | Looking into Legal Education’ <<http://www.lawschooltransparency.com/>> accessed 8 February 2015, a non-profit organisation which has as its objectives: “**Reform** Build a better society and profession by improving the accessibility and affordability of legal education; **Information** Enable more informed decisions by prospective students about whether or where to attend law school and by policymakers for how to regulate law schools; **Accountability** Hold law schools and the ABA accountable for actions that concern the public, the profession, law students, and prospective law students”.

<sup>9</sup> Skills for Justice, ‘Route Maps of Entry Legal Profession’ (*Skills for Justice*) <[http://www.sfjuk.com/wp-content/uploads/2012/12/Visio-RouteMapsOfEntryLegalProfession\\_FullMap-0513.pdf](http://www.sfjuk.com/wp-content/uploads/2012/12/Visio-RouteMapsOfEntryLegalProfession_FullMap-0513.pdf)> accessed 8 February 2015.

<sup>10</sup> Anon A, ‘Legal Execs’ Regulator Sets Sights on Solicitor Firms’ *Law Society Gazette* (15 January 2015) <<http://www.lawgazette.co.uk/practice/legal-execs-regulator-sets-sights-on-solicitor-firms/5046051.fullarticle>> accessed 20 January 2015.

<sup>11</sup> Chartered Institute of Legal Executives, ‘CILEX Membership Diversity Statistics’ (*Chartered Institute of Legal Executives*, 2015) <[http://www.cilex.org.uk/about\\_cilex/equality\\_and\\_diversity/diversity\\_statistics/cilex\\_membership\\_diversity.aspx](http://www.cilex.org.uk/about_cilex/equality_and_diversity/diversity_statistics/cilex_membership_diversity.aspx)> accessed 23 February 2015.

<sup>12</sup> Chartered Institute of Legal Executives, ‘Chartered Legal Executive Lawyer Qualifications’ (*Chartered Institute of Legal Executives*) <[http://www.cilex.org.uk/study/lawyer\\_qualifications.aspx](http://www.cilex.org.uk/study/lawyer_qualifications.aspx)> accessed 8 December 2014.

<sup>13</sup> Chartered Institute of Legal Executives, ‘Infographic’ <<http://www.cilex.org.uk/pdf/Infographic%20A5.pdf>> accessed 23 February 2015.

However, it is worth exploring what happened when, in the *Report*, we tried to turn things the other way around. Variation theory, in education, suggests that we learn from the differences between things.<sup>14</sup> Our attempts to encourage the regulators to collaborate, and to agree on a common benchmark, could have had the benefit, for each of the professions, of highlighting the ways in which their activities, culture and expertise differ from that common benchmark over and above mere overlap of activity licensure. Areas of legitimate competition could become clearer; information for aspirants be more intelligible. Light could be cast on the advantages and disadvantages of different, or common, routes towards the benchmark. Light could be cast on requirements to transcend the benchmark, either in its range of activity or in quality of performance. It might have been liberating to see the different professions – or at least those interested in graduate entry – articulating precisely what they think graduates (of law or any other discipline) bring to their profession, over and above simple exemption from the professional study of particular subjects. So far, so utopian. The Solicitors Regulation Authority (SRA) has gone perhaps the furthest so far in trying to articulate a common benchmark<sup>15</sup> - no easy task when the variety of solicitor activity is greater than in any of the other professions. Of course that benchmark is a compromise and a consensus, and a minimum level. The devil will be in the assessment, which is still under consultation.<sup>16</sup> This may have implications for what is delivered in the

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<sup>14</sup> See, e.g. Akerlind G and others, 'A Threshold Concepts Focus to Curriculum Design: Supporting Student Learning through Application of Variation Theory' (Australian Learning and Teaching Council 2011) [http://www.thresholdvariation.edu.au/sites/default/files/pp8-885\\_anu\\_akerlind\\_final\\_report\\_v1.0\\_.pdf](http://www.thresholdvariation.edu.au/sites/default/files/pp8-885_anu_akerlind_final_report_v1.0_.pdf).

<sup>15</sup> The Chartered Institute of Legal Executives, with a smaller constituency, and at least arguably a smaller range of areas of legal activity, has used a competence framework for those applying for Chartered status for some time: Chartered Institute of Legal Executives, 'Application for Fellowship Rules (Work Based Learning)' <<http://www.cilex.org.uk/pdf/APPLICATION%20FOR%20FELLOWSHIP%20RULES%20Final.pdf>>. At the time of writing, the Bar had just announced its strategy in this regard: Bar Standards Board, 'Future Bar Training' <[https://www.barstandardsboard.org.uk/media/1650565/future\\_bar\\_training\\_programme\\_update\\_february\\_2015\\_pdf\\_\\_va499362\\_.pdf](https://www.barstandardsboard.org.uk/media/1650565/future_bar_training_programme_update_february_2015_pdf__va499362_.pdf)> accessed 23 February 2015.

<sup>16</sup> Solicitors Regulation Authority, 'Training for Tomorrow: A Competence Statement for Solicitors' (20 October 2014) <<http://www.sra.org.uk/sra/consultations/competence-statement.page>> accessed 8 December 2014. The consultation period for the competence framework closed in January 2015 and results are available at Solicitors Regulation Authority, 'Training for Tomorrow: A Competence Statement for Solicitors' (12 March 2015) <<http://www.sra.org.uk/sra/consultations/competence-statement.page>> accessed 16 March 2015

classroom, and how exactly the set of competencies translates, as is apparently the intention, into a benchmark for post-qualification practice where performance becomes more expert, but more specialist, and competence in a management role (not represented in the SRA framework) may be required. More encouraging, for me at least, is qualified evidence of a desire to rely on the benchmark rather than the route, at least for domestic entrants:

2.2 We may admit you as a solicitor if you have completed all or any part of 2.1(a) [academic stage] or (b) [vocational stage, including period of recognised training] by equivalent means.

2.3 Where 2.2 applies you must apply to us in writing in the prescribed form<sup>17</sup> and support your application with such evidence as we consider necessary.

2.4 If you are subject to the QLTSR<sup>18</sup> those regulations apply to your admission as a solicitor and you are not subject to these regulations.<sup>19</sup>

This has been the case since July last year, with a complex set of “equivalent means” evidencing requirements,<sup>20</sup> mapping against existing qualifications (such as those of CILEx), or existing outcomes for each of the conventional stages: LLB degree/Graduate Diploma in Law (GDL), Legal Practice Course,<sup>21</sup> Professional Skills Course. In the case of the “period of recognised training” which has replaced the “training contract”,<sup>22</sup> however, the mapping is

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<sup>17</sup> Unfortunately, the link provided is to the standard form for admission, listing only CILEx, justices’ clerks, QLTS, Irish and Northern Irish solicitors and barristers wishing to retain higher rights.

<sup>18</sup> This is the separate assessment route for (essentially) incoming foreign lawyers: Solicitors Regulation Authority, ‘Qualified Lawyers Transfer Scheme (QLTS)’ (5 December 2013) <<http://www.sra.org.uk/qlts/>> accessed 8 February 2015.

<sup>19</sup> Solicitors Regulation Authority, ‘SRA | SRA Handbook - Qualification and Provider Regulations - SRA Training Regulations 2014 - Qualification and Provider Regulations | Solicitors Regulation Authority’ <<http://www.sra.org.uk/solicitors/handbook/trainingregs2014/content.page>> accessed 8 February 2015.

<sup>20</sup> Solicitors Regulation Authority, ‘Equivalent Means Information Pack’ (July 2014) <<http://www.sra.org.uk/students/resources/equivalent-means-information-pack.page>> accessed 8 February 2015.

<sup>21</sup> The mandatory postgraduate vocational course for aspiring solicitors.

<sup>22</sup> The mandatory period of apprenticeship which follows the vocational course and is the immediate precursor of qualification as a solicitor.

against the outcomes used for the pre-LETR work-based learning pilot with additions representing negotiation and dispute resolution,<sup>23</sup> rather than the Practice Skills Standards applied to conventional domestic entrants<sup>24</sup> or the QLTS “day one” outcomes applied to foreign entrants.<sup>25</sup> The door, nevertheless, seems to be at least ajar.<sup>26</sup> I for one would like to see some improvisation here that perhaps transcends the division into “stages”, routes and processes and exemptions from them. “Jazz” applications, and many of them, based on day one competence, or exemption from all of the components of the route, to challenge how far the regulator will go, along the lines of – but hopefully more successful than – *Bebb v Law Society*?<sup>27</sup> We may find out how good tempered or bad tempered the regulator is prepared to be?<sup>28</sup> Or at least how angry the paralegal army can get?

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<sup>23</sup> Solicitors Regulation Authority, ‘Work-Based Learning Pilot’ (*Solicitors Regulation Authority*) <<http://www.sra.org.uk/students/work-based-learning.page>> accessed 8 February 2014.

<sup>24</sup> Solicitors Regulation Authority, ‘Trainee Information Pack’ (4 July 2014) <<http://www.sra.org.uk/trainees/resources/trainee-information-pack.page>> accessed 8 February 2015. This is on the basis of the relevant application form: the rubric states that the Practice Skills Standards are the basis of the exemption.

<sup>25</sup> Solicitors Regulation Authority, ‘Qualified Lawyers Transfer Scheme (QLTS)’ (5 December 2013) <<http://www.sra.org.uk/qlts/>> accessed 8 February 2015.

<sup>26</sup> The extent to which an extended range of individuals can actually cross the threshold depends, of course, on how creatively such applications are assessed. For a warning, see Kafka F, ‘Before the Law’ in Ian Johnston (tr), *The Trial* (First edition, Verlag Die Schmiede 1925) <<http://records.viu.ca/~johnstoi/kafka/beforethelaw.htm>> accessed 8 February 2015.

<sup>27</sup> (1914) 1 Ch 286, CA.

<sup>28</sup> In March 2015 it was announced that 29 equivalent means applications had been made so far: Hilborne N, ‘Paralegal Hopes to Be the First Solicitor Admitted through “equivalent Means” Route’ <<http://www.legalfutures.co.uk/latest-news/paralegal-hopes-to-be-first-solicitor-admitted-through-equivalent-means-route>> accessed 24 March 2015.