

## **Postmodern Professions? The Fragmentation of Legal Education and the Legal Profession**

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*This article considers the institutional dimensions of professionalism and the legal profession's struggle with the challenges of post-modernity. An aspect of this is the Law Society's Training Framework Review (TFR) which promises changes to solicitors' education from 'cradle to grave'. The first part of the article analyses the structure and drivers of the TFR, their origins, and how they will be articulated. Secondly, the TFR is considered in the context of the political economy of higher education and its role in the new capitalism. Finally, we examine the potential effects of the TFR for the legal profession in the context of increasing practice segmentation and the threat of deprofessionalization, and also for the Law Society itself, whether it can retain a key role in the life course of the legal profession.*

### PROLOGUE

Over the last thirty years professions have been subject to searching critiques; nothing about them is taken for granted anymore. The legal profession, as one of the trinity of original professions, has been mired in controversy as critics have deconstructed its values and objectives. Although for some the criticism has sounded like a jeremiad and they have attempted to resurrect professions as benign markers of sociality, the agnostics are in

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the ascendant.<sup>1</sup> Underpinning the social cohesion of professions with society is the educational process through which new professionals are initiated. The critique of professions has enveloped all aspects of professionalization including education and training, which poses massive challenges to the approach to knowledge creation taken by professions.<sup>2</sup> In this article we consider the institutional dimensions of professionalism and the ways that the legal profession, as a modern institution, grapples with the challenges of postmodernity.

Postmodern theorists observed that radical changes in socio-economic organization presented by post-industrial capitalism in the second half of the twentieth century threatened our prevailing conceptions of knowledge. As societies became bureaucratized and imbued with notions of controlled consumption, they fractured the dominant cultural and aesthetic values and revolutionized the way learning was acquired, classified, made available, and exploited.<sup>3</sup> For Lyotard, for example, the correlation between the acquisition of knowledge and the training of minds was obsolete.<sup>4</sup> Furthermore, as Lyotard and Foucault hypothesized, the linkages between power and knowledge were fundamental to understanding the processes of modernization. This is perceived in Foucault's focus on the role of types of knowledge in supporting the rise of impersonal networks of disciplinary power,<sup>5</sup> and in Lyotard's view that knowledge is a key component in the competition for power. As Lyotard also observed, 'knowledge and power are two sides of the same question: who decides what knowledge is and who knows what needs to be decided?'<sup>6</sup> The relevance to any analysis of the professions is obvious. The power and legitimacy of professions is acquired in part from their status as organizations defined by their control over knowledge. If control over knowledge is lost, what happens to power?

For the solicitors' profession, the Law Society has adopted the role of determining what is knowledge. The power is constrained, however, as the initial stage of legal education is negotiated with universities, and the final

- 1 See, for example, R.L. Abel, 'The Decline of Professionalism?' (1986) 49 *Modern Law Rev.* 1; G. Hanlon, *Lawyers, the State and the Market: Professionalism Revisited* (1999); A. Francis, 'Out of Touch and Out of Time: Lawyers, Their Leaders and Collective Mobility within the Legal Profession' (2004) 24 *Legal Studies* 322. A minority envisage a positive future: T.C. Halliday, *Beyond Monopoly: Lawyers, State Crises and Professional Empowerment* (1987), possibly hinging on change in the profession's relations with the state. See, for example, A.A. Paterson, 'Professionalism and the Legal Services Market' (1996) 3 *International J. of the Legal Profession* 139.
- 2 C. Glasser, 'The Legal Profession in the 1990s – Images of Change' (1990) 10 *Legal Studies* 1.
- 3 H. Lefebvre, *Everyday Life in the Modern World* (1971), but compare A. Giddens, *The Consequences of Modernity* (1990).
- 4 J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (1984) 4.
- 5 M. Foucault, *Discipline and Punish: The Birth of the Prison* (1979).
- 6 Lyotard, *op. cit.* n. 4.

stage of training, the apprenticeship or training contract, has been largely left to solicitors' firms. Both are troubled relationships.<sup>7</sup> The Law Society's Training Framework Review (TFR), promises changes to solicitors' education from 'cradle to grave',<sup>8</sup> marking a potentially radical departure in legal education and training. The Training Framework Review Group (TFRG) proposes that regulatory activity focuses on the assessment of educational outcomes, rather than courses or other processes. Among the ideas under consideration are the centralization of the assessment of some of the post-degree outcomes and external assessment of some elements of the training contract. The combination of these ideas make the conventional, chronological stages of education and training, from academic to vocational education and hence, to apprenticeship, highly contingent.<sup>9</sup> Among the familiar landmarks threatened by the TFR proposals are the current forms of the joint announcement on qualifying law degrees, the Legal Practice Course and the training contract. In aspiring to provide flexibility and accommodate diversity, differentiation, and mobility, the TFR espouses distinctly postmodern themes.

## THE CONTEXT OF THE TRAINING FRAMEWORK REVIEW

Seen in a historical perspective, the TFR proposals are evolutionary rather than revolutionary. The decisive transition from conventional, content-based courses occurred in the late 1980s and early 1990s, when both the Bar and the Law Society instituted the Bar Vocational Course (BVC) and Legal Practice Course (LPC). This represented a Weberian educational rationalization, characterized by the deconstruction and transformation of the arts of professional practice into transactions and skills. This responded to demands to close the gap between academic education and legal practice.<sup>10</sup> Although these new courses were controversial, the Lord Chancellor's Advisory Committee for Education and Conduct proposed further refinements in the mid-1990s, including proposals for a common half course, or licensure, for both branches.<sup>11</sup> Increasing anxiety about law degrees, vocational education, and professional regulation generally has forced education and training up the profession's list of priorities. Launched in 2001, and due to conclude in 2007, the TFR matured under the shadow of the Clementi Review of the Market for Legal Services, which recently proposed that the

7 A. Boon, 'History is Past Politics: A Critique of the Legal Skills Movement in England and Wales' (1998) 25 *J. of Law and Society* 151.

8 Law Society, *Training Framework Review: Consultation Paper* (2001) para. 1.

9 C.O. Houle, *Continuing Learning in the Professions* (1980).

10 See, for example, Lady Marre, *A Time for Change: Report of the Committee on the Future of the Legal Profession* (1988) (Marre report).

11 ACLEC, *First Report on Legal Education and Training* (1996).

legal profession separates its representative and regulatory functions, and that it exercise the latter under the supervision of an independent regulator.<sup>12</sup>

The deliberations of the TFRG have been punctuated by three public consultations to date; the last of these is due to close in July 2005. At an open meeting in 2001, following the first consultation, stakeholders broadly welcomed the attempt to rethink the prescribed elements of solicitor education. The most remarkable aspect of the process by this stage was that ethics would share equal billing with knowledge and skills in the framework. The decision in 2002 to focus the review group's work on the outcomes of the education and training process initially obscured the full implications of the review. Following a paper by independent consultants published early in 2002, the Law Society reworked its outcomes, consulting again late in 2003. The shape, if not the detail, of the current proposals now emerged, generating considerable controversy. The proposed shift from a focus on prescribed courses to the outcomes of education and training signalled loosening of the vocational stage requirements and the possible marginalization of the year-long Legal Practice Course.<sup>13</sup> Proponents of the course argued that this threatened the professional standards of solicitors,<sup>14</sup> a proposition robustly rejected by senior Law Society officers.<sup>15</sup> More cautious assessments concluded that the devil would lie in the regulatory detail.<sup>16</sup>

## FEATURES OF THE PROPOSED FRAMEWORK

The TFRG's proposed outcomes are organized in four groups. Group A outcomes comprise the intellectual, analytical, and problem-solving skills delivered in honours degrees, together with a core of legal knowledge that reworks the current seven foundations of legal knowledge. Familiar subjects are expressed in unfamiliar ways. Rather than Land Law and Equity and Trusts, the newly formulated outcome requires understanding of 'the legal concept of property and the protection, disposal, acquisition and trans-

12 Department of Constitutional Affairs, *Competition and Regulation in the Legal Services Market* (CP(R2)07/02) (2003); D. Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales: Final Report* (2004) (Clementi review); Lord Falconer's speech to the Legal Services Reform Conference signalling the decision to widen providers in the will writing and estate management market (21 March 2005).

13 C. Sanders, 'Law Revamp Could Hit Coffers' *Times Higher Education Supplement*, 4 February 2005.

14 B. Malkin, 'Market Slams Law Soc plans to Abolish Vocational Training' *Lawyer2B*, February 2005, 1; N. Johnson, 'The Training Framework Review – What's All The Fuss About?' (2005) 155 *New Law J.* 341.

15 C. Sanders, 'Profile: Janet Paraskeva, Chief Executive, Law Society' *Times Higher Education Supplement*, 4 February 2005.

16 J. Webb and A. Fancourt, 'The Law Society's Training Framework Review: On the Straight and Narrow or the Long and Winding Road' (2004) 38 *Law Teacher* 293.

mission of proprietary interests' and 'equitable rights, titles and interests'.<sup>17</sup> This appears to be a deliberate departure from the previous prescription of Land Law and Equity and Trusts and an invitation to reduce the scale of these subjects. Some new topics are introduced apparently with the intention of reinforcing the common identity of solicitors. Thus, students will be required to have knowledge of 'the jurisdiction, authority and procedures of the legal institutions and the professions that initiate, develop and interpret the law ...' of 'the rules of professional conduct' and of the values and principles on which professional rules are constructed'. At present, there are no indications of how much time must be spent on each outcome, although work is in progress to develop and explicate the outcomes.

The Group B outcomes, loosely gathered under 'the ability to complete legal transactions and resolve disputes' are readily identifiable with activities in the current Legal Practice Course. The Group C requirements, demonstrating 'a practical understanding of the values, behaviours, attitudes and ethical requirements of being a solicitor', and those in Group D, 'professional, personal management and client relationship skills' could inform both a vocational course and a period of work-based learning. The TFRG however, appeared to reject the allocation of outcomes to stages. Although it considered that some of the Group D outcomes could only be delivered during the period of work-based learning, most were not assigned to a stage in the process. A multiplicity of routes was envisaged and was an express desire of the review.<sup>18</sup>

Among the combinations that cannot be ruled out are degrees and conversion courses for non-law graduates incorporating the Group C transactional outcomes associated with the vocational stage, and vocational courses that incorporate work-based learning, perhaps through supervised clinical experience. It is plausible also that some of the larger firms might incorporate the Group C vocational outcomes in the period of work-based learning. This proliferation of routes will require a regulatory, or audit, regime of some complexity to assess whether a prospective entrant has met an outcome. This may involve questions of time, place, and standard of the experience that is claimed as evidence.

Latterly, the TFRG has considered how the outcomes might be delivered given the implication of an outcomes framework that there should be minimal prescription, and given the promise to enhance standards. An honours degree, as the common currency of European education and professional entry under the Bologna Declaration,<sup>19</sup> was inviolable, as was a period of work-based learning. The TFR proposals envisage the replacement of the

17 Law Society, 'Qualifying as a Solicitor A Framework For The Future: A Consultation Paper' (2005) Annex 1.

18 *id.*, para. 38.

19 J. Webb, 'Academic Legal Education In Europe: Convergence And Diversity' (2002) 9 *International J. of the Legal Profession* 139, at 142.

training contract with a solicitors' firm by a period of work-based learning of up to two years under the supervision of a solicitor. This experience may be located in a wide range of organizations and, indeed, encourages moves between them in search of the rounded experience that will meet all of the required outcomes. The work-based learning regime will be supported by a more rigorous supervision process for intending solicitors, based around completion of a portfolio or learning log, and a more demanding role for supervisors. There are proposals for more external scrutiny of standards, including more rigorous monitoring and reporting processes for the period of work-based learning, centralized assessment of some or all of the Group B outcomes, and a test to be completed before the end of the period of work-based learning. These proposals aspire to make operational the underlying, unifying principle of the Training Framework Review, increase functionality, and respond to the principal influences or spheres of concern; access and standards, specialization, and internationalization. These drivers of the TFR are now considered and the TFRG proposals contrasted with the approach taken by the Bar in the review of its vocational course.

## DRIVERS OF THE TRAINING FRAMEWORK REVIEW

### 1. *Access and standards*

During the last decade disquiet over access to the profession was fuelled by research showing that discrimination was inhibiting the profession's attempts to embrace diversity. The Law Society's own cohort study concluded that large law firms indirectly discriminated against ethnic minority students by selecting trainees on the basis of higher education institution attended and, therefore, albeit indirectly, by social background.<sup>20</sup> This concerned government and others charged with promoting social justice.<sup>21</sup> The TFR proposals, it is said, respond to concerns about the fate of 'non-standard' applicants by reducing the costs of and removing potential bottlenecks in the qualifying process. Prospective entrants are intended to benefit from savings flowing from ending the provider monopoly, from opportunities for broader kinds of work-based learning, and from the more effective integration of skills, knowledge, and ethics across the curriculum. Critics suggest that these benefits are illusory; money wasted on unregulated courses will be a fresh

20 M. Shiner, 'Young, Gifted and Blocked! Entry to the Solicitors' Profession' in *Discriminating Lawyers*, ed. P.A. Thomas (2000) 87.

21 A. Langlands, *Gateways to the Professions: A Consultation Paper* (DES, 2005); A. Fuller and L. Unwin, 'Vocational Guidance' *Education Guardian*, 29 March 2005. A representative of the Commission for Racial Equality recently threatened an inquiry into the legal profession's record on discrimination (Standing Conference for Legal Education, 24 November 2004).

source of criticism of professional regulation and the preference of the market for standard products will deny non-standard entrants post-qualification jobs in legal practice. The underlying concern, however, is that the end of a compulsory Legal Practice Course, and the possible contamination of the undergraduate stage by vocationalism, symbolizes deprofessionalization. There will be a race to the bottom in providing the cheapest route to qualifying as a solicitor. The General Council of the Bar, while launching a review of its Bar Vocational Course, does not appear drawn to iconoclastic solutions. The circumstances of the professions and their courses are similar. The Bar is equally if not more troubled by the access issue, so much so that it was forced to introduce an unpopular requirement that barristers' chambers fund their pupils. There is also criticism in some quarters of the costs of the vocational year, which is very similar to the cost of the LPC.<sup>22</sup> The difference in approach appears to reflect different assessments of the potential for and value of the common socialization of lawyers in the vocational year.

## 2. *Specialization*

Increasing specialization of legal practice calls into question the utility of broad legal education, in which most of what is studied will inevitably be redundant. The Law Society recognized the force of this argument when it accepted the proposal of a consortium of City firms to run a commercially orientated LPC, having earlier conceded the doubling of the content of Business Law and Practice to the City lobby.<sup>23</sup> The TFR proposals may extend this logic by encouraging training routes geared to particular kinds of practice and by paving the way for a more efficient division of time between a generalist pre-qualification regime and post-qualification specialization-focused programme. The Bar claims to be less subject to the pressure of specialization since the Bar Vocational Course has a specialist core of litigation and advocacy, areas in which, if the Bar is to have a future, all barristers ought to have expertise. The Bar has considered a move to accommodate specialization by allowing intending barristers to choose either a civil or criminal route in the BVC. What would be saved, however, may not be worth compromising the common training platform. Barristers already have shorter training than solicitors' training because pupillage is shorter

22 The Bar Vocational Course currently has validated numbers of 1594 and total students of 1709, whereas the LPC had over 8,273 places and 6,837 enrolments for 2004–2005. In the year ending 31 July 2003 there were 5,650 new traineeships registered with the Society, representing an increase (4.9 per cent) on last year's registrations of 5,385. (*Trends in the Solicitors' Profession: Annual Statistical Report* (2003) at para. 8.6). The number of pupillages available fell from 853 to 572 between 2000–01 to 2003–04 ('Bar Special: An Educated Risk' *Legal Week Student*). The average fees for both courses approach £10,000 with Bar courses tending to be slightly more expensive.

23 Webb and Fancourt, *op. cit.*, n. 16.

than the training contract by one year. As barristers are *de jure* sole practitioners, they argue it would be impractical to impose obligations on them at the apprenticeship stage in the way the Law Society proposes.

### 3. *Internationalization*

The English legal profession has been sensitive to international trends in vocational training in other Commonwealth jurisdictions, the changes in the 1990s owing much to overseas innovations, particularly from British Columbia.<sup>24</sup> The TFRG has considered models from other jurisdictions and other professions in formulating its proposals. The interface between national jurisdictions is increasingly problematic. European professions have been moving increasingly closer in many spheres of operation and the profession in England and Wales already recognizes lawyers from other jurisdictions, subject to a rudimentary assessment of knowledge, the Qualified Lawyers' Transfer Test. The issue assumed a different complexion with the decision in *Morgenbesser*,<sup>25</sup> where the European Court ruled that a European legal profession must not refuse to enrol the holder of a legal diploma of another member state on the ground that qualifications are not those normally required to practice in that state, but must compare the qualifications and experience gained in the other member state and assess their relevance to the exercise of the profession in question. The move towards an outcomes framework makes it easier to determine *Morgenbesser* applications by disaggregating evidence requirements. Extending the opportunity to make claims based on 'equivalent experience' to domestic applicants is a logical step. The Bar, however, seems likely to treat *Morgenbesser* applicants on a case-by-case basis and to retain course-based competence judgments.

## THE NEW POLITICAL ECONOMY OF LEGAL EDUCATION?

Even if the immediate impact on undergraduate legal education may be relatively slight, the Training Framework Review is an extremely important development in terms of locating trends in legal education within the wider context of the transformation of higher and professional education. Whatever its particular merits, in policy terms, the TFR clearly fits within the growing marketization of higher education and the move towards a neo- or perhaps fully post-Fordist, some might even say a postmodern, system of education

24 See, for example, C. Roper, 'The Legal Practice Courses – Theoretical Frameworks and Models' (1988) 6 *J. of Professional Legal Education* 77; N. Gold et al. (eds.), *Learning Lawyers' Skills* (1988).

25 *Christine Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova (Case C-313/01)* [2003] All E.R. (D) 190 (Nov.).



and training.<sup>26</sup> This tendency emerges in three particular and related trends that we label commodification, flexibilization, and segmentation.

### 1. *Commodification*

A growing number of writers have identified the extent to which not just the role of the university but knowledge itself is being transformed in the neo-liberal political economy.<sup>27</sup> A key feature of this process is the corporatization and commodification of learning. This goes beyond simply treating knowledge itself as a product in the marketplace; it implies strong epistemological ties between new approaches to learning and the new, flexible, capitalist economy. Ironically, this process of commodification seems increasingly to attach itself to movements that would view themselves as progressive. This is well illustrated, for example, in Bereiter's work on schooling.<sup>28</sup> Bereiter has questioned the conventional 'internal' (that is, mental maps model) and individualistic focus of education. What individuals know on their own is less important than what they can do with others to 'add value' to the enterprise; learning becomes collaborative, outward looking and goal-oriented, rather than an end in itself.

This is not to say that means-ends rationality is 'bad' in any absolute moral sense, but it hints at the power of the new capitalism to co-opt progressive movements to its own ends. As Gee et al. have argued, the new capitalism pre-empts many radical postmodern themes; it too celebrates freedom, change and diversity, the collapse of borders and traditional structures, and the undermining of hierarchical authority.<sup>29</sup> Consequently we do need to be aware of what is at stake here, and the very complexity of the game that is being played.

In higher education generally, this complexity is captured by Gibbons et al. in their discussion of a co-evolutionary shift between 'mode 1' and 'mode 2' knowledge production.<sup>30</sup> Mode 1 describes the conventional norm

26 J. Webb, 'Post-Fordism and the Reformation of Liberal Legal Education' in *The Law School – Global Issues, Local Questions*, ed. F. Cownie (1999).

27 Notably R. Barnett, *The Limits of Competence: Knowledge, Higher Education and Society* (1994); C. Symes and J. McIntyre (eds.), *Working Knowledge: The New Vocationalism and Higher Education* (2000); G. Delanty, *Challenging Knowledge: The University in the Knowledge Society* (2001).

28 C. Bereiter, 'Constructivism, Socioculturalism and Popper's World 3' (1994) 23 *Educational Research* 21.

29 J. Gee et al., *The New Work Order: Behind the Language of the New Capitalism* (1996) 68–72.

30 M. Gibbons et al., *The New Production of Knowledge: The Dynamics of Science and Research in Contemporary Societies* (1994). While the mode 1/mode 2 distinction started out as a description of science research policy, it is increasingly being adopted as a metaphor, even a description of the changing institutional/epistemic organization of university research and learning more generally – see, for example, M. Jacob and T. Hellstrom, *The Future of Knowledge Production in the Academy* (2000).

of academically-based research and scholarship; it is essentially mono-disciplinary, rooted in the research practices of the traditional university. Mode 2 knowledge production, by contrast, describes an alternative, emerging paradigm in which knowledge is the outcome of applied problem-solving, undertaken by multiple producers through collaborative, trans-disciplinary work, which is subject to far greater external measures of social accountability and quality control.<sup>31</sup> Mode 2, they suggest, does not replace mode 1, but serves as a bridge between ‘scientific’ basic research at universities and the social and economic interests of society in a knowledge-based economy. But at the same time, mode 2 does have the capacity to influence the way in which basic research is itself performed and organized.<sup>32</sup>

While Gibbons et al. see mode 2 as essentially a ‘good thing’, for us, it neatly encapsulates some of the tensions of what is potentially a profound epistemic shift. The mode 2 agenda strongly aligns the universities as agents of the new capitalism. It challenges the very conception of knowledge legitimated by the grand narratives of modernity;<sup>33</sup> it emphasizes the interests of knowledge *users* in the shaping of knowledge production,<sup>34</sup> and of university-business networks in knowledge construction and transfer. It reflects a process by which the social success – perhaps even the utility – of knowledge production (which Nowotny et al. sanitize in terms of a rather double-edged standard of ‘social robustness’<sup>35</sup>) comes to be equated with its intrinsic value.

This process of commodification has emerged through a number of trends in the law schools.<sup>36</sup> Many of these are not unique to law: the increasing focus on occupational and technological competences, the standardization of learning outcomes, the various moves to redefine students as customers, and courses as products, are all consistent with this process. The growth in skills-

31 Gibbons et al., id., pp. 3–8.

32 D.F.J. Campbell, ‘University/Business Research Networks: New Challenges for Knowledge Production and Advanced Innovation Systems’ 5 *Bridges*, 14 April 2005 at <<http://bridges.ostina.org>> (last accessed 19 May 2005).

33 Compare Lyotard, op. cit., n. 4.

34 See, further, Delanty, op. cit., n. 27, pp. 108–10.

35 H. Nowotny et al., *Re-Thinking Science: Knowledge and the Public in an Age of Uncertainty* (2001).

36 On legal education in the new political economy see, for example, J. Kelsey, ‘Privatizing the Universities’ (1998) 25 *J. of Law and Society* 51; Webb, op. cit., n. 26; H. Arthurs, ‘The World Turned Upside Down: Are Changes in Political Economy and Legal Practice Transforming Legal Education and Scholarship, or Vice Versa?’ (2001) 8 *International J. of the Legal Profession* 11; M. Thornton, ‘Among the Ruins: Law in the Neo-Liberal Academy’ (2001) 20 *Windsor Year Book of Access to Justice*. 3. See, also, R. Collier, ‘The Changing University and the (Legal) Academic Career Rethinking the Relationship between Women, Men and the “Private Life” of the Law School’ (2002) 22 *Legal Studies* 1, at 12–20 for a discussion of the implications of these changes on the ‘emotional economy’ of the law school.

based learning in law, the emergence of the ‘new legal ethics’<sup>37</sup> – even the normalization of socio-legal studies – are all potentially Janus-faced in this regard. The skills movement has both strongly vocational roots and tendencies, but also, at its most critical and reflexive, draws on the counter-hegemonic agenda of the law clinic movement.<sup>38</sup> The ethics movement (such as it is) while potentially seeking to reinforce the traditional ideological and normative components of legal professionalism, has also sought to eschew a narrow vocational agenda, emphasizing the need to inculcate wider ‘humane values’<sup>39</sup> and to promote resistance to unethical practice cultures and sheer ethical indifference.<sup>40</sup> Similarly, socio-legal and interdisciplinary approaches, while traditionally seeking to counter the continuing dominance of legal formalism and doctrinalism, are also capable of co-option – *à la mode* 2 – either to utilitarian definitions of ‘context’ in terms purely of the business or economic context of law,<sup>41</sup> or to the assimilation of a narrow, increasingly user-defined, policy orientation,<sup>42</sup> both of which may limit or even undermine the potential of the law schools as ‘incubators of social criticism’.<sup>43</sup>

The interesting question for us is, which of these existing tendencies may be exacerbated by the TFR? The academic ‘mission’ of the law school, like other ‘professional schools’ has, in some sense, always been compromised by a strong need to provide technical training and professional accreditation, but this does not justify the widespread failure of legal education

to explore in a systematic manner the questions raised by the obvious fact that the law is the most central and profound method through which power, and therefore justice, is dealt with in a society grounded on acceptance of the Rule of Law.<sup>44</sup>

37 D. Luban, ‘Introduction: A New Canadian Legal Ethics’ 9 *Canadian J. of Law and Jurisprudence* 3.

38 See J. Macfarlane, ‘The Legal Skills Movement Ten Years On: Triumph or Compromise?’ (1997) 24 *J. of Law and Society* 440; R. Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983).

39 See, for example, J. Webb, ‘Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education’ (1998) 25 *J. of Law and Society* 134; K. Economides, ‘Learning the Law of Lawyering’ (1999) 52 *Current Legal Problems* 392, notably at 409–11.

40 A. Boon, ‘Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus’ (2002) 5 *Legal Ethics* 34, at 55.

41 Consider, for example, the way in which the increasing dominance of law and economics in American law schools mirrors – or is mirrored by – the growing use of economic analysis of law in the United States appellate courts.

42 See P. Hillyard and J. Sim, ‘The Political Economy of Socio-Legal Research’ in *Socio-Legal Studies*, ed. P.A. Thomas (1997).

43 J. Hilary, ‘The General Agreement on Trade in Services: Report of a Seminar held by the World Development Movement on the World Trade Organisation’s General Agreement on Trade in Services’ (2001) 10, available at <[www.catalystforum.org.uk/pdf/gats.pdf](http://www.catalystforum.org.uk/pdf/gats.pdf)> (last accessed 10 May 2005).

44 D. Barnhizer, ‘The Justice Mission of American Law Schools’ (1992) 40 *Cleveland State Law Rev.* 285, at 331.

The TFR, despite its evident desire to increase the ethical content of academic and vocational legal education is, in reality, unlikely to bring about that degree of transformation to either the law degree or the vocational stage, whatever form that takes. Indeed, in so far as it may encourage a move to more exempting degrees, it potentially brings the academic and vocational projects of law closer together, for good or ill. At a technical level, this could be welcomed if it allows for a more reflective and intellectually satisfying approach to the professional elements of training; it could even mean a revival of academically neglected areas of procedural and adjectival law. But, on the other hand, there are also risks associated with the introduction of more vocational outcomes to the degree: greater pressure on an expanded curriculum, almost certainly; perhaps also greater pressure from students, employers and others to increase the occupational relevance of the curriculum. This latter prospect may be a cause for concern given the necessary and, at its best, creative tension between the cultural projects of academics and professionals. Will the emphasis on educational outcomes pander to the performative tendencies of a training culture,<sup>45</sup> rather than enabling students to engage in a deep learning process? At the often neglected level of assessment, the move to an outcomes approach is also potentially contentious and technically demanding to implement, particularly in terms of the proposed final stage assessment. What kind of evidence will be required? To what extent will knowledge be directly assessed or inferred? What kind of assessment will be considered appropriate for assessing 'professional' attributes and behaviours?

## 2. *Flexibilization*

Flexibilization, as a concept has its origins in analyses of the post-Fordist labour market.<sup>46</sup> It has been imported into higher education largely as part of the neo-liberal agenda for individualizing learning to meet labour market needs. This shift has been characterized in policy terms by Newby and Warwick as a move from traditional 'just-in-case' general intellectual development to more flexible 'just-in-time' (note, another concept borrowed from the business world) and ultimately 'just-for-you' learning.<sup>47</sup>

45 Using performative in the sense adopted by Lyotard, op. cit., n. 4, whereby knowledge is a commodity judged by its utility.

46 See, for example, C. Benner, *Work in the New Economy: Flexible Labour Markets in Silicon Valley* (2002); G. Standing, 'Globalization, Labour Flexibility and Insecurity: The Era of Market Regulation' (1997) 3 *European J. of Industrial Relations* 7.

47 H. Newby, 'Some Possible Futures for Higher Education' (1999), originally at <[www.cvc.ac.uk/whatwedo/speeches](http://www.cvc.ac.uk/whatwedo/speeches)> (last accessed 8 January 2000). Note, this paper has not migrated to the replacement Universities UK website, but the phrases cited are also attributed to Newby by D. Warwick, 'Welcome To Foresight Conference, 20 January 2000' at <[www.universitiesuk.ac.uk/speeches/show.asp?sp=11](http://www.universitiesuk.ac.uk/speeches/show.asp?sp=11)> (last accessed 10 May 2005).

Flexibilization, in various forms, is already a strongly emerging feature of the higher education terrain, through both national and international policy initiatives: for example, in the domestic agenda around the construction of foundation degrees and government expectations of greater FE/HE partnership and coordination, and also in the Bologna process of constructing a European area of higher education. Pedagogically too, flexibilization is increasingly influencing delivery modes and practices through the use of open and distance learning mechanisms, work-based learning, the construction of virtual learning environments, and so on.

Flexibilization thus represents a change of potentially significant proportions. At best it can help democratize knowledge, enhance access, and assist individuals to develop more self-paced, self-directed, and perhaps personally 'relevant' programmes of learning. It may encourage us to find new and interesting ways of constructing and delivering a curriculum. It too emphasizes the shift from traditional provider-centred models to needs (or demand?)-led educational provision, and thereby also begs questions about the very kind of knowledge and processes that could and should constitute a higher education. Neither of these is necessarily a bad thing. But there are possible consequences that would prove too radical a departure from traditional conceptions of learning for many. Warwick, for example, has raised the possibility of universities as essentially 'assessment institutions', providing no instruction in the conventional sense, but working with students to construct a suitable portfolio of accredited experience that would lead to an academic award.<sup>48</sup>

The TFR proposals for the vocational stage are consistent with this radical restructuring of the educational process, raising important questions about what we might lose pedagogically thereby: a diminishing of the experience of learning as a collective and even an 'embodied' enterprise, perhaps?<sup>49</sup> A growing reliance on performative knowledge and experience, with a corresponding loss of emphasis on underlying conceptual understanding? Perhaps the risk of yet greater marginalization of certain forms of learning or areas of knowledge, for which there is limited (perceived) need in the marketplace?

Structurally too, we might want to consider whether the TFR will actually make that great a difference to either the academic or vocational stages. While hoping that a thousand flowers will bloom, the TFRG itself seems to have largely assumed that the default options of LLB or CPE (equivalent) plus LPC (equivalent) will remain more or less the norm. They could be right. Market differentiation is a risky game; the Canadian Arthurs report attempted in the early 1980s to encourage a more pluralistic, differentiated

48 *id.*

49 D. Beckett, 'Disembodied Learning: How Flexible Delivery Shoots Higher Education in the Foot, Well Sort Of' (1998) 3 *Electronic J. of Sociology* at <[www.sociology.org/content/vol003.003/becket.html](http://www.sociology.org/content/vol003.003/becket.html)> (last accessed 9 September 2004).

system of degree-level legal education.<sup>50</sup> It largely failed in this regard, perhaps, in our view, because it underestimated the inherent conservatism of law schools and their ‘customers’ and/or because, in Harry Arthurs’s view, it failed to anticipate the changing political economy of legal education.<sup>51</sup> But if the TFR does have a radical impact what is it likely to be? Will we see vocational cram courses proliferate as some commentators fear? Will vocational training be moved ‘in-house’ by the large law firms, or consortia of law firms? Will law schools vie to see who can be the first to meet all the ‘academic’ and ‘vocational’ outcomes in a three-year degree programme? We cannot be sure, but we equally cannot preclude any of these possibilities until the outcomes are fully developed and the Law Society’s proposals for monitoring them announced.

### 3. Segmentation

The flexibilization of training is also in part a response to the structural transformation and segmentation of the legal profession.<sup>52</sup> Much of the initial pressure for reform came from the elite law firms. These institutions have already, through the ‘City LPC’, sought to tailor the Legal Practice Course more to their needs. The TFR proposals do not follow the logic of professional segmentation to its logical outcome. The present proposals, whilst allowing greater specialization than the LPC, remain wedded to the notion of a common training framework defined by a core knowledge. For example, it will not be possible to qualify by choosing purely contentious or non-contentious work. In other respects the proposals go much further in reforming education and training than the large firms probably anticipated, particularly as regards the proposals for the external assessment of the final work-based learning (training contract) phase. This will meet resistance because it both increases the burden on training providers and challenges their autonomy in determining competence to practice.

The possible linkage between professional fragmentation and the segmentation/flexibilization of training may also have important implications for the TFR’s avowed mission to increase diversity of access. If the past is a reliable guide, it has been the non-elite institutions, particularly the post-1992 universities, who have been most effective in recruiting non-traditional students and responding to the occupational skills agenda. These same institutions have been generally less effective in gaining access for their students into the elite law firms and corporations. Elites tend to resist any

50 Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (1983).

51 H. Arthurs, ‘The Political Economy of Canadian Legal Education’ (1998) 25 *J. of Law and Society* 14, at 18–19.

52 J.P. Heinz et al., ‘The Scale Of Justice: Observations On The Transformation Of Urban Law Practice’ (2001) 27 *Annual Rev. of Sociology* 337.

downgrading of knowledge. What if the elite universities refuse to play ball with the TFR, and the elite employers refuse to abandon them? While we anticipate that these elite institutions are certainly aware of the need to address diversity, there is a very real risk that the elite players will continue to set the informal benchmarks. The consequence may be that status-based distinctions and divisions between training models will continue to emerge to the benefit of those students who have the resources of both cultural and economic capital.

## BUREAUCRATIZATION, PROFESSIONALISM, AND THE LAW SOCIETY

Theoretically, what does the Training Framework Review signify? We argue that it represents a significant movement in the development of a postmodern legal profession. The TFR is also symptomatic of a professional association seeking to legitimate its authority by developing a highly bureaucratized system of training for a profession that is riven by fragmentation. Weber counterpointed the rise of bureaucratization against ‘collegiate, honorific and avocational forms of administration’ and saw it ultimately forming an iron cage for modern society.<sup>53</sup> Foucault took the notion of bureaucratization a step further when he rejected the separation of power from knowledge, ‘that there is no power relation without the correlative constitution of a field of knowledge’.<sup>54</sup> Our explication of the TFR has we suggest begun to illustrate this: in Foucault’s terms, it is the rise of bureaucratic surveillance (as in the keeping of detailed personal files and records), as we show below.<sup>55</sup>

It starts with the reconfiguration of professionalism and profession. Some may argue that we are seeing the decline of professionalism; others may suggest that it is less drastic and can be interpreted as the modernization of professionalism, in a ‘third way’ sense. Whichever assessment is correct, our conceptions of professionalism are changing.

Early conceptions of professionalism put education at the core: abstract knowledge applied to everyday situations represented a classic description of the professional’s role.<sup>56</sup> But this was presented in a neutral way that took no account of professions’ inclinations towards the monopolization of work areas. Implicit in the TFR’s approach to education and knowledge is, as we have noted, a democratization process, which is encapsulated in the ideas of access and diversity. The TFR attempts to achieve this by breaking down its overarching structure into a set of related categories: knowledge, skills, and

53 H.H. Gerth and C. Wright Mills (eds.), *From Max Weber: Essays in Sociology* (1974) 214.

54 Foucault, op. cit., n. 5.

55 C. Dandeker, *Surveillance, Power and Modernity* (1990).

56 A.M. Carr-Saunders and P. Wilson, *The Professions* (1933).

attributes. The manner in which these are accumulated follows a distinctively post-Fordist direction towards flexibilization.<sup>57</sup> It is useful in this context to compare Freidson's analysis of formal knowledge and democracy.<sup>58</sup> Formal knowledge is associated with the rise of modern science which is rooted in the universities. It is not by definition part of everyday knowledge; it is, rather, elite knowledge.<sup>59</sup> For Daniel Bell 'the heart of the post-industrial society is a class that is primarily a professional class . . . A profession is a learned activity, and thus involves formal training, but with a broad intellectual context'.<sup>60</sup> Much has changed since Bell speculated on the future. He did not foresee the growth in 'mode 2' knowledge production, which we have characterized as double-edged, nor did he see the impact of such artefacts as the New Public Management which view governance issues as matters of coordination by bureaucratic means. Professions as learned activities have ceased to have a secure claim on their jurisdictions. Formal knowledge contains a tension therefore between the role of the intellectual and the technician or, in other words, the difference between pure and applied knowledge. And here we can perhaps understand how the TFR's distinctions take life. They can be tracked on the continuum between pure and applied and they can be monitored by more bureaucratic methods.

If the university is the key institution for the production of formal knowledge and its practitioners, there is a potential danger if 'mode 2' becomes the determinative form of production. The technician is attempting to tame the intellectual. As Dahrendorf neatly puts it: 'All intellectuals have the duty to doubt everything that is obvious, to make relative all authority, to ask all those question that no one else dares to ask'.<sup>61</sup> There is, however, a converse. For professions to attain market control their educational processes must lead to 'credentialed professionalization'.<sup>62</sup> In these terms the TFR makes sense. It binds the Law Society closely into the reproduction of the profession: it almost casts the Society as the carrier of the professions' virtues which reaffirm the continued existence of the legal profession, with especially its responsibility for 'cradle to grave education'. Theoretically, the TFR attempts to blur the distinction between two types of knowledge, elite and demotic, by inferring knowledge from the performance of a skilled activity. The blurring is epitomized in the Law Society's determination to elevate skills because it is in them that the greatest rationalization can emerge and control exerted in a Foucauldian sense. The moves by the Law

57 Webb, op. cit., n. 26, p. 228.

58 E. Freidson, *Professional Powers: A Study of the Institutionalization of Formal Knowledge* (1986).

59 id., p. 4.

60 D. Bell, *The Coming of Post-Industrial Society* (1976) 374.

61 R. Dahrendorf, 'The Intellectual and Society: The Social Function of the "Fool" in the Twentieth Century' in *On Intellectuals*, ed. P. Rief (1969) 55.

62 M.S. Larson, *The Rise of Professionalism: A Sociological Analysis* (1977) 46.



Society discussed in our article illustrate how the Society has come to realize the insufficiency of the ‘command and control’ method of governing legal education, and the profession. The continuing iterations over the years of what constitutes a qualifying law degree, the attempts to dictate relevant legal knowledge through the Law Society Final examinations, annual evaluations of Legal Practices Courses, and so forth are expensive and time-consuming. Moreover, they have failed to reconcile the constituencies of academia and practice.

The TFR, via flexibilization, appears to restructure legal education into a broad, diverse array of options. It is no longer command and control but a move to *verification through audit*, which becomes a compliance-oriented approach to regulation.<sup>63</sup> The Law Society achieves this through an outcomes strategy, which includes greater external supervision of the apprenticeship stage via journals and projects, and the proposal that there is a final ‘Day One’ assessment. This is a subtle form of regulation because it attempts ‘to encourage [organisations, e.g., universities, in] the development of a transparent inner space for self-regulatory capacity’.<sup>64</sup> The purpose is to render compatible educational (or business) purposes with regulatory objectives. Perfect compliance shows that the ideals of the regulator have been fully absorbed. There is an interesting tension between what appears to be the ‘total institutions’ approach as depicted by Goffman,<sup>65</sup> that is, the individual is subsumed within the inclusiveness and ideology of the institution (for example, profession, university, school), where the institution is *in loco parentis*, and a regime that appears to be unfettered except for a ‘light touch’. In the Foucauldian move, alluded to above, the process of self-compliance with regulatory objectives induces ‘normalization’ through the audit surveillance. While it appears empowering, Sewell argues that it is actually a form of control associated with the information gathering and monitoring competences of ‘just-in-time’ and ‘total quality management’.<sup>66</sup>

By adopting the TFR the Law Society is gambling that flexibility in the regulation of education and training can hold the whole together rather than forcing it further apart. If the Law Society continues being a supervisory body, a power that is diminishing, then moving to technical, flexible education would permit control over the occupation’s members by virtue of the regulatory capture. But a far darker picture for the Law Society could haunt it if the TFR is realized. The Clementi review, which government views favourably, urges greater competition among lawyers and other

63 M. Power, *The Audit Implosion: Regulating Risk from the Inside* (2000).

64 *id.*, p. 3.

65 E. Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (1961).

66 G. Sewell, ‘The Discipline of Teams: The Control of Team-Based Industrial Work Through Electronic and Peer Surveillance’ (1998) 43 *Administrative Science Q.* 406.

providers of legal services.<sup>67</sup> Decisions like *Morgenbesser* curtail the ability to exclude foreign lawyers.<sup>68</sup> Add to these the *mélange* of routes into the profession anticipated by the TFR and we arrive at the conclusion that not only could the profession fragment but potentially many non-lawyers may be attracted into acquiring legal credentials. Accountants will have their pre-existing law training and experience in accounting firms evaluated and certified and the same could occur for surveyors and other professional groups. We could hypothesize, for example, professional service firms positively encouraging their staff to become double-qualified so as to provide added value to their clients and build their way to a one-stop shop. It is clear that since *Enron* and *NoVA*,<sup>69</sup> multidisciplinary practice has fallen out of favour. A move to the TFR and the adoption of Clementi's proposals could resuscitate the multidisciplinary practice by giving it a different complexion and more respectability than before, especially if the question of governance is resolved.

If lawyers will be only one component in a portfolio of practitioners delivering legal services, what will be the role of the Law Society? We conceive of two possible directions. The first sees the Law Society expanding its domain through its certification power, as more legal practitioners enter the market. The Law Society takes a holistic perspective on the practice of law and provides a haven for those within it; it becomes the voice for law practice of whatever kind. Our second direction sees the Law Society in conflict with a number of other professional associations. Although the TFR brings in recruits from different backgrounds and occupations, it intensifies competition between professional groups and organizations. Accountants, by virtue of their vastly greater numbers and global reach, may try to assert dominance both over the practice of law via their organizational structures and through co-optation of groups like the Law Society.<sup>70</sup> Or, they may set up alternative structures to challenge the Law Society. These challenges to the hegemony of the Law Society as the dominant paradigm of control in the legal profession open up possibilities for jurisdictional incursions by other professions as they move to take over

67 Clementi, *op. cit.*, n. 12.

68 In the field of elite lawyers most of this discussion could be redundant. The actual site of one's legal credential is almost immaterial to the location of one's work. For these lawyers, their style and mode of work is the same whether they are in New York, London, or Tokyo. This could create a global open market in legal education.

69 Case C-309/99 – *J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-21.

70 Accountants are in conflict with lawyers over their exclusion from the perquisites of the lawyer-client privilege. This could be a back door to it. Accountants are also showing their merger tendencies in their professional associations. The Institute of Chartered Accountants is in merger talks with CIMA and CIPFA. The Law Society could be one more.

work from lawyers.<sup>71</sup> The profession will be fragmented, therefore how will it justify its protections? These are long term scenarios, which are feasible but not inevitable.

The present-day position of the Law Society strongly contrasts with its early incarnation. Sugarman shows how the Law Society through the nineteenth and early twentieth centuries was able to constitute itself as a significant player within the legal profession and without.<sup>72</sup> Not only did it handle issues of conduct but was also a major voice in legislation. At the turn of the century the Law Society was beset by contradictory tendencies that induced a kind of institutional 'schizophrenia'.<sup>73</sup> By the late twentieth century, although the Law Society was active in technical law reform, it had already lost its control over legal aid and its reputation was declining because of internal scandals surrounding its leadership, solicitors being accused of major defalcations, and an increasing inability to cope with misconduct in the profession, all of which, together with growing impatience with the restrictive nature of the legal services market, culminated in Clementi.<sup>74</sup> Flood once observed:

Law and legal education are in a struggle where they may become the handmaidens . . . , or maybe the *consigliere*, of economic efficiency and the juridification of everyday life . . . and as a result are devoid of a sense of justice and community.<sup>75</sup>

The Training Framework Review has the potential, if it can live up to it, to rebuff this dystopian view.

## ENVOI

A number of competing and conflicting visions emerge from our analysis of the proposed training framework. It will make the curriculum more relevant or it will commodify knowledge. It will encourage innovation or it will induce a race to the bottom for the cheapest route to a legal qualification. It could increase access and diversity and introduce multiple entry points. It could also speed up processes of deprofessionalization. It will bridge the gap between knowledge production and the needs of society and economy or it will hasten the law schools' conversion into agents of the new capitalism. It

71 A. Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (1988).

72 D. Sugarman, 'Bourgeois Collectivism, Professional Power and the Boundaries of the State. The Private and Public Life of the Law Society, 1825 to 1914' (1996) 3 *International J. of the Legal Profession* 81.

73 *id.*, p. 121.

74 R. Abel, *English Lawyers Between Market and State* (2003).

75 J. Flood, 'Legal Education, Globalization, and the New Imperialism' in Cownie, *op. cit.*, n. 26, p. 150.

will facilitate control of the reproduction of solicitors through audit and compliance rather than explicit command-and-control techniques. It will provide a framework within which lawyers from different spheres can coexist or it will encourage professional fragmentation and intensify polarization. Is the TFR a solution to the educational challenges facing postmodern professions, or is it opening Pandora's box?