

## **Affective or defective? Exploring the LETR's characterisation of affect and its translation into practice**

### **Abstract**

The Legal Education and Training Review ('LETR') identified the affective dimension as being a critical component of legal practice. This article will review how this dimension was conceptualised within this 2013 report ('the Report'), to what extent it since been acknowledged and incorporated by key stakeholders in the legal profession and whether this has resulted in any significant changes in the way the legal profession approaches its work.

The article will suggest that the LETR's characterisation of affect required further development to provide clear guidance on its translation into legal competencies. It will also suggest that the resulting competency frameworks produced by the Solicitors Regulatory Authority and Bar Standards Board and others include little (if any) explicit engagement with affect.

Overall, despite a growing interest in emotion and wellbeing within the legal profession, there remains a lack of engagement with the affective dimension of practice. This has resulted in the legal profession's relatively uncritical acceptance of a few key buzzwords (such as the term 'emotional intelligence') whilst the full implications of incorporating affect in legal practice remain largely unexplored.

This article will argue that a more coherent and critically informed approach is required to ensure that an important dimension of legal practice obtains the recognition, exploration and reflection which it deserves.

### **Introduction**

The realm of feelings and emotions has commonly been disregarded or avoided when discussing the legal profession, particularly within the United Kingdom.<sup>1</sup> Therefore, the LETR's acknowledgment of the affective dimension of legal practice was particularly worthy of note. However, subsequent debate over the Report has largely overlooked this aspect, in part at least because of its lack conceptual clarity when discussing the term 'affect'. Without a sound definitional foundation, key regulators of the legal profession have found it all too easy to avoid explicit recognition of this dimension within their competency frameworks. Although stakeholders increasingly demand that practitioners display so-called 'soft skills' (for example, around client handling), which are implicitly based upon the affective dimension, there is a lack of informed and nuanced guidance and support provided to facilitate this. Therefore, what could become one of the LETR's most significant legacies is currently being overlooked.

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<sup>1</sup> E. Jones 'Making practice more affective: Emotional intelligence as a legal meta-competency' (2017) 24(1) *European Journal of Current Legal Issues*; R. Grossi 'Understanding law and emotion' (2015) 7(1) *Emotion Review* 55.

Given the scope and status of the LETR as the stated first stage in a review process covering the gamut of legal services education and training within England and Wales<sup>2</sup>, its commissioning by key legal services stakeholders<sup>3</sup> and its position as the first such wholesale review since 1971<sup>4</sup>, it is perhaps unsurprising that anticipation was high in the legal press upon the publication of the Report.<sup>5</sup> However, the reception the Report gained after publication was more mixed, with a leader in the Law Society Gazette suggesting that ‘what has come back is pretty limp’.<sup>6</sup>

Following its publication, the discussion the Report generated often focused on routes to qualification into the legal profession, in particular the continuation of the Bar Professional Training Course and the Legal Practice Course.<sup>7</sup> This is perhaps understandable given the subsequent fairly radical proposal of a new Solicitors Qualifying Examination for England and Wales<sup>8</sup> and the Bar Standards Board’s consultations over their own qualification pathways.<sup>9</sup> However, what was notably lacking within the coverage was any debate over, or even acknowledgment of the identification of the affective dimension as ‘critical to professional practice’, possibly the most innovative and ground-breaking aspect of the Report.<sup>10</sup> Law’s traditional focus on reason and rationality and its prizing of seemingly

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<sup>2</sup> It should be noted that this focus on ‘assuring the quality and competence of those who deliver legal services, whether under an established professional title or not’ explicitly excludes liberal academic legal education and public legal education other than where this is a direct link to this purpose, see Legal Education and Training Review (‘LETR’), *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 25<sup>th</sup> January 2018) 1.11.

<sup>3</sup> The Bar Standards Board, ILEX Professional Services and the Solicitors Regulation Authority.

<sup>4</sup> See the Committee on Legal Education (1971) *Report of the Committee on Legal Education*, Cmnd. 4595.

<sup>5</sup> See, for example, Legal Business ‘Three years in the making: Legal education and training review unveiled’ (25<sup>th</sup> June 2013) <<https://www.legalbusiness.co.uk/blogs/three-years-in-the-making-legal-education-and-training-review-unveiled/>> (accessed 3<sup>rd</sup> August 2018).

<sup>6</sup> The Law Society Gazette, ‘Legal Education and Training Review Does Not Set The Pulse Racing’ (1st July 2013) The Law Society Gazette <[www.lawgazette.co.uk/comment-and-opinion/leader-legal-education-and-training-review-does-not-set-the-pulse-racing/71580.article](http://www.lawgazette.co.uk/comment-and-opinion/leader-legal-education-and-training-review-does-not-set-the-pulse-racing/71580.article)> (accessed 28th May 2018); see also K. Dowell ‘Revealed at last details of Legal Education and Training Review’ (25th June 2013) The Lawyer <[www.thelawyer.com/issues/online-june-2013/revealed-at-last-details-of-the-legal-education-and-training-review/](http://www.thelawyer.com/issues/online-june-2013/revealed-at-last-details-of-the-legal-education-and-training-review/)> (accessed 10th July 2018); A. Aldridge ‘The legal education training review is finally here. And not much has changed’ (26th June 2013) The Guardian <[www.theguardian.com/law/2013/jun/26/legal-education-training-review](http://www.theguardian.com/law/2013/jun/26/legal-education-training-review)> (accessed 23rd July 2018);

<sup>7</sup> A. Aldridge ‘The key points of the Legal Education and Training Review explained in ten tweets’ (25<sup>th</sup> June 2013) *Legal Cheek* <[www.legalcheek.com/2013/06/the-gist-of-the-legal-education-and-training-review-explained-in-10-tweets/](http://www.legalcheek.com/2013/06/the-gist-of-the-legal-education-and-training-review-explained-in-10-tweets/)> (accessed 23<sup>rd</sup> July 2018).

<sup>8</sup> Solicitors Regulation Authority (‘SRA’) ‘A New Route to Qualification: The Solicitors Qualifying Examination’ (2016) <[www.sra.org.uk/sra/consultations/solicitors-qualifying-examination.page](http://www.sra.org.uk/sra/consultations/solicitors-qualifying-examination.page)> (accessed 23rd July 2018).

<sup>9</sup> Bar Standards Board (‘BSB’) *Future Bar Training: Consultation on the Future of Training for the Bar: Academic, Vocational and Professional Stages of Training* (2015) <[www.barstandardsboard.org.uk/media/1700434/fbt\\_triple\\_consultation\\_july\\_2015.pdf](http://www.barstandardsboard.org.uk/media/1700434/fbt_triple_consultation_july_2015.pdf)> (accessed 23rd July 2018).

<sup>10</sup> LETR (n.2) 4.83.

intellectual, analytical thought processes means the discussion of this dimension is worthy of acknowledgment and commendation.<sup>11</sup>

A reason for the lack of subsequent engagement with this aspect of the Report is arguably the lack of conceptual clarity it provided. The actual term ‘affective’ is not defined within the Report, but in the wider legal and psychological literature it has a range of definitions. On occasion, it is used almost interchangeably with the term ‘emotion’<sup>12</sup>, often in legal literature it is used more broadly as a catch-all term for a wide variety of apparently non-cognitive functions and behaviours including, for example, emotions, creativity and feelings.<sup>13</sup> Alternatively, some neuroscientists would deliberately separate affect from emotion, with Feldman Barrett defining affect as a ‘fundamental aspect of consciousness’, in other words, the continuous flow of underlying feelings of pleasantness or unpleasantness (valence) and calm or agitation (arousal), as opposed to the short term, episodic sensations of emotions.<sup>14</sup> The discussion within the Report itself appears to be taking a fairly broad definition, with the apparent inclusion of emotions (termed as ‘emotional intelligence’) as well as behaviours such as displaying respect.<sup>15</sup>

As indicated above, traditionally the law has approached affect with, at best, disregard and, at worst, disdain.<sup>16</sup> In a form of Cartesian dualism<sup>17</sup>, the non-cognitive has been viewed as antithetical to the apparent reason and rationality of cognition (often characterised in law through the term ‘thinking like a lawyer’<sup>18</sup>). Emotions, feelings, moods and preferences, by contrast, have been associated with bodily functions and viewed as irrational, irrelevant and even dangerous.<sup>19</sup> The contemporary position is more complex in relation to legal practice, with an increasing acknowledgement that so-called ‘soft skills’, such as emotional

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<sup>11</sup> Jones (n.1); Grossi (n.1); S. A. Bandes, “Introduction” in Bandes, S. A. (ed) (1999) *The Passions of Law* (New York and London, New York University Press, 1999) 1-15.

<sup>12</sup> See, for example, Chakrabarti and Chatterjea’s reference to the ‘emotional’ brain and ‘thinking’ brain in G. Chakrabarti and T. Chatterjea *Employee’s Emotional Intelligence, Motivation & Productivity, and Organizational Excellence. A Future Trend in HRD* (Singapore, Palgrave Macmillan, 2018) 51.

<sup>13</sup> P. Op ’T Eynde and J. E. Turner ‘Focusing on the Complexity of Emotion Issues in Academic Learning: A Dynamical Component Systems Approach’ (2006) 18(4) *Educational Psychology Review* 361, 362. See also the famous taxonomy of the affective domain set out in D. R. Krathwohl, B. S. Bloom and B. B. Masia *Taxonomy of educational objectives: Handbook II: Affective domain* (New York, David McKay Co, 1964).

<sup>14</sup> L. Feldman Barrett *How Emotions are Made: The Secret Life of the Brain* (London, Pan Macmillan, 2017) 72.

<sup>15</sup> LETR (n.2) 4.83, 4.85.

<sup>16</sup> Grossi (n.1); T. A. Maroney ‘Law and Emotion: A Proposed Taxonomy of an Emerging Field’ (2006) 13(2) *Law and Human Behaviour* 119.

<sup>17</sup> R. Descartes (Translator S. H. Voss) *The Passions of the Soul* (Indianapolis, Hackett Publishing, 1989).

<sup>18</sup> LETR (n.2) 4.62; C. James ‘Lawyers’ wellbeing and professional legal education’ (2008) 42(1) *The Law Teacher* 85.

<sup>19</sup> K. Abrams and H. Keren ‘Who’s Afraid of Law and the Emotions?’ (2010) 94 *Minnesota Law Review* 1997

intelligence, play an important role in client care and working with colleagues.<sup>20</sup> However, the very term ‘soft skill’ still characterises affect by its otherness, as something separate from the core skills associated with cognition. This is despite the weight of scientific evidence demonstrating that affect and cognition are inseparable and intertwined, rendering any artificial separation unworkable and debilitating<sup>21</sup>. For example, discussing emotions in the legal context, Bandes and Blumenthal suggest that:

They influence the way we screen, categorize, and interpret information; influence our evaluations of the intentions or credibility of others; and help us decide what is important or valuable. Perhaps most important, they drive us to care about the outcome of our decision making and motivate us to take action, or refrain from taking action, on the situations we evaluate.<sup>22</sup>

Discussing affect and its impact on individuals, Feldman Barrett argues that any claim a person (or indeed legal professional) makes to be wholly rational and make affect-less decisions is fictional because ‘Your bodily feeling right now will project forward to influence what you will feel and do in the future’.<sup>23</sup> She draws on the work of Danziger et al whose 2011 study of 8 parole board judges in Israel which found that a favourable ruling was more likely after a food break, possibly because of the change in affect generated by this.<sup>24</sup>

Given the importance of affect across the human experience, including within the law, it is perhaps surprising that there had previously only been an extremely limited acknowledgment and discussion of its role in legal practice, particularly in the UK context.<sup>25</sup> Nevertheless, for the Report to explicitly identify the affective dimension as forming a part of the competency framework was a significant milestone and one which had the potential to challenge the traditional focus of the legal profession.

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<sup>20</sup> Jones (n.1).

<sup>21</sup> A. Damasio *Descartes’ Error* (London, Vintage, 2006); I. Blanchette and A. Richards ‘The influence of affect on higher level cognition: A review of research on interpretation, judgement, decision making and reasoning’ (2010) 24(4) *Cognition & Emotion* 561; J. J. A. Shaw and H. J. Shaw ‘From Fact to Feeling: An Explication of the Mimetic Relation Between Law and Emotion’ (2014) 35(1) *Liverpool Law Review* 43.

<sup>22</sup> Bandes, S. A. and Blumenthal, J. A. ‘Emotion and the Law’ (2012) 8(1) *Annual Review of Law and Social Science* 161, 163-164.

<sup>23</sup> Feldman Barrett (n.14) 82.

<sup>24</sup> S. Danziger, J. Leviv and L. Avnaim-Pesso ‘Extraneous factors in judicial decisions’ (2011) 108(17) *Proceedings of the National Academy of Sciences of the United States of America* 6889.

<sup>25</sup> As late as 2013 Maharg and Maughan were describing it as ‘virtual invisible’ in relation to legal education (P. Maharg and C. Maughan ‘Introduction’ in P. Maharg and C. Maughan (eds) *Affect and Legal Education. Emotion in Learning and Teaching the Law* (Aldershot, Ashgate Publishing, 2011) 1).

Since the Report, the focus on ‘soft skills’ in the legal profession has continued apace, driven in no small part by demands for greater personalised client care in response to the potential automation of routine legal processes, as well as by an increasing interest in the wellbeing of practitioners.<sup>26</sup> These implicitly require significant affective competencies, such as the abilities to identify, interpret and respond to emotions displayed by clients and colleagues and to regulate your own emotional responses accordingly.<sup>27</sup> However, it is questionable whether, in the subsequent five years, the importance of acknowledging and explicitly incorporating affect has been truly understood, let alone accepted, by many key stakeholders within the legal profession in England and Wales.

The reasons for this lack of incorporation of the affective dimension may be multifarious, and no doubt include the way in which discussion of the Solicitors Qualifying Examination is dominating the focus of the solicitors’ profession. However, it is arguable that the way the Report itself treated affect has provided some of the justification for the continued lack of appreciation of its role. The starting point for this argument, the way in which the affective dimension is characterised within it, will be explored in the next section.

### **Dissecting the affective/moral dimensions**

Within the Report, affect is referred to using the term ‘the affective and moral dimensions’<sup>28</sup>. The concept of a dimension is used within the Report as part of its emphasis on the need to develop an outcomes-based approach<sup>29</sup> which identifies key competencies required for legal practice, to ensure that legal professionals are competent to perform their roles from day one of their entry or appointment.<sup>30</sup> In other words, that they have an ‘ability to perform the tasks and roles required of a lawyer to (at least) a minimum standard of effectiveness’.<sup>31</sup> Although arguably the role of dimensions within this is not fully explained, their purpose seems to be to map what the Report terms as ‘the ingredients of legal competency’.<sup>32</sup> Thus the first dimension identified is ‘cognitive’, the second ‘integrative’, the third ‘context’, the fourth

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<sup>26</sup> Jones (n.10); R. Collier ‘Wellbeing in the legal profession: reflections on recent developments (or, what do we talk about, when we talk about wellbeing?)’ (2015) 23(1) *International Journal of the Legal Profession* 1; Peppermint Technology ‘What clients really want from a legal service provider’ (2014) <https://www.pepperminttechnology.co.uk/media/46397/peppermint-report-2013.pdf?cldee=ZS5qLmpvbmVzOG9wZW4uYWwudWs%3d&urlid=8> (accessed 23<sup>rd</sup> July 2018).

<sup>27</sup> R. E. Boyatzis “Learning Life Skills of Emotional and Social Intelligence Competencies” in M. London (ed) *The Oxford Handbook of Lifelong Learning* (Oxford, Oxford University Press, 2011) 11-21; D. R. Caruso and P. Salovey *The Emotionally Intelligent Manager: How to develop and use the four key emotional skills of leadership* (San Francisco, Jossey-Bass, 2004).

<sup>28</sup> LETR (n.2) 4.83.

<sup>29</sup> LETR (n.2) 4.55.

<sup>30</sup> LETR (n.2) 4.59.

<sup>31</sup> LETR (n.2) Table 4.1

<sup>32</sup> LETR (n.2) 4.60

‘relationship’, the fifth ‘affective/moral’ and the sixth ‘habits of the mind’.<sup>33</sup> The abilities and traits referred to within the ‘affective/moral’ dimension(s) are:

- Integrity
- Independence
- Emotional intelligence
- Respect for Clients
- Resilience
- Empathy
- Social Responsibility<sup>34</sup>

The Report indicates that this is based on Epstein and Hundert’s definition of core competencies in the medical profession. The Epstein and Hundert paper mirrors contemporary work on law and emotions in emphasising that ‘Recent neurobiological research indicates that the emotions are central to all judgment and decision making’.<sup>35</sup> Their list of abilities and traits includes:

- Tolerance of ambiguity and anxiety
- Emotional intelligence
- Respect for patients
- Responsiveness to patients and society
- Caring<sup>36</sup>

While ‘tolerance of ambiguity and uncertainty’ can be mapped as a sub-set of resilience<sup>37</sup> and ‘responsiveness to patients and society’ onto ‘social responsibility’, it is interesting to note that ‘caring’ is absent from the Report’s list of legal (as opposed to medical) competencies. It does include ‘empathy’, with the comment that this is a more commonly used term within law.<sup>38</sup> One of the Discussion Papers which preceded the Report notes that a balance is needed between empathising with clients and potentially losing objectivity.<sup>39</sup> Therefore, it

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<sup>33</sup> LETR (n.2) Table 4.3.

<sup>34</sup> LETR (n.2) Table 4.3.

<sup>35</sup> R. Epstein and E. Hundert ‘Defining and assessing professional competence’ (2002) 287(2) *Journal of the American Medical Association* 226, 228.

<sup>36</sup> Epstein and Hundert (n.35) 7.

<sup>37</sup> S. S. Luthar, D. Cicchetti and B. Becker ‘The construct of resilience: A critical evaluation and guidelines for future work’ (2000) 71(3) *Child development* 543.

<sup>38</sup> LETR (n.2) 4.85.

<sup>39</sup> Legal Education and Training Review *Briefing Paper 1/2012: Knowledge, skills and attitudes required for practice at present: initial analysis* (undated) <http://www.lettr.org.uk/wp-content/uploads/012012-competence-frameworks-analysis.pdf> (accessed 6th August 2018).

may be either that ‘caring’ and ‘empathy’ are being used as synonyms, or that ‘caring’ is in some way seen as threatening the independence and impartiality much prized in law.<sup>40</sup>

It is unclear from both the Report and Epstein and Hundert’s paper why affect and morality have been included together and whether they are being viewed as effectively one dimension or (more likely given the reference in the plural)<sup>41</sup> two closely interlinked or even interchangeable dimensions. It could be seen as suggesting an assumption that your affective responses have a direct influence on your moral judgement, or are likely to lead you down a path that is ethically sounder or in some way morally superior. This is indicated by Epstein and Hundert’s reference to an ‘affective/moral function’ which is defined as ‘the willingness, patience and emotional awareness to use these skills judiciously and humanely’.<sup>42</sup> However, this is not a correlation that is clear or uncontested within the wider literature on affect and morality. For example, in debates on emotional intelligence, whilst some authors have argued that it promotes positive behaviours, others have suggested it is a value-neutral concept, whilst a number have explored the possibility of individuals with high emotional intelligence being able to exploit this ability in ways which are potentially manipulative and Machiavellian in nature.<sup>43</sup> Similarly, whilst Hoffman argues that empathy will prompt positive, altruistic (or ‘caring’) behavioural responses,<sup>44</sup> Nussbaum disagrees, pointing out that the most skilled torturers must display high levels of empathy with their victim to exact maximum pain.<sup>45</sup>

In the Report itself, it is also unclear which of the abilities and traits it lists are being linked to affect and which are being viewed as moral in nature. Independence, integrity and social responsibility appear, on a common sense reading, more aligned with a moral dimension; whilst emotional intelligence and empathy have clear affective elements.<sup>46</sup> Resilience and respect for clients perhaps have links with both, depending upon how they are defined (which

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<sup>40</sup> L. Carter and T. Burke *Reason in Law 8<sup>th</sup> Edition* (New York, Routledge, 2007) cf P. Schlag *The Enchantment of Reason* (Durham, Duke University Press, 1998).

<sup>41</sup> LETR (n.2) 4.83.

<sup>42</sup> Epstein and Hundert (n.35) 227.

<sup>43</sup> E. J. Austin, D. Farrelly, C. Black and H. Moore ‘Emotional intelligence, Machiavellianism and emotional manipulation: Does EI have a dark side?’ (2007) 43(1) *Personality and Individual Differences* 179; U. K. J. Nagler, K. J. Reiter, M. R. Furtner and J. F. Rauthmann ‘Is there a “dark intelligence?” Emotional intelligence is used by dark personalities to emotionally manipulate others’ (2014) 65 *Personality and Individual Differences* 47.

<sup>44</sup> M. Hoffman *Empathy and Moral Development. Implications for Caring and Justice* (Cambridge, Cambridge University Press, 2000).

<sup>45</sup> M. Nussbaum ‘Reply to Amnon Reichmann’ (2006) 56(2) *Journal of Legal Education* 320, 321; see also k. Kristjánsson *Virtuous Emotions* (Oxford, Oxford University Press, 2018).

<sup>46</sup> In relation to emotional intelligence, see P. N. Lopes, D. Grewal, J. Kadis, M. Gall and P. Salovey ‘Evidence that emotional intelligence is related to job performance and affect and attitudes at work’ (2006) 18 *Psicothema* 132. With regard to empathy, see B. Spivak, B. Batagol, A. Sifris and B. Williams ‘Measuring empathy in undergraduate law students: Examining the factorial validity of the Jefferson Scale of Empathy - Law Students (JSE-LS)’ 58 (2018) *International Journal of Law and Psychiatry* 143, 144.

is not clarified within the Report), but for the purposes of this article, resilience will be considered as an affective aspect.

### **Tangled concepts, shaky foundations?**

Given the Report's lack of definition of the various competencies identified within the affective dimension, it is necessary to briefly consider the underlying concepts involved to fully explore how this dimension has been characterised and demonstrate the lack of conceptual clarity involved in key terms used within it..

#### **(a) Emotional intelligence**

Focusing on the competency most clearly aligned with the affective dimension (notwithstanding the definitional difficulties of affect itself), the term emotional intelligence is an interesting and (maybe unknowingly) contentious choice. It perhaps reflects some of the language of respondents' to the LETR's various consultations as the term emotional intelligence has become widely used both in law and within wider society, following its popularisation by Goleman in 1995 with his book of the same title.<sup>47</sup> However, whilst it appears to appeal to an intuitive understanding of the role of emotions, the scientific literature on the concept demonstrates that its meaning and use are, in fact, highly contentious in many circles.<sup>48</sup> The use of the term 'intelligence' challenges the conventional and enduring view of a form of general intelligence (commonly known as "IQ") which is still held by many scientists today.<sup>49</sup> Even setting aside that debate, the breadth of such a concept is heavily debated even amongst those who support the notion of an emotional intelligence. The model expounded by Goleman is particularly wide (and would, in fact, be likely to encompass empathy, resilience and social responsibility within it).<sup>50</sup> In contrast, the original model propounded by Salovey and Mayer is narrower and more cautious.<sup>51</sup> They themselves argue that their model is based on the specific abilities of individuals (which can be taught and developed), whereas they suggest that Goleman's draws on both abilities and personality traits (which are far more fixed and less adaptable).<sup>52</sup> In addition to these two key models, there are also a vast array of other potential models and measures, all of which vary in terms of their breadth and supporting claims.<sup>53</sup> In relation to law, there has been significant interest

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<sup>47</sup> D. Goleman *Emotional Intelligence* (New York, Bantam Books, 1995).

<sup>48</sup> See, for example, K. A. Murphy (ed) *A Critique of Emotional Intelligence. What Are the Problems and How Can They Be Fixed?* (London, Lawrence Erlbaum Associates, 2006).

<sup>49</sup> M. K. Gardner 'Theories of Intelligence' in M. A. Bray and T. J. Kehle (eds) *The Oxford Handbook of School Psychology* (Oxford, Oxford University Press, 2011).

<sup>50</sup> R. E. Boyatzis 'Competencies as a Behavioral Approach to Emotional Intelligence' (2009) 28(9) *Journal of Management Development* 749 754-755.

<sup>51</sup> P. Salovey and J. D. Mayer 'Emotional Intelligence' (1990) 9(3) *Imagination, Cognition and Personality* 185.

<sup>52</sup> J. D. Mayer, P. Salovey and D. R. Caruso 'Emotional Intelligence. New Ability or Eclectic Traits' (2008) 63(6) *American Psychologist* 503.

<sup>53</sup> For example, R. Bar-On *A broad definition of emotional-social intelligence according to the Bar-On model* (2007) <http://www.reuvenbaron.org/wp/37-2/> (accessed 8<sup>th</sup> August 2018).

in emotional intelligence as a ‘soft skill’ in recent years. However, the academic literature supporting this is largely US based and focuses almost exclusively on the Goleman model, usually with very little (if any) indication as to why this model has been preferred or the scientific evidence to support it.<sup>54</sup>

Rather than the Report seemingly drawing on this somewhat shaky foundation, it is suggested that there are several ways in which it could have avoided some of the debates and contention surrounding the term emotional intelligence. Firstly, the Report could have used a term which is less loaded and significant in scientific terms than intelligence. As an example of this, it is notable that, when a Government-based scheme was devised to promote social and emotional learning in compulsory schooling in the UK, the academics involved chose to use the terms ‘Emotional and social competence’ and ‘emotional and social wellbeing’ instead of intelligence.<sup>55</sup> ‘Emotional competence’ is also a term that has been used in relation to legal practice for a number of years by Silver, and it seems to fit particularly well with the overall focus of the Report.<sup>56</sup> Of course, as with emotional intelligence, the term is also potentially very broad and ambiguous. To facilitate its implementation within legal practice it would be necessary to drill-down into its specifics in more detail, for example, highlighting key skills such as emotion regulation.<sup>57</sup> However, for the high-level form of meta-competency the Report appears to have been aiming for, it appears to be appropriate.

### **(b) Empathy**

The second term which clearly relates to the affective dimension in the Report is empathy. Once again, this term has a high level of popular acceptance (often being interpreted as ‘walking in another’s shoes’), but in scientific terms suffers from some lack of definitional clarity. For example, the neuroscientist Batson has identified eight different common definitions of the word.<sup>58</sup> It is commonly accepted that there are both affective and cognitive aspects to empathy<sup>59</sup> and within the literature on empathy and legal practice it has been the

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<sup>54</sup> See, for example, D. Austin and R. Durr ‘Emotion regulation for lawyers: A mind is a challenging thing to tame’ (2016) 16(2) *Wyoming Law Review* 387.

<sup>55</sup> K. Weare and G. Gray *What Works in Developing Children’s Emotional and Social Competence and Wellbeing?* (2014) Research Report RR456, Department for Education and Skills, <http://webarchive.nationalarchives.gov.uk/20130401151715/http://www.education.gov.uk/publications/eOrderinDownload/RR456.pdf> (accessed 13th August 2018) 14.

<sup>56</sup> M. Silver *The Affective Assistance of Counsel: Practising Law as a Healing Profession* (Durham, N. C., Carolina Academic Press, 2007).

<sup>57</sup> See, for example, T. A. Maroney and J. J. Gross ‘The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective’ (2014) 6(2) *Emotion Review* 142.

<sup>58</sup> D. Batson ‘These Things Called Empathy: Eight Related but Distinct Phenomena’ in J. Decety and W. Ickes (eds) *The Social Neuroscience of Empathy* (Cambridge, Massachusetts and London, England, The MIT Press, 2011).

<sup>59</sup> Goldman, A. I. (2006) *Simulating Minds: The Philosophy, Psychology and Neuroscience of Mindreading* (Oxford, Oxford University Press, 2006) 140.

cognitive elements which appear to have been most widely prized and explored.<sup>60</sup> As indicated previously, it has a potential, but contentious, relationship to prosocial behaviours and may have possible implications in terms of detachment and objectivity.<sup>61</sup> For individual legal professionals, it is also questionable what impact empathy may have on mental wellbeing and whether there are potentially problematic gender differentiations.<sup>62</sup> Given these ambiguities, it is arguable that providing a definition of empathy would have afforded more clarity within the Report, giving a clearer starting point to develop further exploration and discussion.

### (c) Resilience

Resiliency is becoming increasingly prized as a characteristic of individual legal professionals.<sup>63</sup> It essentially refers to the ways in which individuals can positively adjust and adapt to change and adversity.<sup>64</sup> However, as with the term ‘empathy’, there is a lack of definitional clarity in the wider general and legal literature (and no definition attempted within the Report).<sup>65</sup> A key issue which has been identified in relation to resilience is the way in which it can be used to shift the focus away from structural and organisational issues and instead emphasise the need for individuals to prove themselves able to cope and adjust. This has become a particular concern in relation to narratives around mental wellbeing in the legal profession, with resilience forming a part of neoliberal narratives around individual responsibility:

Specifically, the problem of lawyer distress is recast by neoliberalism not as a result of structural problems in legal education or the legal profession, but as a result of three particular types of individual predisposition: a ‘biochemical imbalance’; an ‘illness’; or simple ‘inadequacy’.<sup>66</sup>

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<sup>60</sup> J. Gerarda Brown ‘New Directions in Negotiation and ADR: Deeply Contacting the inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays’ (2012) 39 *Washington University Journal of Law and Policy* 189; Westaby, C. and Jones, E. ‘Empathy: an essential element of legal practice or ‘never the twain shall meet’?’ (2017) 25(1) *International Journal of the Legal Profession* 107.

<sup>61</sup> Hoffman (n.44) and Nussbaum (n.45); see also P. Bloom *Against Empathy. The Case for Rational Compassion* (London, The Bodley Head, 2016).

<sup>62</sup> For a discussion on this in the medical context, see R. Samra ‘Empathy and Burnout in medicine – acknowledging risks and opportunities. *Journal of General Internal Medicine*’ (2018) 33(7) 991.

<sup>63</sup> See, for example, J. Pryce-Jones ‘Motivation and Resilience’ (2014) *The Law Society Gazette* <https://www.lawgazette.co.uk/practice-management/motivation-and-resilience/5039399.article> (accessed 13th August 2018).

<sup>64</sup> Luthar et al (n.37).

<sup>65</sup> S. Humphries and L. Bleasdale *Undergraduate Resilience Research Project. Project Report*, [http://teachingexcellence.leeds.ac.uk/wp-content/uploads/2018/01/LITEbleasdalehumphreys\\_fullreport\\_online.pdf](http://teachingexcellence.leeds.ac.uk/wp-content/uploads/2018/01/LITEbleasdalehumphreys_fullreport_online.pdf) (accessed 19th September 2018).

<sup>66</sup> Paula Baron ‘Sleight of hand: lawyer distress and the attribution of Responsibility’ (2014) 23(2) *Griffith Law Review* 261, 273.

This can arguably lead to a focus on in some way ‘fixing’ or ‘mending’ the individual who is experiencing issues with mental health or wellbeing, to successfully return them to the working environment (and economic productivity), whilst ignoring the wider institutional, structural and cultural factors within law which caused, or contributed to, the original issues.<sup>67</sup> As the affective dimension and mental wellbeing are so irrevocably intertwined<sup>68</sup> it can be seen that the same dangers will also apply if resilience is used as a key competency without further explanation or qualification.

When considering the Report’s characterisation of the affective dimension, it is worth noting that the terms ‘emotional intelligence’, ‘empathy’ and ‘resilience’ used are ones which are in popular usage and already have some currency within legal practice. There are certainly potential benefits in using vocabulary that can, at least to some extent, be related to by those involved in or with the legal profession. However, at the same time, there is also (as the Report acknowledged in general terms) the need to base the terminology used on a sound evidence-base.<sup>69</sup> Here, it appears there is a divergence between the wider scientific literature on affect and the terms used to capture that dimension within the Report. Without further definition or discussion, or a clear conceptualisation being provided, their broad and ambiguous nature arguably detracts from their meaningful incorporation into a competency-based approach to legal practice. As a result, it is perhaps unsurprising that the response of the regulators in England and Wales to date has largely ignored the Report’s references to the affective dimension.

### **Making the explicit implicit again: The responses of the regulators**

In regulatory terms, the three key responses to the Report came from the Solicitors Regulation Authority (‘SRA’), the Bar Standards Board (‘BSB’) and what was then the Institute of Legal Executives, now the Chartered Institute of Legal Executives Regulation (‘CILEx Regulation’). Responding specifically in relation to the Report’s proposal of a competency framework, on 11<sup>th</sup> March 2015 the SRA’s Board approved the current ‘Statement of Competence for Solicitors’ which sets out a range of competencies.<sup>70</sup> Within this Statement, it is notable that there is no specific reference to ‘affect’, ‘emotion’ or ‘wellbeing’ (or any synonymous terms), although many of the competencies identified do implicitly include elements of the affective dimension. For example, the requirement to ‘Communicate clearly and effectively, orally and in writing...’ would require an ability to correctly identify and interpret a client or colleague’s emotional state and cues, to ensure that you were able to respond to their ‘individual characteristics’ and use the ‘most appropriate’

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<sup>67</sup> Baron (n.64); R.Collier ‘Wellbeing in the legal profession: reflections on recent developments (or, what do we talk about, when we talk about wellbeing?)’ (2016) *International Journal of the Legal Profession*.

<sup>68</sup> For discussion on the relationship between emotional competence and wellbeing in the legal workplace see

<sup>69</sup> LETR (n.2) 1.15.

<sup>70</sup> Solicitors Regulatory Authority *Statement of solicitor competence* (2015)

<https://www.sra.org.uk/solicitors/competence-statement.page> (accessed 14th August 2018).

forms of communication and impart ‘any difficult and unwelcome news clearly and sensitively’.<sup>71</sup> Similarly, to ‘Establish and maintain effective and professional relations with clients’ would require a careful weighing of the balance of empathy and detachment and an ability to manage emotions to maintain relevant boundaries.<sup>72</sup>

CILEx Regulation’s response to the Report’s competency-based approach was to devise its set of Day One Outcomes for Chartered Legal Executives (known as Fellows).<sup>73</sup> Within these Outcomes, references to demonstrating ‘a range of client care behaviours’, including being able to ‘Identify and understand a client’s or service user’s position’ and ‘Manage a client’s or service user’s expectations’ imply a requirement for a certain level of emotional competency.<sup>74</sup> However, once again, the affective dimension is not explicitly referred to and the vocabulary used fails to acknowledge its import. This is despite both sets of competencies feeling the need to have discrete sections included on ‘good business practice’<sup>75</sup> and ‘business awareness’<sup>76</sup>, a somewhat telling indication of priorities within the legal sector.<sup>77</sup>

It could be suggested that a form of implied recognition of affect within these competency frameworks is sufficient to ensure the acknowledgment and recognition of this dimension. However, this seems an unlikely outcome, given that much of legal education and training has been demonstrated to denigrate the importance and role of affect, suggesting most legal professionals will struggle to identify this implicit message.<sup>78</sup> Even if an individual’s experience in practice leads them to appreciate the role of affect, it is also questionable whether they will have the knowledge or understanding to appreciate how to utilise this dimension appropriately and effectively in a pressurised and demanding working environment.<sup>79</sup> On the other hand, explicitly incorporating the affective dimension in the vocabulary and content of legal competencies is not without its dangers, for example, the possibility of added emotional labour for legal professionals<sup>80</sup> and the potential perpetuation

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<sup>71</sup> SRA (n.70); for examples of such scenarios in practice see C. C. Kelton ‘Clients Want Results, Lawyers Need Emotional Intelligence’, (2015) 63 *Cleveland State Law Review* 459.

<sup>72</sup> SRA (n.70); Kelton (n.71).

<sup>73</sup> Chartered Institute of Legal Executives Regulation (‘CILEx Regulation’) *Day One Outcomes – Fellow* (2015) [https://www.cilexregulation.org.uk/~/media/pdf\\_documents/cilex-regulation/resources/day-one-outcomes-may-2015.pdf?la=en](https://www.cilexregulation.org.uk/~/media/pdf_documents/cilex-regulation/resources/day-one-outcomes-may-2015.pdf?la=en) (accessed 14<sup>th</sup> August 2018).

<sup>74</sup> CILEx Regulation (n.73) 5 and 6.

<sup>75</sup> SRA (n.70).

<sup>76</sup> CILEx Regulation (n.73) 8.

<sup>77</sup> A. Boon, L. Duff and M. Shiner ‘Career Paths and Choices in a Highly Differentiated Profession: The Position of Newly Qualified Solicitors’ (2001) 64(4) *The Modern Law Review* 563, 565.

<sup>78</sup> M. Towness O’Brien, S. Tang and K. Hall, ‘No time to loose: Negative impact on law student wellbeing may begin in year one’ (2011) 2(2) *The International Journal of the First Year in Higher Education* 49; Maharg and Maughan (n.24); E. Jones ‘Transforming Legal Education Through Emotions’ (2018) 38(3) *Legal Studies* 450.

<sup>79</sup> K. Abrams and H. Keren ‘Who’s Afraid of Law and the Emotions?’ (2010) 94(6) *Minnesota Law Review* 1997; R. Grossi ‘Understanding law and emotion’ (2015) 7(1) *Emotion Review* 55.

<sup>80</sup> L. C. Harris ‘The Emotional Labour of Barristers: An Exploration of Emotional Labour by Status Professionals’ (2002) 39(4) *Journal of Management Studies* 553; C. Westaby ‘Feeling like a sponge’: The

of neo-liberal discourses around the bringing of the whole self into the working environment.<sup>81</sup> However, as the Report acknowledged, the affective dimension is already present within legal practice. Therefore, making this explicit within a competency framework will allow the discussion and exploration of its impact to be prioritised and developed in a more nuanced, informed manner which could eventually assist in alleviating some of the difficulties currently experienced by legal professionals.<sup>82</sup>

Out of the regulators, it is the BSB who has moved furthest towards the explicit inclusion of the affective dimension within their ‘Professional Statement for Barristers’ with the requirement that, when working with others, barristers will ‘treat all people with respect and courtesy’ including knowing ‘how and where to demonstrate empathy, and act accordingly’.<sup>83</sup> The inclusion of empathy and the nuanced wording used has the potential to develop a much wider debate around its usage in legal practice, although to date it is unclear how (and to what extent) this has been acknowledged and interpreted by members of the Bar. It is interesting to speculate why the BSB chose to incorporate empathy but not emotional intelligence, resilience or affect more generally, perhaps suggesting that an equivocality towards this dimension still remains.

## Conclusion

However, there is still a tendency within some, particularly more task-based, competence frameworks to focus on a relatively narrow range of cognitive competencies, leaving the development of soft skills and meta-competencies implicit. This may mean that insufficient attention is given to those skills and meta-competencies in the education and training process.<sup>84</sup>

In light of the lack of explicit recognition of the affective dimension within the regulatory responses to the Report, the above quotation appears almost prophetic in nature. Or perhaps it is more accurate to say that the legal profession, led by its regulators, are in danger of repeating old cycles of behaviour as they adapt to the new competency-based approach of the Report. Within the Report itself, the affirmation of the importance of the affective dimension in legal practice was worthy of great commendation. However, its characterisation of affect,

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emotional labour produced by solicitors in their interactions with clients seeking asylum’ (2010) 17(2) *International Journal of the Legal Profession* 153.

<sup>81</sup> K. Lynch ‘Neoliberalism and Marketisation: The Implications for Higher Education’ (2006) 5(1) *European Education Research Journal* 1; A. M. D’Aoust ‘Ties that Bind? Engaging Emotions, Governmentality and Neoliberalism: Introduction to the Special Issue’ (2014) 28(3) *Global Society* 267.

<sup>82</sup> S. Douglas ‘Incorporating Emotional Intelligence in Legal Education: A Theoretical Perspective’ (2015) 9(2) 56; C. James ‘Seeing things as we are. Emotional intelligence and clinical legal education’ (2005) 9 *International Journal of Clinical Legal Education* 123.

<sup>83</sup> Bar Standards Board Professional Statement for Barristers (2015) [https://www.barstandardsboard.org.uk/media/1707496/bsb\\_professional\\_statement\\_2015.pdf](https://www.barstandardsboard.org.uk/media/1707496/bsb_professional_statement_2015.pdf) (accessed 14<sup>th</sup> August 2018) 17.

<sup>84</sup> LETR (n.2) 4.13.

in particular the inclusion of broad, ambiguous and undefined terms lacking conceptual clarity to map this dimension, arguably failed to provide a well-developed framework for its explicit inclusion within the profession's subsequent competency frameworks.

By largely disregarding the Report's affirmation of the importance of the affective dimension, the regulatory bodies are missing an opportunity to equip members of the legal profession with competencies that are integral to legal practice and which can have a significant impact on wellbeing, performance and the development of reflective practitioners.<sup>85</sup> Of course, simply explicitly including such affective competencies is not in itself sufficient to embed them within legal practice and culture. However, it would send a clear message to the key stakeholders within the profession that this dimension can be, and should be, acknowledged and explored.

One way forward could be for a working party to be formed, drawing together a range of key stakeholders in the legal profession along with those offering appropriate scientific and psychological expertise and representatives of other professions (particularly medicine) to provide more detailed, clearer guidance on the incorporation of the affective domain. Indeed, it could be that the remit of the existing Legal Professions Wellbeing Taskforce in England and Wales<sup>86</sup> and Legal Wellbeing Scotland<sup>87</sup> could evolve to encompass this (although a cross-jurisdictional approach covering all of the United Kingdom and the Republic of Ireland would be strongest). Such a working party could consider not only the use of affect within the competency frameworks stemming from the Report, but also the inclusion of the affective dimension in other areas, including in relation to health and safety, risk management, the assessment of skills, Continuing Professional Development requirements and legal education and training. If the regulators and other stakeholders in the legal profession, can now begin to afford the affective dimension the recognition and status it deserves, the LETR may yet be able to gain the recognition they deserve for acknowledging this vital element of legal practice.

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<sup>85</sup> Jones (n.1); Kelton (n.71); Douglas (n.82); James (n.82).

<sup>86</sup> The Law Society of England and Wales *Legal Professions Wellbeing Taskforce* (2016) <http://www.lawsociety.org.uk/news/stories/legal-professions-wellbeing-taskforce/> (accessed 15<sup>th</sup> August 2018).

<sup>87</sup> LawCare Scottish Legal Profession Tackles Mental Health Issues (2016) <https://www.lawcare.org.uk/files/ReleaseFinal.pdf> (accessed 15<sup>th</sup> August 2018).