

## LIBERALISATION AND THE LEGAL PROFESSION IN ENGLAND AND WALES

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**ABSTRACT.** *This article explores the process and impact of liberalisation on the legal profession in England and Wales. Liberalisation brings a tendency to consider the profession in market-focused terms, with the professional–client relationship reconfigured in overtly economic fashion as constituting the interaction of supply and demand. The article examines the past and present structure of the profession, arguments for liberalisation and manifestations of liberalisation efforts. Having identified the distinctive dynamics of supply and demand within legal services markets, the article considers the potential implications, both immediate and in broader societal terms, of reconceptualising the legal profession in this manner.*

**KEYWORDS:** *legal profession, legal services, liberalisation, legal aid.*

Anyone who thinks talk is cheap should get some legal advice.<sup>1</sup>

### I. INTRODUCTION

The legal profession in England and Wales has a long complex history.<sup>2</sup> Typically viewed as a bastion of privilege and tradition, from the mid-twentieth century onwards it underwent rapid and notable change: remarkable expansion in numbers, followed by liberalisation which effected far-reaching alterations to rules for entry and practice. The profession thus transformed “from a pre-capitalist craft occupation . . . into a capitalist service industry”.<sup>3</sup> This article explores the process and impact of

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<sup>1</sup> Attributed to Franklin Jones, American humorist.

<sup>2</sup> P. Brand, *The Origins of the English Legal Profession* (Oxford 1992); R.L. Abel, *The Legal Profession in England and Wales* (Oxford 1988).

<sup>3</sup> H. Sommerlad, R. Young, S. Vaughan and S. Harris-Short, “The Futures of Legal Education and the Legal Profession” in H. Sommerlad, R. Young, S. Vaughan and S. Harris-Short (eds.), *The Futures of Legal Education and the Legal Profession* (Oxford 2015), 3.

liberalisation on the legal profession in England and Wales. It seeks to understand what liberalisation means in this context, and how liberalisation efforts shape and change our vision of the profession and its role within society. In doing so, the article offers an original perspective on the contemporary profession: aiming both to explain the process of liberalisation on its own – overtly market-focused – terms, and critically to appraise the transformation of the lawyer from counsellor to competitor to date.

Much work on the profession emphasises the extent to which its principal branches, solicitors and barristers, historically disclaimed the logic and language of the market. With liberalisation, however, comes a tendency to view the profession in market-oriented terms. Thus, the former *professional–client* relationship is reconfigured, in explicitly economic fashion, as constituting the interaction of forces of *supply* and *demand* for legal services. Concepts like commoditisation, market concentration, economies of scale and scope, and disruptive innovation, are increasingly recognised and discussed. From one perspective, this shift in nomenclature merely acknowledges expressly what has always been true in practice: that lawyers are businesspeople, often highly remunerated ones. Clients, moreover, are consumers of professional services, albeit the underlying issues at stake frequently transcend the purely economic. Yet the ideology of the market can only be pushed so far, in part because of the profession's significant non-economic role within the broader societal structure, but also because the legal services market is notably removed from the archetype of perfect competition. The advent of liberalisation, moreover, alters expectations of what is required of lawyers, whether by their clients, by government or by society beyond.

This article aims to map and explain the shift towards a market-focused approach to legal services provision. To do so, the article describes and explores the distinctive dynamics of supply and demand within contemporary legal services markets. It then considers the potential implications of reconceptualising the legal system and the profession in explicitly economic terms. Legal liberalisation encompasses an array of regulatory, political and even technological developments, much of which has been considered elsewhere.<sup>4</sup> The article seeks to add to the existing literature by taking the basic premise of liberalisation – that economic activity should be subject to competitive market forces – and considering the consequences that follow for lawyers and their clients. It thus endeavours to give greater shape and content to the often-ambiguous notion of liberalisation as it is deployed in this context, and to provide a reasoned assessment of its prospects for success when considered on those terms.

<sup>4</sup> An excellent overview is H. Sommerlad, A. Francis, J. Loughrey and S. Vaughan, “England & Wales: A Legal Profession in the Vanguard of Professional Transformation?” in R.L. Abel, O. Hammerslev, H. Sommerlad and U. Schultz (eds.), *Lawyers in 21st-Century Societies*, vol. 1 (London 2020).

The article begins by examining the past and present structure of the profession (Section II), arguments in favour of liberalisation (Section III), and five manifestations of liberalisation efforts (Section IV). The primary contribution is contained in Section V, which considers the emergent dynamics of the supply and demand sides of the legal services sector in the wake of liberalisation. Section VI concludes briefly.

## II. THE LEGAL PROFESSION: PAST AND PRESENT

We begin with an overview of the legal profession in England and Wales. Legal services are an expansive product category. They comprise “reserved” legal activities – rights of audience, conduct of litigation, reserved instrument activities, probate, notarial services and administration of oaths – and other non-reserved activities, namely “the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes; [and] the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes”.<sup>5</sup> Reserved legal services can be provided only by appropriately qualified practitioners,<sup>6</sup> making this the most straightforward understanding of what a “lawyer” entails. Services provided by qualified practitioners in their professional capacities or by authorised providers that employ those individuals, moreover, come within the notion of “regulated” services, and are subject to full regulatory scrutiny even if the specific activity is outside the reserved core.<sup>7</sup> Both reserved and regulated services thus fall within the “professional” sphere of the market. Yet the broad definition of legal services above allows ample scope for unreserved activities (e.g. general legal advice, employment advice, will-drafting) provided by unregulated entities (e.g. citizens advice bureaux, trade unions, will-writers).

Regulatory tasks in respect of reserved activities are performed today by numerous professional bodies.<sup>8</sup> Yet for centuries the legal profession in England and Wales comprised primarily two branches: barristers, the “senior” branch, and their more numerous “junior” colleagues, solicitors. Largely an artefact of historical development, the distinction between barrister and solicitor titles is one of the more idiosyncratic features of the jurisdiction. Each branch originally enjoyed its own monopoly in its practice area – rights of advocacy for the Bar, conveyancing by solicitors – and each

<sup>5</sup> Legal Services Act 2007 (LSA07), s. 12.

<sup>6</sup> *Ibid.*, s. 13

<sup>7</sup> There are exceptions: e.g. treatment of multi-disciplinary partnerships under the SRA Standards and Regulations, November 2019.

<sup>8</sup> Including the Institute of Legal Executive, Office of the Immigration Services Commissioner, Council for Licensed Conveyancers, Chartered Institute of Patent Agents, Institute of Trade Mark Attorneys and Faculty Office.

today maintains distinctive entry and training requirements, representative and regulatory bodies, and core or conventional practice areas.

In considering the impact of liberalisation on the legal profession, however, this article takes a broader functional approach that focuses on lawyers as legal service-providers: subject to regulatory obligations but also to increasing competitive pressures. This approach acknowledges the blurring of traditional demarcations between the discrete branches and the increasing fragmentation within the branches themselves; both issues are considered below. It also mirrors the approach in recent high-level reports on the sector. These include the Clementi Report, which suggested that the different professional branches should no longer be regarded as separate professions, in part due to earlier liberalisation efforts;<sup>9</sup> and those of studies by the Legal Education and Training Review,<sup>10</sup> Competition and Markets Authority<sup>11</sup> and Institute for Employment Studies<sup>12</sup>, each of which adopts an expansive understanding of “legal services” as the focus for reform. It further reflects academic work which identifies an emergent quality of liminality among legal professionals,<sup>13</sup> alongside the disruptive market dynamics that provide the starting point for this piece.<sup>14</sup> Where relevant, however, title-based distinctions are flagged and discussed. Given its research question, the article does not consider the judiciary nor directly address lawyers in government service, although both often have prior experience of private practice.

The legal sector has long-exhibited many of the characteristics that distinguish liberal professions from other business activities. These include mastery of a specialised field of knowledge, representation by a governing body (here, *bodies*) with control over members, entry requirements focused on competence, powers of self-regulation imposing elevated standards of practice, and limitations on self-interest, namely the lawyer’s overriding duty to her client.<sup>15</sup> Burrage recognised a notable paradox in the historical

<sup>9</sup> D. Clementi, “Review of the Regulatory Framework for Legal Services in England and Wales – Final Report”, 2004, available at <https://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/content/report/index.htm> (last accessed 5 February 2021) (“Clementi Review”), 4.

<sup>10</sup> Legal Education and Training Review (LETR), “Setting Standards – the Future of Legal Services Education and Training Regulation in England and Wales”, 2013, available at <https://letr.org.uk/wp-content/uploads/LETR-Report.pdf> (last accessed 5 February 2021).

<sup>11</sup> Competition and Markets Authority, “Legal Services Market Study – Final Report”, 2016, available at <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf> (last accessed 5 February 2021) (“CMA Study”).

<sup>12</sup> M. Williams, J. Buzzeo, J. Cockett, S. Capuano and H. Takala, “Research to Inform Workforce Planning and Career Development in Legal Services – Employment Trends, Workforce Projections and Solicitor Firm Perspectives – Final Report”, (2019) IES Report 537, available at <https://www.employment-studies.co.uk/resource/research-inform-workforce-planning-and-career-development-legal-services> (last accessed 5 February 2021) (“IES Report”), 97–98.

<sup>13</sup> L. Bleasdale and A. Francis, “Great Expectations: Millennial Lawyers and the Structures of Contemporary Legal Practice” (2020) 40 *Legal Studies* 376, 381.

<sup>14</sup> Sommerlad et al., “Vanguard of Professional Transformation”.

<sup>15</sup> R.L. Abel, *The Making of the English Legal Profession* (Washington 1998), 6–7.

development of the legal profession: as English society generally became more entrepreneurial and market-oriented, lawyers became progressively less so, largely immune to regulation by state or market.<sup>16</sup> Hanlon similarly identified two progressive stages of evolution: from a gentlemanly conception of professionalism, whereby lawyers were status-holders associated with the elite, to a social service conception linked to ideas of social democracy.<sup>17</sup> Yet, notably lacking from either conception is enthusiasm for or engagement with the *market* as such.

This archetypal view – of a homogeneous, high-status profession composed of individual providers – has changed since the mid-twentieth-century.<sup>18</sup> Three strands of this shift are of interest. First, there was an “extraordinary”<sup>19</sup> growth in the size of the profession from the 1960s onwards.<sup>20</sup> Relevant factors included increased legal aid, the emergence of academic legal education creating a career pathway, increased numbers of women joining the profession and changing social patterns, including greater homeownership and divorce which created additional legal need.<sup>21</sup> Increased numbers have two important consequences: greater heterogeneity among professionals, which potentially challenges the distinctive identity that the principal branches cultivated over many decades; and a risk of oversupply leading to increased competitive pressures, including downward pressure on prices and the possibility of market exit by suppliers.

Second, although the profession was initially spared the brunt of Thatcherite deregulatory fervour, from the late 1980s onwards its restrictions and professional practices were viewed with suspicion. Thus the historic latitude granted to the legal profession, whereby regulatory independence was a core requirement to discharge its perceived constitutional role of protecting the rights and liberties of citizens, was progressively pared back.<sup>22</sup> An important milestone was the Courts and Legal Services Act 1990, which removed the practice monopolies of the principal

<sup>16</sup> M. Burrage, *Revolution and the Making of the Contemporary Legal Profession* (Oxford 2006), 593.

<sup>17</sup> G. Hanlon, *Lawyers, the State and the Market* (Basingstoke 1999).

<sup>18</sup> Abel, *Legal Profession*, 307.

<sup>19</sup> M. Zander, *Legal Services for the Community* (London 1978), 25.

<sup>20</sup> There were around 18,700 solicitors with practising certificates in 1952 (*The Law Society Gazette*, “Those Were the Days”, available at <https://www.lawgazette.co.uk/news/those-were-the-days/37198>, article (last accessed 5 February 2021)), 54,734 in 1989 and 146,953 in 2019 (*The Law Society*, “Trends in the Solicitors’ Profession – Annual Statistics Report 2019”, 2020, available at <https://www.lawsociety.org.uk/en/topics/research/annual-statistics-report-2019> (last accessed 5 February 2021), 31). The numbers at the Bar were 2,518 in 1970, 6,835 in 1991 (M. Blacksell and C. Fussell, “Barristers and the Growth of Local Justice in England and Wales” (1994) 19 *Transactions of the Institute of British Geographers* 482, 484, 486) and 17,367 in 2019 (BSB, “Diversity at the Bar 2019”, 2020, available at <https://www.barstandardsboard.org.uk/uploads/assets/912f7278-48fc-46df-893503eb729598b8/Diversity-at-the-Bar-2019.pdf> (last accessed 5 February 2021), 11).

<sup>21</sup> Discussed by Sommerlad et al., “Vanguard of Professional Transformation”, and R. Abel, “England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors” in R. Abel and P.S.C. Lewis (eds.), *Lawyers in Society* (Berkeley 1995), ch. 2.

<sup>22</sup> Described in R.L. Abel, *English Lawyers between Market and State: The Politics of Professionalism* (Oxford 2003).

branches. The Legal Services Act 2007, discussed below, broke a further monopoly by enabling non-lawyers to take financial interests in legal services firms. Gradually, state-endorsed restrictions on practice have been removed, thus exposing lawyers, at least in principle, to ever-greater competition.

Third, the rise and fall of legal aid provision has an important role in defining the profession. A modern system for criminal and certain civil matters was introduced by the Legal Aid and Advice Act 1949, as a complement to the emerging welfare state. Its scope was expanded in 1970, when a broader range of civil claims came within its ambit. With funding came greater opportunity to translate abstract legal need into concrete demand, with knock-on expansionary effects for service-providers. From the mid-1980s, however, the increasing cost of provision, together with its close alliance to (by then much-maligned) welfare statism, led to criticism of its perceived profligacy. This resulted in sustained efforts by Tory governments to cut costs, primarily by reducing rates.<sup>23</sup> Yet legal aid reform was more than a partisan issue, with New Labour subsequently attempting to “marketise” provision in the Access to Justice Act 1999.<sup>24</sup> To sell its reforms, the Government attacked “fat cat” lawyers, who were characterised as profiting at the public’s expense.<sup>25</sup> The Coalition Government further reduced – arguably “decimated”<sup>26</sup> – both civil and criminal provision. This has profound effects for two constituencies: individuals who rely upon legal aid to secure access-to-justice, and professionals whose work is funded, wholly or partly, by legal aid. The implications for both are considered in Section V.

### III. NARRATIVES OF LIBERALISATION

Before considering how liberalisation occurs within the legal profession, we might ask why it may be necessary. Broadly speaking, liberalisation implies a transition from controlled to competitive markets. Ordinary usage encompasses a spectrum of market-making and -shaping activities, including deregulation, privatisation, structural separation and antitrust enforcement. In professional services, liberalisation implies a removal of common restraints on competition, including restrictions on entry, organisational form, promotional activity and pricing.<sup>27</sup>

<sup>23</sup> *Ibid.*, at ch. 7.

<sup>24</sup> *Ibid.*, at ch. 8. The Act removed money claims from legal aid, imposed minimum service standards and imposed merits tests to remove unmeritorious cases: *ibid.*, at 344; and A. Paterson, *Lawyers and the Public Good* (Cambridge 2011), 89. In *Coventry v Lawrence No.3* [2015] UKSC 50, [2015] 1 W.L.R. 3485, at [72], the Supreme Court acknowledged that its introduction meant that “a widely-accessible civil legal aid system . . . ceased to exist”.

<sup>25</sup> Abel, *English Lawyers*, 344.

<sup>26</sup> See “Visit to the United Kingdom of Great Britain and Northern Ireland – Report of the Special Rapporteur on Extreme Poverty and Human Rights”, (2019) A/HRC/41/39/Add.1, available at <https://digitallibrary.un.org/record/3806308?ln=en> (last accessed 5 February 2021), 9.

<sup>27</sup> F.H. Stephen, *Lawyers, Markets and Regulation* (Cheltenham 2013), 23.

Liberalisation is, to put it mildly, a disputed form of regulatory policy-making.<sup>28</sup> It is closely associated with neoliberalism, a rough understanding of which is the promotion of less state/more market in economic and social governance.<sup>29</sup> Debates on liberalisation often take a polarised form: from viewing the process as a baseline requirement for inclusion within the modern global economy,<sup>30</sup> to a dogmatic enterprise that aims to introduce market forces at any cost and as an end itself in itself<sup>31</sup> – the “commodification of everything”.<sup>32</sup> Assuming that legal liberalisation is not *purely* an ideological exercise, it is valuable to consider its anticipated benefits – and thus its underlying regulatory rationale. Legal liberalisation is advocated from two distinct perspectives: that of a “free competition” argument, and that of an “access-to-justice” argument.

#### A. The “Free Competition” Argument

[F]ree competition between the providers of legal services will, through the discipline of the market, ensure that the public is provided with the most efficient network of legal services at the most economical prices.<sup>33</sup>

The “free competition” argument emphasises the extent to which the legal profession constitutes a business activity like any other. Lawyers are service-providers, clients are consumers and legal services are akin to a commodity, commanding a market price and susceptible to forces of supply and demand. From this perspective, there is no meaningful distinction between lawyers and plumbers; to the extent that perceptions of difference persist, these are attributable primarily to the pretensions of lawyers.<sup>34</sup> Accordingly, legal services cannot and should not escape the new normal of liberalisation and competition. Subjecting the profession to greater competitive pressures has the potential to generate the attendant benefits of an open market: downward pressure on prices and greater choice on the demand side; increased opportunities for new entrants offering more innovative or cost-effective services on the supply side; and reduced need for costly regulation. It also removes an anomalous and illegitimate advantage: to the extent that we do not permit plumbers to

<sup>28</sup> A provocative account focusing on the professions is K.T. Leicht, “Market Fundamentalism, Cultural Fragmentation, Post-modern Skepticism, and the Future of Professional Work” (2016) *Journal of Professions and Organisation* 103.

<sup>29</sup> D. Singh Grewal and J. Purdy, “Introduction: Law and Neoliberalism” (2014) 77 *Law and Contemporary Problems* 1; D. Harvey, *A Brief History of Neoliberalism* (Oxford 2005). The term is, however, criticised as potentially “too vague or polemical for responsible use”: Singh Grewal and Purdy, “Introduction”, 2.

<sup>30</sup> J. Clifton, F. Comin and D. Díaz-Fuentes, “Privatizing Public Enterprises in the European Union 1960–2002: Ideological, Pragmatic, Inevitable?” (2006) 13 *J.E.P.P.* 736, 738.

<sup>31</sup> T. Prosser, *The Limits of Competition Law* (Oxford 2005), 123.

<sup>32</sup> Harvey, *Neoliberalism*, 165.

<sup>33</sup> Lord Chancellor’s Department, *The Work and Organisation of the Legal Profession*, Cm 570, 1989, at [1.2].

<sup>34</sup> A suggestion of Paterson, *Public Good*, 12.

cartelise because it contravenes the public interest, lawyers should be held to an equivalent standard.

The free competition argument emphasises the perceived link between liberalisation and neoliberalism.<sup>35</sup> For some commentators, legal liberalisation is driven primarily by a political agenda aimed at deepening markets forces while rolling back the state.<sup>36</sup> The liberalisation programme has been associated with a “hegemony of neoliberal thinking about the relationship between the public and private sectors, the benefits of applying the logics of the market to wider and wider spheres of human activity, and transferring responsibility for the resolution of social problems from the state to the individual”.<sup>37</sup> A provocative related account suggests that conservatives targeted the profession because of its association with social democracy, principally the link to the welfare state through legal aid.<sup>38</sup> The crux of this rationale, nonetheless, is the assumed superiority and perhaps inevitability of market forces as the organising principle for economic and social activity, including the law.

Although persuasive as a partial explanation for the practice of liberalisation, the free competition argument encounters two difficulties. The first is that legal services markets are far from the archetype of perfect competition.<sup>39</sup> Legal services are a product where a minimum level of quality is important: a will must be validly executed, a property correctly conveyed, etc. Yet it is difficult for clients to know *ex ante* whether their lawyer has the requisite skills, while problems in service delivery may be discovered only years later when parties seek to rely upon the original work (upon death of the testator, reconveyance of the property, etc.).<sup>40</sup> This contrasts with, say, inadequate plumbing services, the effects of which tend to be more readily apparent to purchasers. Legal consumers furthermore often require services at periods of acute vulnerability or “great need”.<sup>41</sup> Accordingly, regulatory intervention to ensure minimum quality levels,

<sup>35</sup> J. Webb, “The LETRs (Still) in the Post: The Legal Education and Training Review and the Reform of Legal Services Education and Training – A Personal (Re)view” in Sommerlad et al., *Futures*, ch. 6, 102; S. Aulakh and I. Kirkpatrick, “Changing Regulation and the Future of the Professional Partnership: The Case of the Legal Services Act, 2007 in England and Wales” (2016) 23 *International Journal of the Legal Profession* 277, 281.

<sup>36</sup> Stephen, *Markets and Regulation*, 83.

<sup>37</sup> Sommerlad et al., “Futures”, 4.

<sup>38</sup> Hanlon, *State and the Market*, 27.

<sup>39</sup> OECD, “Competitive Restrictions in Legal Professions”, (2009) DAF/COMP(2007)39, available at <https://www.oecd.org/regreform/sectors/40080343.pdf> (last accessed 5 February 2021); C. Decker and G. Yarrow, “Understanding the Economic Rationale for Legal Services Regulation: A Report for the Legal Services Board”, 2010, available at [https://www.legalservicesboard.org.uk/Projects/rationalising\\_scope\\_of\\_regulation/pdf/economic\\_rationale\\_for\\_Legal\\_Services\\_Regulation\\_Final.pdf](https://www.legalservicesboard.org.uk/Projects/rationalising_scope_of_regulation/pdf/economic_rationale_for_Legal_Services_Regulation_Final.pdf) (last accessed 5 February 2021).

<sup>40</sup> Zander, *Legal Services*, 137.

<sup>41</sup> Competition and Markets Authority, “CMA Publishes Review of Progress in Legal Services Sector”, <https://www.gov.uk/government/news/cma-publishes-review-of-progress-in-legal-services-sector> (last accessed 5 February 2021).



arguably, remains warranted in the public interest, over and above ordinary consumer protection rules. Moreover, injecting competition into the legal services sector, even if considered desirable, appears to be less-than-straightforward, as the available empirical evidence suggests that, thus far, liberalisation has not significantly increased competition in England and Wales.<sup>42</sup>

The second difficulty is that even well-functioning legal services markets are unlikely to satisfy all consumer need. Legal services remain an expensive commodity even under competition. Recent experiences in markets affected by legal aid cuts, for instance, indicate that, for the most disadvantaged section of the population, legal assistance remains an unaffordable luxury.<sup>43</sup> Efficiency in distribution is thus insufficient to ensure complete coverage. Instead, some degree of *redistribution*, whether through state subvention or cross-subsidisation between users, is necessary.<sup>44</sup> From this perspective, a degree of market failure is inherent in legal services.<sup>45</sup>

### B. The “Access-to-justice” Argument

Access-to-justice requires not only that the legal advice given is sound, but also the presence of the business skills necessary to provide a cost-effective service in a consumer-friendly way.<sup>46</sup>

A well-functioning market . . . is particularly important where the products or services are critical to consumers, the economy and society.<sup>47</sup>

An alternative perspective focuses on the ability of a liberalised legal services market to improve “access-to-justice”, thus advancing what many would argue are inherently *non-economic* values including equality, democracy and protection for the rule of law.<sup>48</sup> Access-to-justice can be defined, broadly, as the ability of people to obtain just resolution of justiciable problems and enforce their rights, in compliance with human rights standards.<sup>49</sup> In contrast to the free competition argument, the access-to-justice rationale emphasises the distinctiveness of legal services: the profession is embedded in, and contingent upon, the wider social

<sup>42</sup> Stephen, *Markets and Regulation*, 106; CMA Study.

<sup>43</sup> “Visit to the United Kingdom – Report of the Special Rapporteur on Extreme Poverty and Human Rights”; Amnesty International, “Cuts that Hurt: The Impact of Legal Aid Cuts in England on Access to Justice”, 2016, available at [https://www.amnesty.org.uk/files/aiuk\\_legal\\_aid\\_report.pdf](https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf) (last accessed 5 February 2021); L. Trinder, “Taking Responsibility? Legal Aid Reform and Litigants in Person in England” in M. Maclean, J. Eekelaar and B. Bastard (eds.), *Delivering Family Justice in the 21st Century* (Oxford 2015).

<sup>44</sup> A. Higgins, “The Costs of Civil Justice and Who Pays?” (2017) 37 O.J.L.S. 687.

<sup>45</sup> Paterson, *Public Good*, 77.

<sup>46</sup> Clementi Review, 5.

<sup>47</sup> CMA Study, at [2.3].

<sup>48</sup> A. Hudson, *Towards a Just Society* (London 1999), 17–18.

<sup>49</sup> OECD and the Open Society Foundation, *Legal Needs Surveys and Access to Justice* (Paris 2019), 24.

structure,<sup>50</sup> operating as a public safeguarding service.<sup>51</sup> Access to effective legal assistance, from this perspective, is indispensable to pursuit of justice.<sup>52</sup> Yet accessibility depends on affordability, as legal need can be satisfied only where purchasing legal services is within the grasp of consumers.<sup>53</sup> The lynchpin of any cartelisation strategy is creation of artificial scarcity: cartelists, whether lawyers or plumbers, reduce the quantity of goods/services available below the competitive level to earn supra-competitive profits on remaining supply. Hence liberalisation – and with it, removal of barriers to entry and other producer-imposed restraints on trade – has the potential to further access-to-justice by increasing the availability, and reducing the price, of legal services.<sup>54</sup>

Although prominent in contemporary discourse, the access-to-justice argument also encounters two difficulties in practice. The first is the compromise, and thus risk, that is inherent in increasing access by increasing competition. Although effective provision of legal services requires both efficacy and efficiency, these two values are not necessarily mutually reinforcing. In particular, there may be a trade-off between quality and cost.<sup>55</sup> High-quality legal services are often more costly to provide, thus restricting *access* to a narrower subset of wealthier clients. Yet greater availability of lower-cost, lower-quality services may compromise the objective of achieving *justice* if it prompts a drop in professional standards.<sup>56</sup> This tension is seen, *inter alia*, in debates regarding commoditisation, discussed below, where the price of tackling inefficiency in individualised service provision may be the de-professionalisation of providers and the downgrading of services offered.<sup>57</sup>

The second difficulty is similar to that encountered in the context of the free competition argument: regardless of how effectively competition develops within legal services markets, a sizeable subset of – typically the most vulnerable among – the population remains outside its reach. Even if one does not object to conceptualising the citizen coming to law as a “consumer” of legal services,<sup>58</sup> absent sufficient means the consumer cannot access assistance, and thus in practice the citizen is denied equal access.<sup>59</sup> The necessary solution again is to remove this from the purview of the

<sup>50</sup> Sommerlad et al., “Futures”, 5.

<sup>51</sup> J.R. Faulconbridge and D. Muzio, “Financialisation by Proxy: The Case of Large City Law Firms” in Sommerlad et al., *Futures*, ch. 3, 42.

<sup>52</sup> R.L. Abel, “An Agenda for Research on the Legal Profession and Legal Education: One American’s Perspective” in Sommerlad et al., *Futures*, ch. 10, 216.

<sup>53</sup> A. Roy, “Creating a More Flexible Approach to Education and Training” in Sommerlad et al., *Futures*, ch. 8, 170.

<sup>54</sup> R. Susskind, *Tomorrow’s Lawyers: An Introduction to Your Future*, 2nd ed. (Oxford 2017), 32.

<sup>55</sup> CMA Study, at [5.1].

<sup>56</sup> Clementi Review, 6.

<sup>57</sup> Stephen, *Markets and Regulation*, 120.

<sup>58</sup> Cf. Hudson, *Just Society*, 9, 31.

<sup>59</sup> Cf. Higgins, “Costs of Civil Justice”, 693, who queries why legal assistance is considered inviolable when other public services are rationed.

market through public or private subvention, and legal aid in particular is a core strand of the access-to-justice project.<sup>60</sup> Yet, although this does not invalidate the access-to-justice rationale for liberalisation, again we see its limits: the economic understanding of a legal services “market” does not map precisely onto broader notions of justice and thus law as a public good.

The expansive understanding of liberalisation in this article includes efforts to restructure legal aid, discussed below. In this context we typically refer to marketisation, yet the above rationales remain applicable. The free competition argument would link marketisation to broader efforts to corporatise and privatise public services in the interests of efficiency, and perhaps ultimately to roll-back the welfare state. The access-to-justice argument may justify using market forces to achieve maximum value from finite legal aid budgets. The extent to which such arguments are plausible and legitimate takes us into delicate political territory beyond the scope of this article; yet the parallel movement towards marketisation of legal aid remains an important component of the transformation of the legal profession which informs our analysis.

#### IV. LIBERALISATION AND THE FUTURE OF THE LEGAL PROFESSION

Liberalisation, as noted, implies a transition from controlled to competitive markets. In this section, we examine five manifestations of such transition within the contemporary legal services sector. The first two examples comprise instances of liberalisation in a strict sense, involving removal of restrictions on practice and entry. The next two represent important sources of competitive pressure, which have prompted or are likely to prompt greater commoditisation of provision. The final example illustrates the dynamics of competition in liberalised legal services markets. The aim is not to provide a comprehensive overview of legal liberalisation, but rather to sketch its most important or illuminating elements. In doing so, this section informs our interrogation of the implications of liberalisation in Section V.

##### *A. Clementi Report and Legal Services Act 2007*

Arguably, the most significant recent development is the Clementi Review of the Regulatory Framework for Legal Services in England and Wales, which resulted in enactment of the avowedly liberalising Legal Services Act 2007 (LSA07). The Review, the final report of which was published in December 2004, was directed towards investigating “what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal

<sup>60</sup> Paterson, *Public Good*, 60. See also discussion of justice as a “basic” good like electricity or water, in Decker and Yarrow, *Legal Services Regulation*, 15–19.

sector”.<sup>61</sup> As noted, the legal sector had long followed a model of self-regulation, under the aegis of the Bar Council for barristers and the Law Society for solicitors. Although not inherently defective as a regulatory approach, there was a widely held view that self-regulation had failed effectively to discipline or deter inadequate or inappropriate behaviour by lawyers.<sup>62</sup> Three of the Review’s recommendations, and their implementation in LSA07, are important for our purposes.

The first is Clementi’s endorsement of a split of representative and regulatory functions within the professional organisations that comprise the profession, with oversight of frontline regulators by an independent umbrella regulator. This was encapsulated in establishment of the Legal Services Board (LSB) under Part 2 of LSA07, alongside the separation of, *inter alia*, the Solicitors Regulatory Authority (SRA) and Bar Standards Board (BSB) from the Law Society and Bar Council, respectively. Justifying departure from self-regulation, Clementi focused on the inherent conflict of interest it generates; suggesting, in effect, that practitioners could not be *trusted* – but nor should they be *expected* – to promote public and consumers interests at the expense of their private interests.<sup>63</sup> Yet splitting representative and regulatory functions, arguably, encourages the professional associations to become *quasi*-trade associations, focused on promoting members’ interests; a single-minded approach which, Paterson argued, clashes with the essence of professionalism.<sup>64</sup>

The second recommendation related to complaints procedures for legal services. The Review highlighted a perceived inadequacy of the existing procedures of the professional bodies, concerning both the quantity and quality of complaints assessment.<sup>65</sup> In recommending a single independent body to handle consumer complaints – culminating in creation of the Legal Services Ombudsman under the Office for Legal Complaints – the Review sought to simplify, clarify and ensure consistency and independence of complaints procedures.<sup>66</sup> The alignment of procedures for the various branches further blurs the line between ostensibly distinct legal service-providers. It also requires all lawyers to become more consumer-focused, by taking complaints about poor quality service seriously.

Finally, the Review recommended introduction of “alternative business structures” (ABSs), departing from long-standing restrictions that prevented barristers and solicitors from entering into partnerships with other professionals, whether lawyers or non-lawyers.<sup>67</sup> ABSs comprise legal practices

<sup>61</sup> Clementi Review, 1.

<sup>62</sup> Abel, *English Lawyers*, 398; Stephen, *Markets and Regulation*, 40.

<sup>63</sup> Clementi Review, 27–29.

<sup>64</sup> Paterson, *Public Good*, 33.

<sup>65</sup> Clementi Review, 57–61.

<sup>66</sup> *Ibid.*, at 64.

<sup>67</sup> *Ibid.*, at 105.

where a management role or ownership interest is held by a “non-authorised” person or body, that is, a non-lawyer.<sup>68</sup> In approving the introduction of ABSs, the Review swept away conventional justifications for a restrictive approach to legal business structures. It exploded the myth of lawyers as dispassionate professionals operating outside the market, casting scorn on “the notion that for lawyers, unlike businessmen, making money is merely a happy by-product of doing their professional duty”.<sup>69</sup> It emphasised the extent to which practitioners engage in profit-seeking behaviour,<sup>70</sup> including cherry-picking of profitable activities;<sup>71</sup> that consumers value not merely effective legal skills but also lower prices<sup>72</sup> alongside high-quality business services;<sup>73</sup> and the potential for new entrants and investors to introduce innovative “fresh ideas” that would enable more effective and efficient service provision.<sup>74</sup> In the years since enactment of LSA07, the number of ABSs has risen steadily but slowly,<sup>75</sup> arguably falling short of expectations.<sup>76</sup> Introduction of the possibility of ABSs nonetheless altered the status quo within the profession, moving away from the public interest values implicit in the partnership model,<sup>77</sup> and reflecting instead a “more entrepreneurial vision of the future role of the lawyer”.<sup>78</sup> The gradual uptake of ABS licences also appears to be altering modes of doing business, with greater emphasis on integrated client-specific service provision, and reduced emphasis on traditional values like professionalism and access-to-justice.<sup>79</sup>

### *B. Legal Education and Training Review (LETR) and Introduction of the Solicitors Qualifying Examination (SQE)*

A second key development is the LETR,<sup>80</sup> and subsequent efforts of the SRA to reform entry pathways for solicitors. The LETR was commissioned by the principal frontline regulators<sup>81</sup> to review the education and training requirements of individuals and entities delivering legal services.<sup>82</sup> It was

<sup>68</sup> LSA07, s.72.

<sup>69</sup> Clementi Review, 122.

<sup>70</sup> *Ibid.*, at 121–22.

<sup>71</sup> *Ibid.*, at 119.

<sup>72</sup> *Ibid.*, at 108.

<sup>73</sup> *Ibid.*, at 133–34.

<sup>74</sup> *Ibid.*, at 115.

<sup>75</sup> As of November 2019, there were around 1,300 ABSs, from a profession of 10,000 firms: A. Francis, “Law’s Boundaries: Connections in Contemporary Legal Professionalism” (2020) 7 *Journal of Professions and Organization* 70, 73.

<sup>76</sup> Aulakh and Kirkpatrick, “Changing Regulation”, 282.

<sup>77</sup> *Ibid.*, at 277.

<sup>78</sup> Paterson, *Public Good*, 25.

<sup>79</sup> Francis, “Law’s Boundaries”, 75–76.

<sup>80</sup> LETR.

<sup>81</sup> SRA, BSB and Institute of Legal Executives Professional Standards.

<sup>82</sup> LETR, v.

prompted by the perceived expansion and evolution of the legal services market in England and Wales, triggered by LSA07.<sup>83</sup> Other relevant factors included the prospect of technological innovation in service delivery, reduced intakes after the Global Financial Crisis, a rise in outsourcing and the high cost of legal education which, inter alia, lowered uptake among new entrants of social justice-oriented work.<sup>84</sup> The LETR had to grapple with traditional arguments for and against restrictive entry requirements: whether a blunt but plausibly effective guarantor of quality service provision;<sup>85</sup> or simply a means to control supply.<sup>86</sup> Three themes emerged: namely, the need for legal education to ensure, *simultaneously*, quality, accessibility and flexibility in training.

Among other developments, the LETR prompted the SRA to reconsider training routes for entry into the solicitor profession. The motivation behind the *Training for Tomorrow* review echoed the LETR's findings: to ensure consistently high standards across the solicitor branch, and to remove barriers to access.<sup>87</sup> It culminated in proposals to replace the existing decentralised training route with a two-stage SQE. This abandons the Qualifying Law Degree (QLD), and focuses on an ostensibly more relevant range of legal practice topics.<sup>88</sup> The move followed extensive consultation with stakeholders and no small amount of controversy, with the solicitor branch, for the most part, "distinctly underwhelmed" by the proposed changes.<sup>89</sup> Large corporate firms expressed particular concern about a glut of mediocre, underprepared junior lawyers flooding the market;<sup>90</sup> a concern that sits uneasily with the SRA's insistence that the SQE provides the most appropriate mechanism by which to guarantee the quality and competence of solicitors, while removing supposed barriers to worthy yet underprivileged candidates. Yet employers with greater personal experience of recruiting staff via non-traditional routes are more positive about its prospect.<sup>91</sup> The much-disputed innovations of the SQE raise interesting questions, particularly the role of competence – perceived *and* actual – as a dimension of competition. This is considered further below.

<sup>83</sup> LETR, v.

<sup>84</sup> Webb, "LETRS".

<sup>85</sup> Roy, "More Flexible Approach", 171.

<sup>86</sup> Abel, *English Lawyers*, 114–16.

<sup>87</sup> SRA, "Training for Tomorrow", 2013, available at <https://www.sra.org.uk/globalassets/documents/sra/training-tomorrow.pdf?version=49a4a5> (last accessed 5 February 2021), 5.

<sup>88</sup> SRA, "Solicitors Qualifying Examination (SQE) Briefing", 2020, available at <https://www.sra.org.uk/globalassets/documents/sra/news/sqe-briefing.pdf?version=4a3d31> (last accessed 5 February 2021). The SQE was approved by the LSB, "Decision Notice 27 October 2020", available at <https://www.legal-servicesboard.org.uk/wp-content/uploads/2020/10/20201027-Decision-Notice-SQE.pdf> (last accessed 5 February 2021). The SQE regulations come into force from 1 September 2021.

<sup>89</sup> E. Hall, "Notes on the SRA Report of the Consultation on the Solicitors Qualifying Exam: 'Comment Is Free, but Facts are Sacred'" (2017) 51 *The Law Teacher* 364, 370.

<sup>90</sup> IES Report, 97–98.

<sup>91</sup> *Ibid.*, at 98.

### C. Disruptive Innovation in Legal Services Provision

We turn to market features that augment the effects of competition for legal services, thus reinforcing the impact of liberalisation. The first is the prospect of disruptive innovation, via new legal technologies (lawtech) that change and ultimately challenge traditional modes of services provision. Lawtech has no fixed definition and can be understood expansively. Susskind, for instance, identified 13 categories of lawtech with the potential to disrupt conventional approaches to lawyering: including document automation, online dispute resolution, online reputation systems, online education and the prospect of “legal question answering” using artificial intelligence (AI).<sup>92</sup> A narrower understanding of lawtech is as “technology that provides self-service direct access to legal services for consumers”, and thus “substitutes for a lawyer’s input”.<sup>93</sup> This is distinct from greater use of technology by administrative agencies tasked with applying legal rules,<sup>94</sup> or by courts adjudicating disputes,<sup>95</sup> which fall outside the scope of this article.

Disruptive technologies coincide with liberalisation of the profession to the extent that they facilitate the commoditisation of legal work: moving away from the “cottage industry” model of bespoke services provided to individual clients with unique issues, and towards standardisation, systematisation and even externalisation (i.e. pre-packaging and online provision) of legal products.<sup>96</sup> Commoditised legal work, at its most crude, might be characterised as “work from which [lawyers] can no longer make money”.<sup>97</sup> There is also potential for a feedback effect, insofar as deregulation and competition create scope for technological innovation in lawyering.<sup>98</sup>

The full impact of the development of lawtech, and in particular its potential to disrupt legal services provision, is an open question. There is little evidence that the traditional role of the “lawyer” is headed for extinction anytime soon, being considered among the least likely candidates for mechanisation by AI in future.<sup>99</sup> To date, the legal profession in England and Wales has, depending on one’s perspective, either successfully resisted

<sup>92</sup> Susskind, *Tomorrow’s Lawyers*, 44–55.

<sup>93</sup> Competition and Markets Authority, “Review of the Legal Services Market Study in England and Wales – An Assessment of the Implementation and Impact of the CMA’s Market Study Recommendations”, 2020, available at <https://www.gov.uk/cma-cases/review-of-the-legal-services-market-study-in-england-and-wales> (last accessed 5 February 2021) (“CMA Implementation Review”), at [20].

<sup>94</sup> Discussed in J. Cobbe, “Administrative Law and the Machines of Government: Judicial Review of Automated Public-sector Decision-making” (2019) 39 *Legal Studies* 636.

<sup>95</sup> Discussed in A. Zuckerman, “Artificial Intelligence – Implications for the Legal Profession, Adversarial Process and Rule of Law” (2020) 136 *L.Q.R.* 427.

<sup>96</sup> Susskind, *Tomorrow’s Lawyers*, 25–30.

<sup>97</sup> *Ibid.*, at 25.

<sup>98</sup> Stephen, *Markets and Regulation*, 127.

<sup>99</sup> J. Morison and A. Harkens, “Re-engineering Justice? Robot Judges, Computerised Courts and (Semi) Automated Legal Decision-making” (2019) 39 *Legal Studies* 618, 619.

or failed to reap the benefits of the anticipated lawtech revolution.<sup>100</sup> Reticence may, however, prove unviable longer-term. Greater recourse to lawtech is not necessarily anathema to quality services provision, moreover, potentially enabling for instance the pooling of legal expertise.<sup>101</sup> A counter-argument is that it may “impoverish” expertise insofar as lawyers are no longer required to exercise a range of traditional legal skills.<sup>102</sup> Human lawyers nonetheless continue to possess various “added-value” attributes when compared with lawtech-based provision, including greater empathy with clients, a commitment to ethics-based lawyering and the capacity to address legal novelty.<sup>103</sup>

Yet, to the extent that legal services provision can be and increasingly is “decomposed” into distinct tasks, at least some of which can be “de-lawyered” (i.e. effectively performed by non-lawyers, including via lawtech),<sup>104</sup> then the putative specialness of the lawyer’s craft may be insufficient to retain its current business. As Legg and Bell argue, it is unhelpful to generalise about the impact of lawtech as a whole. Instead, it is necessary to consider discrete practice areas, some of which (e.g. document review or basic contract drafting) are more susceptible than others.<sup>105</sup> Law firms, indeed, perceive a strict dichotomy between high-volume commoditised (and largely mechanised) work, and high-quality legal services.<sup>106</sup> There is also the possibility that lawtech developers may in future choose to integrate vertically and offer services directly to clients, in competition with lawyers.<sup>107</sup> Even if the growing use of lawtech is unlikely to change fundamentally the role of the lawyer in the short-term, it may disrupt the economics of legal practice by shifting patterns of supply and demand,<sup>108</sup> as discussed below.

One area where, in principle, mechanisation has the potential to make an unambiguously positive contribution is in facilitating access-to-justice, by, essentially, driving down the costs of services provision. As noted in Section III(B), there may be a trade-off to the extent that commoditised provision is cheaper but also, potentially, less nuanced or sensitive to clients’ personal circumstances. As Zuckerman argues, it may nonetheless be

<sup>100</sup> M. Sako, J. Armour and R. Parnham (“Lawtech Adoption and Training: Findings from a Survey of Solicitors in England and Wales”, 2020, available at [https://www.law.ox.ac.uk/sites/files/oxlaw/oxford\\_lawtech\\_adoption\\_and\\_training\\_survey\\_report\\_18\\_march\\_2.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/oxford_lawtech_adoption_and_training_survey_report_18_march_2.pdf) (last accessed 5 February 2021), 5) report that, although most solicitors make use of basic lawtech, adoption of technology incorporating AI is much lower.

<sup>101</sup> Susskind, *Tomorrow’s Lawyers*, 31; M. Legg and F. Bell, *Artificial Intelligence and the Legal Profession* (Oxford 2020), 7.

<sup>102</sup> Zuckerman, “Artificial Intelligence – Implications”, 441.

<sup>103</sup> Legg and Bell, *Artificial Intelligence*, 8.

<sup>104</sup> Anticipated by Susskind, *Tomorrow’s Lawyers*, 32–43.

<sup>105</sup> Legg and Bell, *Artificial Intelligence*, chs 5, 7 in particular.

<sup>106</sup> IES Report, 12.

<sup>107</sup> Zuckerman, “Artificial Intelligence – Implications”, 440.

<sup>108</sup> *Ibid.*, at 440–41.



preferable to perfectly tailored but unaffordable services.<sup>109</sup> Yet, perversely, it is precisely those practice areas where lawtech has greatest potential in access-to-justice terms (by reducing costs for vulnerable consumers) that adoption is slowest: perhaps unsurprisingly, those firms that can most afford to invest in lawtech are least likely to have publicly funded clients.<sup>110</sup>

#### D. Reform of Legal Aid

This brings us to the second current of change, namely the retrenchment of legal aid provision, which removed large quantities of funding from the criminal and civil justice systems in the last decade. As described in Section II, publicly funded legal aid rose then fell in the later twentieth-century, subject to anti-welfare scepticism during the Thatcher era, and deprioritised in comparison with health and education under New Labour. Yet the most profound change was effected under the Coalition Government which took power in 2010, promising “a fundamental review of Legal Aid to make it work more efficiently”.<sup>111</sup> The ensuing consultation was premised on the assumption that an existing *over-availability* was over-incentivising legal proceedings that would be better resolved outside the court system; but it was also explicit about “the need to reduce substantially spending on legal aid” as a motivating factor.<sup>112</sup>

Despite serious concerns raised by respondents,<sup>113</sup> the Government proceeded with a two-pronged attack on aid provision. Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO12), swathes of both civil and family law proceedings were removed from coverage absent exceptional circumstances, essentially reversing the default approach under the Access to Justice Act 1999.<sup>114</sup> The nominal access-to-justice alternatives for would-be clients comprise a mixture of self-help and non-legal processes like mediation, although the evidence suggests that, for many, the result has been a failure to exercise or

<sup>109</sup> *Ibid.*, at 439.

<sup>110</sup> The Law Society, “Technology, Access to Justice and the Rule of Law: Is Technology the Key to Unlocking Access to Justice Innovation?”, 2019, available at <https://tspdsitecore.azureedge.net/-/media/files/topics/research/technology-access-to-justice-rule-of-law-report.pdf?rev=7e0b66965a484682828ef0636ec55980&hash=FE6B57256242EB420046FFF0505A02FA> (last accessed 5 February 2021), 11.

<sup>111</sup> HM Government, “The Coalition: Our Programme for Government”, 2010, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/78977/coalition\\_programme\\_for\\_government.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf) (last accessed 5 February 2021), 23.

<sup>112</sup> Ministry of Justice (MoJ), “Proposals for the Reform of Legal Aid in England and Wales”, 2010, Consultation Paper CP12/10, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228970/7967.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228970/7967.pdf) (last accessed 5 February 2021), at [2.25].

<sup>113</sup> MoJ, “Reform of Legal Aid in England and Wales: The Government Response”, 2011, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228890/8072.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228890/8072.pdf) (last accessed 5 February 2021).

<sup>114</sup> A. Pratt, G. Sturge and J. Brown, “The Future of Legal Aid”, 2018, Debate Pack CDP-2018/0230, available at <https://commonslibrary.parliament.uk/research-briefings/cdp-2018-0230/> (last accessed 5 February 2021), 2.

defend their legal rights at all.<sup>115</sup> In tandem, while access to criminal legal aid was left largely intact, the Government targeted the other side of the equation by slashing the rates paid to professionals – barristers and solicitors – for their services. The Government was, however, subsequently forced to abandon more extreme proposals for further marketisation.<sup>116</sup> These included wildly unpopular plans for price-competitive tendering that would have forced defence lawyers to underbid each other for work,<sup>117</sup> and a dual contracting system which, it was feared, would drastically reduce the number of criminal defence firms.<sup>118</sup>

The effects of these cuts on the legal profession and the clients that it serves have been severe. The UN Special Rapporteur on extreme poverty and human rights described LASPO12 as “decimating” civil legal aid in England and Wales, pointing to an 82 per cent decline in the number of funded cases between 2010/11 and 2017/18.<sup>119</sup> (The flipside was a 37 per cent decline in aid spending over the period.<sup>120</sup>) For professionals working in criminal defence, funding cuts have resulted in detrimental working patterns and chronically low morale which is described as “unsustainable”.<sup>121</sup> Undoubtedly, the story of legal aid is an example of how the ideology of austerity has been deployed, whether deliberately or effectively, to roll-back the parameters and protections of the welfare state. Yet these recent efforts also appear to be directed at the profession itself, and thus function as a type of liberalisation-by-stealth. As Lord Chancellor Clarke asserted: “not the least of my aims is for a reformed profession: one where there is enough provision to ensure people have access-to-justice; but more broadly, that we have competitive, consumer-focused law firms that can compete internationally.”<sup>122</sup> The implications are explored in the next section.

<sup>115</sup> “Visit to the United Kingdom – Report of the Special Rapporteur on Extreme Poverty and Human Rights”, 9–10.

<sup>116</sup> Discussed by T. Smith and E. Cape, “The Rise and Decline of Criminal Legal Aid in England and Wales” in A. Flynn and J. Hodgson (eds.), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Oxford 2017), ch. 4.

<sup>117</sup> MoJ, “Transforming Legal Aid: Delivering a More Credible and Efficient System”, 2013, Consultation Paper CP14/2013, available at <https://www.justice.gov.uk/downloads/consultations/transforming-legal-aid.pdf> (last accessed 5 February 2021), ch. 4.

<sup>118</sup> MoJ, “Transforming Legal Aid: Crime Duty Contracts”, 2014, available at [https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-crime-duty-contracts/supporting\\_documents/transforminglegalaidcrimedutycontractsconsultationpaper.pdf](https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-crime-duty-contracts/supporting_documents/transforminglegalaidcrimedutycontractsconsultationpaper.pdf) (last accessed 5 February 2021). The likelihood of forcing non-approved firms from the market was acknowledged when the proposal was withdrawn: Written Ministerial Statement made by the Lord Chancellor and Secretary of State for Justice, Michael Gove, “Changes to Criminal Legal Aid Contracting”, 2018, available at <https://www.gov.uk/government/speeches/changes-to-criminal-legal-aid-contracting> (last accessed 5 February 2021).

<sup>119</sup> “Visit to the United Kingdom – Report of the Special Rapporteur on Extreme Poverty and Human Rights”, 9.

<sup>120</sup> Pratt, Sturge and Brown, “The Future of Legal Aid”, 3.

<sup>121</sup> J. Thornton, “Is Publicly Funded Criminal Defence Sustainable? Legal Aid Cuts, Morale, Recruitment and Retention in the English Criminal Law Professions” (2020) 40 *Legal Studies* 230, 251. Considering these issues specifically for Wales, see also R. Dehaghani and D. Newman “The Crisis in Legally Aided Criminal Defence in Wales: Bringing Wales into Discussions of England and Wales” (*Legal Studies*, forthcoming).

<sup>122</sup> MoJ, “Reform of Legal Aid in England and Wales”, 5.

*E. Legal Services Market Study*

Finally, we consider how competition functions in action within the legal services sector. For this, we turn to the Competition and Market Authority (CMA), *Legal Services Market Study* from 2016, which offered a stocktaking of existing liberalisation efforts,<sup>123</sup> and its subsequent *Implementation Review* from 2020.<sup>124</sup> The Study concluded that, despite the ostensible presence of significant competition alongside low barriers to entry, the legal services market did not work well for individual consumers or small businesses. Such purchasers lacked the experience and information necessary to negotiate the market and to engage confidently with providers, and were hampered by a lack of transparency regarding price, service and quality. The Study proposed a package of remedies to increase consumer engagement, which aimed to increase the quantity and accessibility of information available.<sup>125</sup> The Study also raised concerns about high regulatory costs which potentially resulted in higher retail prices and in barriers to innovation, although it proposed no specific remedies.<sup>126</sup>

The CMA's findings on demand-side competition were endorsed by the Ministry for Justice<sup>127</sup> alongside relevant regulators.<sup>128</sup> The Implementation Review subsequently noted a substantial increase in the levels of market information available to consumers, but only limited impact on levels of competition. This it attributed partly to the recent nature of reforms, but also, more problematically, to continuing issues of consumer mistrust and disengagement.<sup>129</sup> Greater transparency nonetheless continues to be the prescription going forward.<sup>130</sup> Conversely, the Ministry declined to follow a recommendation to examine the regulatory framework, citing an absence of obvious necessity.<sup>131</sup> The Implementation Review similarly doubled down on this issue, identifying "a strong case for wholesale [regulatory] reform", not least due to significant growth in the unauthorised sector because of advances in lawtech.<sup>132</sup>

<sup>123</sup> CMA Study.

<sup>124</sup> CMA Implementation Review.

<sup>125</sup> CMA Study, ch.7.

<sup>126</sup> *Ibid.*, at [5.53].

<sup>127</sup> MoJ, "Legal Services Market Study", 2017, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/669507/Govt-Response-to-CMA-study.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/669507/Govt-Response-to-CMA-study.pdf) (last accessed 5 February 2021), 1.

<sup>128</sup> LSB, "Increasing Market Transparency: How LSB Will Implement the Recommendation Directed to It in The Competition and Market Authority's Market Study", 2017, available at [https://www.legalservicesboard.org.uk/Projects/pdf/2017/20170413\\_DeliveryofCMArecom.pdf](https://www.legalservicesboard.org.uk/Projects/pdf/2017/20170413_DeliveryofCMArecom.pdf) (last accessed 5 February 2021); SRA, "SRA Response: Competition and Markets Authority Legal Services Market Study Report", 2017, available at <https://www.sra.org.uk/sra/consultations/consultation-responses/cma-report/> (last accessed 5 February 2021); BSB, "CMA Legal Services Market Study: BSB Response", 2017, available at <https://www.barstandardsboard.org.uk/uploads/assets/749c3da4-e027-43ab-b422035b29c0e3bb/CMA-Action-Plan-FINAL.pdf> (last accessed 5 February 2021).

<sup>129</sup> CMA Implementation Review, ch. 3.

<sup>130</sup> *Ibid.*, at ch. 4.

<sup>131</sup> MoJ, "Legal Services Market Study".

<sup>132</sup> CMA Implementation Review, at [20], and ch. 5.

Arguably, the CMA's recent work in the legal sector raises more questions than it answers, and a full market investigation reference is surely a possibility.<sup>133</sup> Yet it remains of interest, both because of what it tells us about competition in legal services, and because of the illuminating – and contrary – vision of the legal consumer that emerges.

## V. LIBERALISATION AND THE DYNAMICS OF LEGAL SERVICES MARKETS

The preceding section outlined the key dynamics of liberalisation in legal services. Although liberalisation may occur through positive and overt efforts, it can also be effected – and affected – more obliquely. In this penultimate section, we reassess the liberalisation process specifically on its own terms: namely, by considering the implications of reconfiguring the *professional–client* relationship, in an overtly economic manner, as constituting the interaction of *supply* and *demand* in legal services markets. It was noted above that a fundamental underpinning assumption of liberalisation as a form of regulatory policymaking is that economic activity should be subjected to competitive market forces. In this section, we evaluate what this means in practice for today's lawyers and their clients. We consider first the evolving understanding of the lawyer within the liberalised legal marketplace, followed by the different faces of today's legal consumer.

### *A. Lawyers after Liberalisation: From Counsellor to Competitor*

We begin with the supply side, namely the various groups that comprise the legal profession, including what might be considered its good substitutes. We consider the evolving profession from three perspectives: that of the lawyer as status-holder, as supplier of services and as competitor.

#### *1. Lawyers as status-holders*

We start with the long-standing notion of the lawyer as a status-holder.<sup>134</sup> Traditionally, there was a strong link between the law as a professional occupation, and notions of respectability and “gentlemanly” behaviour.<sup>135</sup> High status was inherent in the Bar due to its aristocratic origins, and became a core professional project for solicitors seeking to bring their occupation into line.<sup>136</sup> Burrage, indeed, suggested that the distinctive features of the profession – including practice-based training, a clear demarcation of occupational jurisdiction and reliance upon voluntary associations to defend shared interests – were reflective, even in part constitutive, of the

<sup>133</sup> As foreseen in CMA Study, at [30]. Market investigations are conducted under Part 4 of the Enterprise Act 2002.

<sup>134</sup> Abel, *Legal Profession*, 17.

<sup>135</sup> Hanlon, *State and the Market*, 12.

<sup>136</sup> Paterson, *Public Good*, 18; Burrage, *Revolution*, 484–90.

English class system.<sup>137</sup> Yet, as more archaic aspects of legal practice were discarded, lawyers continued to benefit from a perceived standing as “social service professionals” with antipathy to the market,<sup>138</sup> and as “the leading experts in a complex field which affects every citizen”.<sup>139</sup> To be a qualified lawyer was thus a position of “cultural weight”.<sup>140</sup>

Liberalisation, however, renders it impossible for the profession to disdain market dynamics, resulting in an increasingly commercialised, entrepreneurial vision of the lawyer as a professional services-provider.<sup>141</sup> The loss of historic monopolies removed the prestige of exclusivity and the comfort of artificially reduced competition. Commoditisation challenges the perception of lawyers – or at least of legal work – as highly skilled, bespoke and inimitable. Cuts to legal aid and other manifestations of the “more-for-less challenge”<sup>142</sup> prompt clients to demand value-for-money in tandem with learned counsel. Even the buzzword of “commercial awareness”, an inescapable shibboleth for today’s aspiring corporate lawyers, illustrates the extent to which “the law” is a business like any other. Declining levels of trust in and respect for the profession further indicate that the attendant status of lawyers cannot help but have declined.<sup>143</sup> The contemporary profession is thus criticised for clinging to a “dying bourgeois ideal”<sup>144</sup> premised upon disinterest, independence and expertise, all of which can be challenged in today’s legal marketplace.

Yet, even within this new normal, traces of the lawyer as status-holder remain. The profession’s historic status-marker – regulated title – is being repurposed as a quality mark, offering a competitive advantage to holders. For the Bar, its self-proclaimed tradition of “excellence” has shifted from a largely ideological differentiator to effectively a service guarantee.<sup>145</sup> A key objection to the SQE proposal was fear on the part of large corporate firms that the internationally recognised “solicitor brand”<sup>146</sup> might be diluted with the advent of less obviously academic entry standards.<sup>147</sup> It culminated in a compromise from the SRA, whereby the SQE remains primarily a graduate-entry programme, despite abolishment of the QLD.<sup>148</sup>

<sup>137</sup> Burrage, *Revolution*, 633.

<sup>138</sup> Hanlon, *State and the Market*, 16.

<sup>139</sup> Zander, *Legal Services*, 23.

<sup>140</sup> LETR, at [5.22].

<sup>141</sup> Hanlon, *State and the Market*, 186.

<sup>142</sup> Susskind, *Tomorrow’s Lawyers*, 3.

<sup>143</sup> Paterson, *Public Good*, 18–19.

<sup>144</sup> Abel, *English Lawyers*, 498.

<sup>145</sup> A. Goulondris, *The Enterprising Barrister* (Oxford 2020), 108–10.

<sup>146</sup> Paterson, *Public Good*, 36. Francis, “Law’s Boundaries”, 76, notes ABSs deploy the language of “professionalism” as a quality mark.

<sup>147</sup> The City of London Law Society, “Paper Prepared by the Training Committee on the Joint Legal Education & Training Review of the SRA, the Bar Standards Board and ILEX Professional Standards”, 2012, available at <https://www.citysolicitors.org.uk/storage/2013/06/UK-2988295-v3-CLLS-LETR-reworked-paper-Feb-2012-2.pdf> (last accessed 5 February 2021).

<sup>148</sup> SRA, “Solicitors Qualifying Examination (SQE) Briefing”.

This chimes with a claimed preoccupation with firm image in the corporate law sector: partly due to the instrumental value of attracting clients and high-quality recruits, but also because of the “psychic rewards” that a prestigious firm image affords.<sup>149</sup> The critical profits-per-equity-partner metric might even be construed as the contemporary reimagining of a traditional lawyerly status symbol, more in keeping with the reality of the liberalised legal marketplace (if slightly bombastic).<sup>150</sup>

The notion of law as a status-based profession can also have exclusionary and thus less defensible effects, however. Abel took a dim view of status, arguing that both branches of the profession historically sought to elevate and preserve their status through exclusion, particularly of those who could not afford the costs of qualifying, and of persons deviating from the archetype of the English lawyer (women, ethnic minorities, those from poorer backgrounds).<sup>151</sup> More recently, “those status symbols have become embarrassments”, with recognition that representativeness is crucial for legitimacy.<sup>152</sup> “Equality of access”,<sup>153</sup> as reflected *inter alia* in the SQE scheme, becomes of key importance. Yet legitimate doubts exist as to whether the ostensible level-playing-field of the SQE will address the concerns that motivated its introduction:<sup>154</sup> namely, a profession that is disproportionately middle-class and Russell Group-educated, particularly in its upper echelons.<sup>155</sup> It is, however, more diverse than the Bar.<sup>156</sup> The question of representativeness raises another issue, linked to our consideration of the legal consumer below: would a more representative profession be a *better* one from a client perspective?<sup>157</sup>

Merely getting “in” and nominally attaining the requisite status is only half the battle: there is also the question of culture, similarly tied up with status. Although the law does well in gender diversity in terms of numbers, for instance, its culture remains heavily male-oriented – and, indeed, this is portrayed as an indicator of professionalism, namely what women sign up for when they obtain the status of lawyer.<sup>158</sup> Accordingly, even if the law has lost some of its *external* distinctiveness in comparison with other

<sup>149</sup> M. Galanter and S. Roberts, “From Kinship to Magic Circle: The London Commercial Law Firm in the Twentieth Century” (2008) 15 *International Journal of the Legal Profession* 143, 171.

<sup>150</sup> On similar themes, see Faulconbridge and Muzio, “Financialisation”.

<sup>151</sup> Abel, *English Lawyers*, 121.

<sup>152</sup> *Ibid.*, at 149.

<sup>153</sup> Paterson, *Public Good*, 38.

<sup>154</sup> Bridge Group, *SQE: Monitoring and Maximising Diversity*. Report prepared for the SRA, 10 July 2020.

<sup>155</sup> S. Aulakh, A. Charlwood, D. Muzio, J. Tomlinson and D. Valizade, *Mapping Advantages and Disadvantages: Diversity in the Legal Profession in England and Wales* (Birmingham 2017). Up-to-date statistics available at: SRA, “How Diverse is the Legal Profession?”, available at <https://www.sra.org.uk/sra/equality-diversity/key-findings/diverse-legal-profession/> (last accessed 5 February 2021).

<sup>156</sup> Comparable statistics can be found in BSB, “Diversity at the Bar 2019”.

<sup>157</sup> A question raised by Thornton, “Is Publicly Funded Criminal Defence Sustainable?”, 242.

<sup>158</sup> H. Sommerlad, “‘A Pit to Put Women In’: Professionalism, Work Intensification, Sexualisation and Work–life Balance in the Legal Profession in England and Wales” (2016) 23 *International Journal of the Legal Profession* 61, 65.

professions and trades, the perceived status and role of the lawyer may continue to have *internal* resonance, in shaping how lawyers view and what they expect from each other. This is supported by empirical work on “millennial” lawyers in England, who associate closely with traditional legal professional values, despite the superficially different characteristics of this cohort.<sup>159</sup>

Finally, lingering perceptions of status might explain the continuing popularity of the profession despite current levels of oversupply<sup>160</sup> and thus the comparatively poor career prospects for new entrants. Yet it might also be queried whether the well-known – although by no means universally realised – pecuniary rewards associated with the profession could have the perverse effect of diminishing this underlying status longer-term, if new entrants join purely “for the money” rather than any nominal higher calling. Susskind noted a paradox of the contemporary legal profession: many of today’s highest-earners did not anticipate these rewards at entry, whereas many joining today expect rewards that cannot be realised.<sup>161</sup> Paterson described the problem succinctly—“greed.”<sup>162</sup>

## 2. *Lawyers as suppliers*

This brings us to the notion of the lawyer as a *supplier* of services, fulfilling clients’ legal needs or wants. Such a conceptualisation coincides with liberalisation in two dimensions. First, by removing barriers to entry and practice, liberalisation increases overall levels of supply, whether offered by lawyers or by non-lawyers providing substitutable products. Second, in many areas of practice, greater competitive pressure is prompting a fundamental rethinking and reorganisation of how services are supplied.

What does it mean to conceive of the lawyer essentially as supplier of a fungible commodity? The departure from regulation by title, arguably, marks a shift in understanding from the lawyer as “expert” to that of “service-provider”, competing, indeed, for business in many areas with non-lawyers. As the Clementi Review recognised, the barriers between formally different categories of lawyer have become more porous and less distinct.<sup>163</sup> In tandem, the classic measure of a lawyer’s worth – the billable hour – is headed for extinction within swathes of the profession: shifting the emphasis from the cost of the input (the lawyer’s time) to value of their output.<sup>164</sup> The “business” of being a lawyer today, moreover, does not merely encompass the provision of legal services *sensu stricto*: the Clementi Review, for instance, placed almost equivalent weight and

<sup>159</sup> Bleasdale and Francis, “Great Expectations”, 386.

<sup>160</sup> LETR, at [2.169], [3.111], [3.153].

<sup>161</sup> Susskind, *Tomorrow’s Lawyers*, 18.

<sup>162</sup> Paterson, *Public Good*, 10.

<sup>163</sup> Clementi Review.

<sup>164</sup> Susskind, *Tomorrow’s Lawyers*, 17.

value on the quality of business services provided by legal professionals as on their legal advice as such.<sup>165</sup>

Yet expansion of entry into the profession coupled with a retreat from the sole-practitioner model leads to stratification on other bases.<sup>166</sup> These include distinctions in terms of material rewards, power and status;<sup>167</sup> fragmentation between corporate and private client work;<sup>168</sup> and stratification within ostensibly similar groupings, such as the emergence of a less prestigious category of salaried rather than equity partner in large London firms.<sup>169</sup> Francis accordingly construed liberalisation as antithetical to any conception of the legal sector as a “profession” as a single whole, insofar as its constituents face increasingly vigorous pressures that pull them in different directions.<sup>170</sup> Thus, even if we speak of the profession generally as suppliers of legal services, the products that different categories of lawyers provide are substitutable only to a limited extent. As the LETR recognised, the array of different career paths for lawyers today may call into question the value of “portmanteau” qualifications like the solicitor and barrister titles.<sup>171</sup> Yet critics of the SQE argue that the proposal may heighten this process of fragmentation, by replacing the professional ideal of a common educational experience with induction into the culture of a specific organisation.<sup>172</sup>

A point that follows is the extent to which this conception of the lawyer *qua* supplier is consistent with ethical and/or social service dimensions of its role. It was argued above that the commercial realities of practice today mean that no lawyer that wishes to continue in business can remain entirely above the fray of the marketplace. Nonetheless, it seems uncontroversial that, even within liberalised markets, the distinctive social contribution of legal service-providers should not be ignored.<sup>173</sup> An obvious manifestation is the continuing presence of professional regulation both over certain activities and providers, with little suggestion that regulatory controls ought to be removed in any wholesale manner. Thus the *quid pro quo* for the claimed competitive advantage provided by the registered title “brands” is a more restrictive trading environment, whereby suppliers have less wiggle room to cut costs or offer innovative products.<sup>174</sup> Perhaps

<sup>165</sup> Clementi Review.

<sup>166</sup> Sommerlad et al., “Futures”, 4.

<sup>167</sup> Abel, *Legal Profession*, 290.

<sup>168</sup> Hanlon, *State and the Market*, 161.

<sup>169</sup> Galanter and Roberts, “Kinship to Magic Circle”, 167.

<sup>170</sup> A. Francis, “Legal Ethics, the Marketplace and the Fragmentation of Legal Professionalism” (2005) 12 *International Journal of the Legal Profession* 173.

<sup>171</sup> LETR, at [3.99].

<sup>172</sup> A. Boon and A. Whyte, “Lawyer Disciplinary Processes: An Empirical Study of Solicitors’ Misconduct Cases in England and Wales in 2015” (2019) 39 *Legal Studies* 455, 461.

<sup>173</sup> Webb, “LETReS”, 127.

<sup>174</sup> Although regulation is not considered a major constraint on innovation by most lawyers: CMA Study, at [5.37].



unsurprisingly, larger firms appear to be better equipped at negotiating (and staying within) regulatory hurdles,<sup>175</sup> suggesting that there may be economies of scale in compliance.<sup>176</sup>

Yet, even when acting within existing regulatory obligations, difficult questions arise for the lawyer operating *qua* businessman/technician versus *qua* professional/counsellor: about what has been termed “the profession’s ‘moral compass’”.<sup>177</sup> Kershaw and Moorhead use the role of Magic Circle firm Linklaters in the collapse of Lehman Brothers to argue persuasively for greater professional responsibility in respect of practices that might be strictly legal but clearly contravene the public interest.<sup>178</sup> Yet they acknowledge that creativity and zeal are often precisely what corporate clients look for,<sup>179</sup> creating a risk that virtuousness might demolish a firm’s bottom line. A lawyer doing private client work may similarly face a dilemma where the best outcome for the client, broadly understood, results in the lawyer herself losing work, for example encouraging reconciliation over divorce.<sup>180</sup> The negative effects of cuts to criminal legal aid have been noted but bear repeating; resulting in work patterns that make defence practitioners themselves doubt the fairness of proceedings.<sup>181</sup> Moreover, viewing the lawyer merely as a technician who completes discrete pieces of work is, arguably, to neglect her obligation towards the progressive development and improvement of the law generally.<sup>182</sup> Although lawyers today remain committed to serving their clients, it is unclear to what extent they are, and should be expected to remain, committed to serving the wider public interest in addition.<sup>183</sup> Thus, viewing the legal profession solely in “supplier” terms is difficult to square with Sanders’ definition of lawyering as a profession which “requires the deployment of skills and knowledge with a sense of *values* and of what can realistically and *justly* be achieved”.<sup>184</sup>

### 3. *Lawyers as competitors*

Implicit in conceptualising the lawyer as supplier is that she is also a competitor, vying for business with providers of substitutable services. Legal liberalisation as a whole represents a rejection of historic arguments that dignity and ethics restrict the scope for (overt) competition in legal

<sup>175</sup> Boon and Whyte, “Lawyer Disciplinary Processes”, 465–67.

<sup>176</sup> These could result from fixed costs in developing and/or policing compliance mechanisms.

<sup>177</sup> LETR, at [2.71].

<sup>178</sup> D. Kershaw and R. Moorhead, “Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession” (2013) 76 M.L.R. 26.

<sup>179</sup> *Ibid.*, at 59–60.

<sup>180</sup> Zander, *Legal Services*, 160.

<sup>181</sup> Thornton, “Is Publicly Funded Criminal Defence Sustainable?”, 235.

<sup>182</sup> A. Sanders, “Poor Thinking, Poor Outcome? The Future of the Law Degree after the Legal Education and Training Review and the Case for Socio-legalism” in Sommerlad et al., *Futures*, ch. 7, 152 (emphasis added).

<sup>183</sup> Paterson, *Public Good*, 41.

<sup>184</sup> Sanders, “Poor Thinking”, 168 (emphasis added).

services.<sup>185</sup> The profession, traditionally, evinced hostility towards direct solicitation of business, partly due to a desire to maintain the dignity – and thus prestige – of the profession, and partly due to a self-interested belief that competition was irrelevant for professional services.<sup>186</sup> Such squeamishness has been largely abandoned, with solicitors permitted to advertise since removal of the conveyancing monopoly in the 1980s,<sup>187</sup> and direct access to barristers allowed since 2004.<sup>188</sup> Yet legal services markets remain far from the model of perfect competition.<sup>189</sup> Such difficulties are more acute in the private and small business client segments than in markets serving large corporate clients, as explained below. Several aspects of the competitive dynamics of legal services markets generally are nonetheless noteworthy.

The first is that, as lawyers compete more vigorously and overtly, issues of price, quality, choice and innovation in services provision – and not merely of *access* – gain importance. In practice areas where commoditisation is commonplace, such as conveyancing, price competition is most vigorous. For more complex issues, like divorce, clients may be more concerned about the quality of representation (or at least face more dispersed pricing).<sup>190</sup> There is, moreover, acknowledgement that quality of services provision can vary: that clients ultimately “get what they pay for”, even if this means that lower-quality lawyering may have knock-on negative effects for a client’s legal position.<sup>191</sup> The most extreme manifestation of this is for legal aid recipients, who increasingly receive provision of the lowest common denominator if they receive any at all. Yet many lawyers working in fields affected by legal aid cuts have reacted in line with what economic theory suggests should be the supplier response, by innovating and commoditising provision to cut costs.<sup>192</sup>

Yet, even if lawyers are increasingly required to consider issues of efficiency in how they serve clients, actually competing in legal services is not straightforward. Particularly for non-corporate clients, it can be difficult to drum up profitable demand for unmet legal need, as opposed to benefitting from increased demand generated by external forces (e.g. increased homeownership and divorce).<sup>193</sup> Currently underserved

<sup>185</sup> See e.g. Clementi Review; CMA Study.

<sup>186</sup> Zander, *Legal Services*, 46–47.

<sup>187</sup> L.L. Hill, “Publicity Rules of the Legal Professions within the United Kingdom” (2003) 20 *Arizona Journal of International and Comparative Law* 232, 336. Direct unsolicited advertising is prohibited as of 2019.

<sup>188</sup> BSB, “Public Access Guidance for Lay Clients”, 2019, available at <https://www.barstandardsboard.org.uk/resources/public-access-guidance-for-lay-clients.html> (last accessed 5 February 2021).

<sup>189</sup> Paterson, *Public Good*, 19.

<sup>190</sup> CMA Study, at [3.185]–[3.190].

<sup>191</sup> On markets where competition negatively impacts quality, see A. Ezrachi and M. Stucke, “The Curious Case of Competition and Quality” (2015) 3 *J.A.E.* 227.

<sup>192</sup> M. Maclean, “Delivering Family Justice: New Ways of Working for Lawyers in Divorce and Separation” in Sommerlad et al., *Futures*, ch. 4.

<sup>193</sup> Abel, *Legal Profession*, 296–98.

clients are often the least attractive to service-providers due to their limited means.<sup>194</sup> Undoubtedly a hangover from pre-liberalised more genteel times, many lawyers have a distinct preference for, say, public legal education (a particularly ineffective form of demand creation) rather than touting for business (the most effective strategy).<sup>195</sup> At the top of the profession, selling legal services remains individually driven: lawyers who are perceived by powerful clients as particularly effective can extract a premium, whether as highly paid barristers or within their firms (or by moving to another firm).<sup>196</sup> Yet, at the other end of the spectrum – publicly funded work – legal professionals face immense and capricious (to some extent) countervailing buyer-power, where the political rhetoric of “tough choices”<sup>197</sup> translates into the near-visceration of certain practice areas, and the fostering of a dog-eat-dog mentality in others. The shift towards a liberalised model thus generates winners and losers: corporate lawyers and those associated with the City benefit, while lawyers in the public sector lose out.<sup>198</sup>

This raises a further consideration, namely the question of potential oversupply in legal services markets, and the extent to which the market mechanism can self-correct in response. In theory, under competition, market forces impact the rate of supply,<sup>199</sup> and this is conceivably the most proper means to determine the appropriate level of provision.<sup>200</sup> Yet there are two difficulties with this narrative. First, despite being “a buyers’ market”<sup>201</sup> at point of entry, it simply does not reflect current conditions. While the growth in undergraduate legal education introduced a new, not-insignificant entry barrier (a three-year tertiary qualification), it also led to a greatly expanded profession by opening clear entry paths.<sup>202</sup> At the professional qualification stage, the LETR and overarching approach of the LSB have been described as “fiercely neoliberal”,<sup>203</sup> seeking to minimise entry requirements in the belief that a well-functioning marketplace will enable consumers to locate and employ professionals with the necessary competences. This is despite the fact that the LETR repeatedly recognised problems of “oversupply”,<sup>204</sup> albeit it suggested that the issue was one of too many students completing professional training (BPTC/LPC) rather

<sup>194</sup> Abel, *English Lawyers*, 485.

<sup>195</sup> *Ibid.*

<sup>196</sup> Hanlon, *State and the Market*, 162. Perhaps the most notorious example of legal “star power” is the £8 million that Jonathan Sumption earned for defending Roman Abramovich – an arrangement that delayed his arrival on the Supreme Court by half a year: D. Leppard, “Chelsea’s Big Defender – The QC Paid £8m”, *The Sunday Times*, available at <https://www.thetimes.co.uk/article/chelseas-big-defender-the-qc-paid-pound8m-8r9j5jr8> (last accessed 5 February 2021).

<sup>197</sup> MoJ, “Proposals for the Reform of Legal Aid in England and Wales”, 3.

<sup>198</sup> Hanlon, *State and the Market*, 32.

<sup>199</sup> Zander, *Legal Services*, 237.

<sup>200</sup> Paterson, *Public Good*, 24.

<sup>201</sup> Bleasdale and Francis, “Great Expectations”, 395.

<sup>202</sup> Abel, *Legal Profession*, 271–72.

<sup>203</sup> Sanders, “Poor Thinking”, 140.

<sup>204</sup> LETR, at [2.169], [3.111], [3.153].

than excess at the vocational training stage.<sup>205</sup> The view outside the profession is that, while high numbers of lawyers create problems for those trying to operate profitably, this is unproblematic for the public at large.<sup>206</sup> Yet it may be questioned whether lowering barriers to entry is necessarily welfare-enhancing, not least for individuals who might be enticed to join the profession, where longer-term overall employment prospects are hardly buoyant<sup>207</sup> and where demonstrable competence is an important marker of quality.<sup>208</sup>

Second, conversely, there is evidence that competitive pressure, and its attendant negative impacts on the quality of professional life in affected practice areas, results in lawyers exiting the profession *after* qualification. The – mercifully abandoned – Grayling legal aid reforms were premised precisely on the desirability of a leaner, more cut-throat criminal defence sector,<sup>209</sup> while cuts to funding for civil and family matters similarly impact adversely on those branches (not to mention their clients).<sup>210</sup> The publicly funded Bar is claimed to be “on its last legs”,<sup>211</sup> while defence solicitors face “extinction”.<sup>212</sup> The difficulty is that, although retrenchment alleviates *overall* levels of oversupply, it risks creating serious problems of access-to-justice in affected markets.<sup>213</sup> The continued influx of new entrants presents no solution, as lawyers are understandably reluctant to enter dysfunctional practice areas, which frequently, moreover, do not have the resources to support their training.<sup>214</sup> Such disequilibrium returns us to the suggestion in Section III that some degree of market failure may be inherent in the legal services sector: thus requiring heightened (or at least revitalised) state intervention to ensure sufficient provision in the public interest.

### *B. The Faces of the Legal Consumer*

Having considered how liberalisation changes our view of the legal *profession*, we turn to the different faces of the legal *consumer* in today’s commercialised – but also stratified – marketplace. The term “demand” is used as shorthand for the array of clients and their diverse problems that

<sup>205</sup> *Ibid.*, at [6.15].

<sup>206</sup> Webb, “LETRs”, 133.

<sup>207</sup> As evidenced in the IES Report.

<sup>208</sup> Roy, “More Flexible Approach”, 171.

<sup>209</sup> See notes 116–118 above.

<sup>210</sup> S. Wong and R. Cain, “The Impact of Cuts in Legal Aid Funding of Private Family Law Cases” (2019) 41 *Journal of Social Welfare and Family Law* 3; N. Byrom, “Cuts to Civil Legal Aid and the Identity Crisis in Lawyering: Lessons from the Experience of England and Wales” in Flynn and Hodgson, *Access to Justice*.

<sup>211</sup> Goulandris, *The Enterprising Barrister*, ch. 12, 115.

<sup>212</sup> O. Bowcott, “Criminal Defence Solicitors May be Extinct in Five Years, Says Law Society”, *The Guardian*, available at <https://www.theguardian.com/law/2018/apr/17/criminal-defence-solicitors-may-be-extinct-in-five-years-says-law-society> (last accessed 5 February 2021).

<sup>213</sup> Amnesty International, “Cuts that Hurt”.

<sup>214</sup> Thornton, “Is Publicly Funded Criminal Defence Sustainable?”, 245–47.

are addressed by the legal market.<sup>215</sup> The notion relates to that of a “justiciable problem”, namely a problem raising legal issues, whether or not recognised as such by individuals facing it, and whether or not any action taken to address it involves lawyers or legal processes.<sup>216</sup> When it comes to legal services, there is a legitimate question of who should define demand:<sup>217</sup> whether suppliers, who profit from providing legal solutions to social problems regardless of whether law offers the optimal recourse; or consumers, who are often under-aware of how their problems might benefit from a legal disposition. More pertinently, demand can be compared to the concept of “legal need”, that is, circumstances where an individual has an issue that they cannot solve themselves, but would be helped by professional assistance.<sup>218</sup> Legal need may be met (i.e. the issue is resolved through provision of useful help) or unmet (i.e. the issue is not resolved adequately, either due to an absence of support or to unhelpful support).<sup>219</sup> Not every justiciable problem translates into legal need, meaning that it would be wasteful to include all such problems within the outer reaches of the notion of demand in legal services markets. A certain degree of unmet need may be a “permanent condition”, furthermore, insofar as there will always be people with legal issues who, deliberately, unwittingly or unavoidably, fail to access legal services to resolve them.<sup>220</sup> Yet we can reasonably include all legal need, whether met or unmet, within the definition of potential demand. Additionally, while the language of legal need is associated with the access-to-justice literature and thus focuses on individuals, the legal sector in England and Wales provides services to a wide variety of corporate clients, whose legal needs revolve around business obligations and advantages rather than personal plight.

Several overarching themes are noteworthy. First, a consumer’s willingness to pay for legal services depends upon both their means and the anticipated benefit arising from the service in relation to its cost.<sup>221</sup> Second, there is apparently insurmountable value in personal experience when purchasing legal services, whether at the corporate or individual level:<sup>222</sup> “personal networks, trust and the markets are intimately interlinked in the professional services world.”<sup>223</sup> Beyond these general observations, consumers have very different experiences when sourcing legal services.

<sup>215</sup> On difficulties of defining demand, see Zander, *Legal Services*, 273.

<sup>216</sup> H. Genn, *Paths to Justice: What People Do and Think about Going to Law* (Oxford 1999), 12.

<sup>217</sup> Paterson, *Public Good*, 78.

<sup>218</sup> YouGov, “Legal Needs of Individuals in England and Wales”, 2020, Technical Report 2019/20, available at <https://www.lawsociety.org.uk/en/topics/research/legal-needs-of-individuals-in-england-and-wales-report> (last accessed 5 February 2021), 84.

<sup>219</sup> *Ibid.*

<sup>220</sup> Zander, *Legal Services*, 346; YouGov, “Legal Needs of Individuals”.

<sup>221</sup> Zander, *Legal Services*, 213.

<sup>222</sup> Hanlon, *State and the Market*, 143–48.

<sup>223</sup> *Ibid.*, at 147.

*1. Large corporate clients*

Large corporate clients are at the apex of consumer sovereignty. Their business is typically high in value; they engage in repeat purchasing; and there is less concern about information asymmetries as such entities are usually advised by in-house counsel. Thus when it comes to wealthy corporate clients, the conventional view that the professional has the upper-hand does not hold true, as clients can exert significant control – and economic pressure – over the professional–client relationship.<sup>224</sup> This is seen, inter alia, in the growing use of fixed and capped fees and discounts,<sup>225</sup> reflecting an entrepreneurial understanding of the law firm whereby lawyers are expected to accept and take efforts to mitigate business risks.<sup>226</sup> Merely being a *legal* adviser is insufficient, moreover, meaning that lawyers must demonstrate effective commercial awareness.<sup>227</sup> Corporate clients also benefit from innovations in service delivery in a way that private clients are not (yet) doing. Their greatest risk, conversely, may be *intra*-firm agency problems, insofar as external counsel are typically instructed by managers whose personal interests as employees may not align fully with the interests of the corporation.<sup>228</sup>

Two facets of the corporate legal consumer are significant. The first is that they shop around in an increasingly globalised marketplace, reflected both in the arrival of overseas (predominantly American) firms in London, and in the expansion of UK-based firms into other jurisdictions.<sup>229</sup> On the one hand, this increases levels of supply and competitive pressure, forcing providers to work hard to attract and keep clients. On the other, it may facilitate the emergence of a small global elite of law firms, which can resist the pressures for change that are anticipated to alter significantly the day-to-day working life of smaller competitors.<sup>230</sup>

A second facet of concern stems from the potential disjuncture between the corporate lawyer's business interests and her wider societal obligations. Under the auspices of lawyerly "zeal", corporate law aligns the profession's commercial interests with their clients' interests.<sup>231</sup> Given this reality, Loughrey argues that the current regulatory framework, which focuses on ensuring that lawyers do not harm clients by acting contrary to their interests, over- and under-regulates corporate firms. The enhanced ability of corporate clients to monitor their lawyers and impose countervailing buyer-power means that, in practice, such problems are less likely to arise. Yet there is little within the existing regulatory framework to ensure independence

<sup>224</sup> *Ibid.*, at 109–21; Abel, *English Lawyers*, 403.

<sup>225</sup> Galanter and Roberts, "Kinship to Magic Circle", 163.

<sup>226</sup> Hanlon, *State and the Market*, 115.

<sup>227</sup> *Ibid.*, at 118.

<sup>228</sup> Kershaw and Moorhead, "Consequential Responsibility", 49.

<sup>229</sup> Galanter and Roberts, "Kinship to Magic Circle", 163–65.

<sup>230</sup> Susskind, *Tomorrow's Lawyers*, 62.

<sup>231</sup> Kershaw and Moorhead, "Consequential Responsibility", 46.

from clients, meaning that solicitors are under-deterred from engaging in socially harmful behaviour to advance clients' immediate interests.<sup>232</sup>

## 2. Privately funded individual clients (including SMEs)

We turn to privately funded individual clients, a category that incorporates small and medium-sized enterprises (SMEs) whose profile as purchasers is similar to private clients.<sup>233</sup> It was in this market that the CMA Study concluded that competition does not work well. This was, in part, due to the contrary nature, in some ways, of the typical consumer, who cannot properly engage with the market and does not reap its potential benefits. Consumers here often fail to recognise justiciable problems as potentially “legal” in nature; they place significant (potentially undue) reliance on informal advice/recommendations when sourcing representation; and they are turned off by overt competition like branding or advertising.<sup>234</sup> “Shopping around” can be difficult: consumers face high search costs; comparable price and quality information is scarce; and the prevalence of contingency fees can dull willingness to comparison-shop.<sup>235</sup> Whereas large corporate clients assisted by in-house counsel are in a better position to judge the quality of legal services *ex ante*, private clients without legal experience are dependent on external markers of quality, such as the educational achievements of service-providers (e.g. the “solicitor brand”).<sup>236</sup> Such consumers place considerable value on regulated title and will pay a premium for this privilege, but there are concerns that consumers do not understand its implications: more specifically, consumers think that lawyers are more highly regulated than is the case.<sup>237</sup> The limited impact of the remedies implemented after the CMA Study suggests that activating consumer engagement – that is, encouraging clients to become more proactive and less deferential – is not straightforward. A question is thus whether further top-down intervention is desirable, perhaps even a degree of re-regulation, as occurred in energy markets with similar issues of seemingly intractable consumer disengagement.<sup>238</sup>

## 3. Publicly funded clients

Finally, we consider publicly funded clients, namely recipients of legal aid. Here, “demand” is split between the immediate beneficiary of and ultimate

<sup>232</sup> J. Loughrey, “Accountability and the Regulation of the Large Law Firm Lawyer” (2014) 77 M.L.R. 732, 758–60.

<sup>233</sup> Following the approach in CMA Study.

<sup>234</sup> CMA Study, especially ch. 3.

<sup>235</sup> N. Semple, “Mystery Shopping: Demand-side Phenomena in Markets for Personal Plight Legal Services” (2019) 26 International Journal of the Legal Profession 181.

<sup>236</sup> Roy, “More Flexible Approach”, 172; CMA Study, at [4.15]–[4.18].

<sup>237</sup> Paterson, *Public Good*, 37; extensive discussion in CMA Study, at [3.48]–[3.58], [5.89]–[5.119].

<sup>238</sup> Discussed by M. Ioannidou and D. Mantzari, “The UK Domestic Gas Electricity (Tariff Cap) Act: Re-regulating the Retail Energy Market” (2019) 82 M.L.R. 488.

payor for legal services. In contradistinction to privately funded clients, the scope of what is recognised as “legitimate” demand has contracted rapidly in the last decade. Several aspects of this contraction are noteworthy.

To start with, while it is irrefutable that indigent individuals experience genuine and pressing legal need, much of the negative rhetoric is premised on an essentially *discretionary* understanding of demand. Historically, indigent provision was treated as an act of altruism, something for which recipients ought to be grateful. Instead of being a means by which to level the playing field of access-to-justice, it was considered a positive – and implicitly optional – benefit.<sup>239</sup> Prior to the introduction of generalised legal aid in 1949, a principal objection was that facilitating access might encourage needless and wasteful litigation.<sup>240</sup> The renewed attack on aid from the 1980s onwards took a similar tack, premised upon scepticism about “supplier-induced demand” (i.e. manufactured by the legal profession), which it was claimed artificially inflated the size, complexity and cost of the publicly funded caseload.<sup>241</sup>

This notion, that indigent demand is less authentic and more open to question, finds expression in recent restructuring. The Clarke reforms, culminating in LASPO12, essentially introduced a naughty-versus-nice ranking of permissible legal needs: deigning to meet only a small fraction of recognised need in the civil and family spheres. The Grayling proposals sought to remove almost all choice from criminal aid recipients as the necessary trade-off for improved value-for-money from the purchaser perspective, an approach that contrasts starkly with the direct focus on choice in the CMA Study. Underpinning these reforms is the theme of personal responsibility: the idea that individuals ought to “to take greater personal responsibility for their problems”<sup>242</sup> rather than resorting to (state-funded) legal avenues of redress.<sup>243</sup> Conversely, the notion of legal representation as an entitlement for individuals has been largely rejected.<sup>244</sup>

The perceived neoliberal tenor of such arguments has been criticised.<sup>245</sup> There is ambiguity, however, whether paternalism or more basic libertarianism is the key motivation. In any event, between the questions of what the state considers a person ought to require in terms of legal need and what it considers prudent to provide, there is little consideration of the concept of legal need from the perspective of individuals *actually experiencing* such need, suggesting that some categories of demand are deemed more equal than others. Moreover, the particularly narrow – literal, even – understanding of

<sup>239</sup> Zander, *Legal Services*, 14.

<sup>240</sup> The pre-history of the universal legal aid regime is detailed in R. Egerton, *Legal Aid* (London 1945).

<sup>241</sup> Hanlon, *State and the Market*, 96–97; Abel, *English Lawyers*, 266–73; Paterson, *Public Good*, 75.

<sup>242</sup> MoJ, “Proposals for the Reform of Legal Aid in England and Wales”, at [2.11].

<sup>243</sup> Trinder, “Taking Responsibility?”.

<sup>244</sup> MoJ, “Reform of Legal Aid in England and Wales”, at [140].

<sup>245</sup> F. Kaganas, “Justifying the LASPO Act: Authenticity, Necessity, Suitability, Responsibility and Autonomy” (2017) 39 *Journal of Social Welfare and Family Law* 168, 178–79.



vulnerability that emerges is at odds with that deployed in other sectors, such as energy.<sup>246</sup> The disheartening explanation is, perhaps, that legal aid recipients do not command much public sympathy, compared with recipients of other free-at-point-of-use public services like healthcare or education.

This brings us to the inescapably political nature of legal aid, which is essentially about fairness in (re)distribution.<sup>247</sup> Unsurprisingly, the perceived acceptability of rationing differs depending upon whether one adopts the perspective of recipient or payor.<sup>248</sup> For those for whom legal aid is a fundamental access-to-justice mechanism, the subordination of justice to economics<sup>249</sup> results in suboptimal protection of basic rights and social entitlements.<sup>250</sup> Yet, public money is not endless, while juxtaposing legal aid with health and education rarely does recipients any favours. (The past decade has seen cuts to all three.) Paterson thus concluded that demand for legal aid will always outstrip supply, so that the pertinent question is prioritisation.<sup>251</sup> Moreover, spending on aid does not translate automatically into provision of justice:<sup>252</sup> it concerns *access* but not necessarily *dispensation* of justice.<sup>253</sup>

Perhaps the key concern, ultimately, is whether good substitutes for state-funded legal services exist for previously eligible clients: whether through more competitively priced private offerings, effective do-it-yourself representation or alternative dispute resolution mechanisms. The available evidence is unencouraging, however.<sup>254</sup> Although existing efforts to diversify aid provision are critiqued as “lacking in imagination”,<sup>255</sup> the current situation serves as an important reminder that market-based mechanisms can be “a seriously inadequate means of protecting rights to equal citizenship because we do not come to markets as equals”.<sup>256</sup> Legal liberalisation has clear limits from this perspective.

## VI. CONCLUSIONS

This article traced the contours and explored the implications of liberalisation of the legal profession in England and Wales. Our starting premise was

<sup>246</sup> Ofgem, “Vulnerable Consumers in the Energy Market”, 2019, available at <https://www.ofgem.gov.uk/publications-and-updates/vulnerable-consumers-energy-market-2019> (last accessed 5 February 2021).

<sup>247</sup> Hudson, *Just Society*, 19; Paterson, *Public Good*, 108; Higgins, “Costs of Civil Justice”, 688.

<sup>248</sup> Paterson, *Public Good*, 74.

<sup>249</sup> Abel, *English Lawyers*, 341.

<sup>250</sup> A review of LASPO12 revealed numerous areas of concern, including increased self-representation, “advice deserts” as professionals exit practice areas, and unawareness of remaining support: MoJ, “Post-implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012”, 2019, CP 37, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf) (last accessed 5 February 2021).

<sup>251</sup> Paterson, *Public Good*, 76–77.

<sup>252</sup> Hudson, *Just Society*, 20.

<sup>253</sup> *Ibid.*, at 21.

<sup>254</sup> Amnesty International, “Cuts that Hurt”; Trinder, “Taking Responsibility?”.

<sup>255</sup> Higgins, “Costs of Civil Justice”, 688.

<sup>256</sup> Prosser, *Limits of Competition Law*, 29.

that the process involves a reimagining of the professional–client relationship as the interaction of supply and demand for legal services. Lawyers are subject to increasingly insistent market forces, clients are encouraged to shop around, and value-for-money is emerging as a contemporary “golden thread” of the justice system. Yet the language of supply and demand, arguably, both over- and understates the case here. A highly profitable legal services industry undoubtedly exists, yet the dynamics of competition do not work well in many segments. Lawyers, moreover, are more than mere suppliers: they are vital cogs within the apparatus of justice, meaning that unmet demand has negative ripple effects beyond market disequilibrium.

The purpose of this piece was not to argue for or against liberalisation. There is merit to both the free competition and access-to-justice perspectives considered in Section III. Yet the arguments from both perspectives have limitations, as illustrated by our exploration of the deeper implications of liberalisation in Section V. Few outside the profession would fail to see advantages in a more responsive, accountable legal sector, where the trope of the intimidating out-of-touch lawyer no longer dominates. It would, however, be naïve to think that greater competition fixes all ills. Both lawyers and plumbers provide vital services, but the qualitatively distinct nature of the law negates any assumption that the same market circumstances are optimal for the sale of each. Throughout this article, we encountered instances where the free market logic of “you get what you pay for” delivers suboptimal results: not only in terms of protecting clients from their lawyers, but also protecting lawyers from their clients, and indeed ensuring a degree of responsibility towards society and the proper development of the law as a whole. The debacle of legal aid, moreover, cautions that, even if “more market” is desirable, this does not imply a concomitant need for “less state”.

Contemporary liberalisation efforts represent important milestones within the ongoing evolution of the legal profession. The profession must and undoubtedly will adapt to the challenges posed – and opportunities offered – by greater competition, heterogeneity and flexibility. In doing so, however, the distinctiveness of what lawyers do, and of why clients access legal services, should not be forgotten. The ultimate promise of liberalisation is to harness the power of the market to secure value-for-money alongside access-to-justice. Yet the transformation from counsellor to competitor, although perhaps inevitable, has not been seamless thus far.