

Tending the Flame: Technological Innovation and the *Legal Services Act* Regime

A paper prepared for the Legal Services Board
by Noel Semple¹
August 6, 2019

Table of Contents

1. Executive Summary	2
2. Introduction.....	4
2.1. Tending the flame	4
2.2. Emerging Legal Services Technologies.....	6
3. Under-Regulation Risks in LSA Framework.....	6
3.1. Risks from Non-Regulated Providers	7
3.2. Risks from Out-of-Jurisdiction Legal Services Providers	9
3.3. New Reservations of Activities too Cumbersome	11
3.4. Risks Created by Third Party Technology.....	13
3.5. The LSA Regime Does not Regulate Digital Comparison Tools	15
3.6. Problematic Division of Authority Between Approved Regulators	17
3.7. Too many small regulators, not able to “keep up”	18
3.8. Systemic Risks	20
3.9. Complexity and Indeterminacy Deterring Entrepreneurship	22
4. Over-Regulation Risks.....	24
4.1. Regime Deters Alternative Business Structure Firms	25
4.2. Opportunities to Redact Reserved List not Taken Up	27
4.3. New Legal Orders Impeded	28
4.4. Exports of Legal Services Impeded by Regime’s Lack of Independence from Government	30
4.5. Protectionism by Approved Regulators Due to Insufficient Independence.....	31
4.6. Unregulated Provision Deterred	34
5. Conclusions.....	35
5.1. Under-Regulation Risks.....	35
5.2. Over-Regulation Risks.....	37
5.3. Conclusions regarding the LSA Regime.....	39
Proactive, or Premature Regulatory Reform?.....	40

¹ J.D., Ph.D. Associate Professor, University of Windsor Faculty of Law. www.noelsemple.ca I am grateful to the Legal Services Board for commissioning this work. Thanks to David Fowles, Steve Brooker, and Caroline Wallace for their very helpful comments.

1. Executive Summary

The *Legal Services Act 2007* (LSA) created a distinctive regime for the regulation of legal services in England & Wales. In the period since 2007, technological innovation has accelerated in the legal services sector. Significant changes have already occurred, and prognosticators have sketched plausible scenarios of dramatic transformation. As part of the Legal Services Board's Technology Project, this paper assesses the impact of technological innovation on the LSA regime. Is the LSA 2007's legal and regulatory framework able to support new technologies for legal service delivery, and respond appropriately to the risks these technologies may create?

Technological innovation poses two types of risk to the LSA regime. First, there is the risk of under-regulation: that consumers or other interested parties will be exposed to risks and detriments brought about by legal services innovation. Second, there is an over-regulation risk: the LSA regime could choke the flame of technological innovation and thereby deprive the public of innovation's benefits. The paper's overall conclusion is that the risks are real, but the LSA regime remains capable, for the time being, of responding to them.

Part 3 of this paper identifies specific under-regulation risks caused by the LSA Regime. Providers of tech-enabled, but deficient services may escape regulation because they are outside of the regime's scope (section 3.1) or outside of England & Wales (3.2). The LSA's system for extending regulation to new fields may be too slow or arbitrary (3.3). Third party suppliers of legal technology (3.4) and digital comparison tools (3.5) are increasingly prominent sources of risk to consumers, but they are apparently outside the regime's scope. The multiplicity of regulators in the LSA regime may mean that major risks to consumers fall through the gaps between them (3.6), or that some of the regulators are too small to deal appropriately with technological change (3.7). Looking beyond consumers, broader public interests may be endangered if technology builds up systemic risks that divided and competing regulators cannot handle (3.8), or if the system's complexity deters entrepreneurship and market entry (3.9). The paper identifies several reforms to the LSA that could mitigate these risks.

The possibility of an over-regulatory LSA regime, choking the flame of technological progress, must also be taken seriously. The regime might, in theory, deter ABS firms (4.1), fail to

redact the reserved activities list after technology reduces risks (4.2), or impede the emergence of new legal orders (4.3). The LSA regime is not completely independent of the state, which might undermine export markets for some technologically advanced legal services (4.4). Nor is the regime completely independent of the professions, which creates risks of protectionism and gold-plating if regulatory decisions are not truly independent (4.5). Finally, the regime's sharp dichotomy between regulated title-holders and unregulated providers of non-reserved activities might throw unwarranted shade on the latter group, in consumers' eyes (4.6). Although small amendments might be justified (see section 4.3), the author's conclusion is that technology-related over-regulation risks are currently manageable within the LSA regime.

Part 5 of the paper summarizes the findings and recommendations. It argues against speculative or "proactive" reform based on potential future risks. The overall conclusion of the paper is that technology-related over-regulation risks are currently manageable within the broad regime established by the LSA.

2. Introduction

The *Legal Services Act 2007* (LSA) created a distinctive regime for the regulation of legal services. The LSA Regime delineates the scope of legal services regulation, establishes regulatory bodies, and defines the relationships between them. It does not establish detailed rules for the provision of legal services; that work is delegated to the approved frontline regulators.

Twelve years is not long in the life of the law. However, in the period since 2007, technological innovation has accelerated in the legal services sector. Significant changes have already occurred, and a full third of consumer legal services are now received online.² Prognosticators have sketched plausible scenarios of dramatic transformation in the legal services market, driven by technology.³

As part of the Legal Services Board's Technology Project, this paper assesses the impact of technological innovation on the LSA regime. There is no doubt that new technology can justify regulatory reform. Indeed, Cristie Ford suggests that innovation itself should be thought of as a focus of regulation, in addition to good and services.⁴ The question here is whether the LSB and approved regulators, acting within the current LSA regime, will be able to carry out any and all reform necessary to protect consumers and advance the public interest. A case has been made for major revisions to the legal services regulatory regime of England & Wales, e.g. abolishing title-based regulation and/or the two-level system.⁵ Does technological innovation in legal services augment this case?

2.1. Tending the flame

Technological innovation in legal services should ideally be a robust, steady flame which creates heat and light. For consumers of legal services, technological innovation should deliver

² Legal Services Consumer Panel (England & Wales), "Tracker Survey 2019 Briefing note: how consumers are using legal services (July 30, 2019)" (London, UK: LSCP, 2019), online: <<https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2019/07/2019-07-25-How-consumers-are-using-2019-FINAL.pdf>>.

³ Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (New York: Oxford, 2015) ; Jordan Furlong, *Law Is a Buyer's Market: Building A Client-First Law Firm [Kindle Edition]* (Toronto: Law21, 2017) .

⁴ Cristie Ford, *Innovation and the State* (Cambridge, UK: Cambridge University Press, 2017) at 6.

⁵ E.g. Legal Services Board, "A vision for legislative reform of the regulatory framework for legal services in England and Wales" (2016), online: <https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2016/20160909LSB_Vision_For_Legislative_Reform.pdf>; Stephen Mayson, "The Focus of Legal Services Regulation (Independent Review of Legal Services Regulation)," <<https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation>>.

better quality, lower prices, and wider choice. Looking beyond consumer interests, technological innovation should also deliver broader public interest benefits such as stronger rule of law, and economic benefits from efficiency and exports.

The flame of technological innovation can also be dangerous. It can scorch consumers with new kinds of deficient, exploitative, or monopolistic legal services. Technological innovation might also start wider conflagrations, such as the erosion of democratic institutions for which social media have recently been blamed.⁶

Legal services regulators must tend the flame of technological innovation. They must minimize the risks that it creates, while helping it to do as much good as possible. This is the standard against which the LSA Regime will be compared in this paper.

In keeping with the LSB's overall approach to its work,⁷ this paper focuses on risks. Technological innovation poses two types of risk to the LSA regime. First, there is the risk of under-regulation: that consumers or other interested parties will be exposed to risks and detriments brought about by legal services innovation. Second, there is an over-regulation risk: the LSA regime could choke the flame of technological innovation and thereby deprive the public of its benefits.

Part 2 of this paper reviews specific under-regulation risks caused by the LSA Regime. Part 3 does likewise with over-regulation risks. Part 4 concludes by discussing possible reforms. I suggest several specific measures, including revisions to the *Legal Services Act*, that would reduce under-regulation and over-regulation risks. However, while there may be other good reasons for major reform, technological innovation in the legal services sector does not require such wholesale reform.

⁶ Culture Digital, Media and Sports Committee (House of Commons, UK),, "8th Report - Disinformation and 'fake news': Final Report (Published 18 February 2019),"

<<https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1791/179102.htm>>

⁷ "A risk-based approach to the regulation of legal services – rather than an 'all or nothing' approach – will help ensure that any given legal activity is assessed against a logical and informed framework of benefit and risk before imposing regulation." (Legal Services Board, "A vision for legislative reform of the regulatory framework for legal services in England and Wales" 2016), online:

<https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2016/20160909LSB_Vision_For_Legislative_Reform.pdf>

2.2. Emerging Legal Services Technologies

Legal service technology includes any computer-aided process, method, or technique used in the provision of information, advice, or representation regarding the application of the law or the resolution of legal disputes. This paper will consider existing legal services technology, as well as technology that might soon emerge.

Legal services technology has been ubiquitous for many years, but until recent years it was mostly “supportive” in the sense proposed by Stephen Mayson –supporting humans in delivering legal services. *Substitutive* technology, which displaces human labour, is a more recent development, and one which has more profound ramifications for regulators which will be explored below.⁸ The LSB’s *Technology and Innovation in Legal Services* report has identified ten specific technologies that are prominent; most of these are substitutive to some extent.⁹

3. Under-Regulation Risks in LSA Framework

Under-regulation occurs when aggregate welfare within a regulator’s jurisdiction is lower than it would be if regulation had been tighter or more expansive. Most commonly, under-regulation occurs because regulators have failed to mitigate risks that could have been mitigated without imposing disproportionate costs. Those exposed to the risks may be consumers, or they may be other members of the public whose interests depend on legal services. This section identifies technological innovation in the legal services sector that might render the LSA Regime under-regulatory.

⁸ Stephen Mayson, "The Focus of Legal Services Regulation (Independent Review of Legal Services Regulation)," <<https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation>>.

⁹ These are listed in Legal Services Board (UK), “Technology and Innovation in Legal Services – Main Report” (London: LSB, 2018), online: <<https://research.legalservicesboard.org.uk/wp-content/media/Innovation-survey-2018-report-FINAL-2.pdf>> at page 10: (1) Interactive websites (e.g. embedded forms); (2) Live chat/ virtual assistants on site, (3) Cloud storage, (4) ID checking, electronic signatures, email security, (5) Apps connecting clients to advice/updates, (6) Technology Assisted Review (TAR): software that searches and classifies documents, (7) Automated Document Assembly (ADA) : drafts using rules and decision trees, (8) Robotic Process Automation (RPA) : automates high-volume/repeatable tasks, (9) Predictive Technology : e.g. predicting outcomes of cases, (10) Blockchain/ Distributed Ledger Technology (DLT).

3.1. Risks from Non-Regulated Providers

The LSA Regime does not apply to a large portion of the market -- 25% according to one estimate.¹⁰ It does not, generally, regulate legal services which are not “reserved.”¹¹ The following chart shows the regulatory status of legal services under the *Legal Services Act*:

Reserved Legal Activities	Unreserved and Exempt Legal Activities
The exercise of a right of audience	Providing legal advice
The conduct of litigation	Representing someone in a mediation or negotiation
Reserved instrument activities	Representing someone in a court or tribunal, so long as this does not constitute the exercise of a right of audience
Probate activities	Activities conducted by exempt persons under Schedule 3 of the <i>Legal Services Act</i> (e.g. people granted rights of audience by a court)
The administration of oaths	
Notarial Activities	

Services not covered by the LSA regime are not entirely unregulated. They are subject to other statutes (such as the *Consumer Rights Act 2015* and the *Electronic Commerce (EC Directive) Regulations 2002*) and the common law. Nevertheless, the LSA regime is distinguished from the regimes of many other OECD countries because it applies legal-sector-specific regulation only to some and not all legal services.¹² The LSB found that for-profit providers outside the LSA regime were used in approximately 5% of the cases in which

¹⁰ Solicitors Regulation Authority (England & Wales), “The changing legal services market” SRA, 2016), online: <www.sra.org.uk/risk/resources/changing-legal-services-market.page>

¹¹ However, under the LSA Regime, unreserved activities may also be regulated if they are conducted by a licensed professional subject to an approved regulator’s regulation. See section 4.6, below.

¹² Some other countries prohibit all provision of legal services except as authorized by the regulatory regime. Andy Boon and Noel Semple, “Fundamental Questions in Legal Services Regulation” in Richard L. Abel et al. eds., *Lawyers in Society 30 Years After* (Oxford, UK: Hart, 2019) [forthcoming], at Section II.A.i. See for example Ontario’s *Law Society Act, R.S.O. 1990, c. L.8, s. 26.1*: “no person, other than a licensee whose licence is not suspended, shall practise law in Ontario or provide legal services in Ontario.”

consumers paid for legal services.¹³ Not-for-profit providers, most of which are unregulated according to the LSB's estimate, dealt with 37% of the problems for which advice was sought.¹⁴

Already, the LSB has observed that “some high-risk activities fall beyond the reach of regulation.¹⁵” Technology might rapidly create new risks to consumers in spaces outside the regime's reach. As Cristie Ford put the point, “innovation seeps under, around, and through regulatory structures and undermines them and their boundaries in unanticipated ways.”¹⁶ Legal advice, which is distinguished from legal information in that it applies the law to a specific set of facts, is outside the LSA regime. Legal advice-giving is subject to significant information asymmetry, placing consumers at potential risk.¹⁷ As Alison Hook points out, a rogue app has the potential to damage more people, more quickly than a rogue human can.¹⁸

Notwithstanding the applicability of general consumer protection law, significant risks may emerge from the lack of distinctively legal regulatory protections. For example, suppose someone creates CrimeFinder.com, an unregulated internet application. CrimeFinder.com solicits information about illegal activities that users have engaged in. Using a database of criminal records, it then predicts for the user how law-enforcement authorities and judges would respond, were they to become aware of the infractions.

Non-sector-specific privacy regulation might prevent CrimeFinder from using the information submitted for another purpose (e.g. blackmailing the users). However, because the application would be outside the LSA Regime, its users would not benefit from the LSA's

¹³ Legal Services Board (England & Wales), “Research Summary: Unregulated Legal Services Providers (June, 2016)” (London: LSB, 2016), online: <<https://www.legalservicesboard.org.uk/wp-content/media/Unregulated-providers-research-summary.pdf>>

¹⁴ Ibid.

¹⁵ Legal Services Board, “A vision for legislative reform of the regulatory framework for legal services in England and Wales” 2016), online: <https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2016/20160909LSB_Vision_For_Legislative_Reform.pdf>

¹⁶ Cristie Ford, *Innovation and the State* (Cambridge, UK: Cambridge University Press, 2017) at 139. Ford was writing about financial services.

¹⁷ Dana Remus and Frank Levy, “Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law” (2017) 30 *Geo. J. Legal Ethics* 501, online: “consumer protection concerns are as salient with respect to legal technologies as they are with respect to legal services generally. In both cases, the expertise in question is complex, esoteric, and specialized; in both cases information asymmetries can quickly lead to market failure.”

¹⁸ Alison Hook, “The Use and Regulation of Technology in the Legal Sector beyond England and Wales: Research Paper for the Legal Services Board” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf>> at 52.

protection of legal professional privilege.¹⁹ Thus, law-enforcement authorities would presumably be able to access the submitted information with a search warrant. If the LSA Regime were to actively regulate all legal services, then it could deal with such under-regulation risks. Note that regulating all legal services would not necessarily apply anything more than the lightest touch to activities considered low-risk.²⁰ Section 190 of the LSA could be revised to extend legal professional privilege to all information related to the provision of legal advice. Further, Part 6 of the LSA (requiring firms to have formal complaints-handling processes, and establishing the Legal Ombudsman available to consumers as a fall-back) could be extended to cover all providers of legal services.²¹ In addition to providing redress to a larger group of consumers, this would generate data about any problems created by emerging legal technologies outside of the current reserved activities.

3.2. Risks from Out-of-Jurisdiction Legal Services Providers

The LSA Regime applies to legal services providers within England and Wales. It does not protect domestic consumers from deficient legal services that are imported from abroad. This distinguishes the LSA Regime from some consumer protection regimes – such as the food safety regime -- which apply to all goods or services of a certain type that are consumed within the jurisdiction, and make explicit provision for imports.

The possibility of importing legal services is not new, but the regional specificity of law has limited it in practice. However, technological innovation will increase the potential for imports.²² Internet applications have marginal costs of supply which are close to zero, and they

¹⁹ LSA, s. 190.

²⁰ Legal Services Board, “A vision for legislative reform of the regulatory framework for legal services in England and Wales” (2016), online: <https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2016/20160909LSB_Vision_For_Legislative_Reform.pdf>

²¹ LSB Legislative Options Review. The CMA commented favourably on the LSA’s complaints system: Competition & Markets Authority (UK), “Legal services market study: Final Report” (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at 4.124. It also recommended that the Ministry of Justice consider extending redress schemes in this way: Competition and Markets Authority (UK), “CMA demands greater transparency from legal service providers (15 December 2016),” <<https://www.gov.uk/government/news/cma-demands-greater-transparency-from-legal-service-providers>>.

²² Stephen Mayson, “The Focus of Legal Services Regulation (Independent Review of Legal Services Regulation),” <<https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation>> at Section 2.3; Law Society of Alberta, Law Society of Manitoba and Law Society of Saskatchewan, “Innovating Regulation” (Edmonton, Winnipeg, Regina: LSM LSA, LSS, 2015), online: <http://lawsociety.ab.ca/docs/default-source/innovating-regulation/innovating-regulation-paper_v6.pdf?sfvrsn=2> at 65; Judith Bennett, Tim Miller, Julian Webb, Rachele Bosua, Adam Lidders and Scott Chamberlain, “Current State of Automated Legal Advice

are equally accessible everywhere in the world.²³ Mancini suggests that document-drafting for non-contested legal needs will be of particular interest to these new entrants.²⁴ Nor are contested matters immune. For example, DoNotPay.com – which is based in the United States -- offers legal services, based on UK law, related to parking tickets received in the UK.²⁵

More traditional “bespoke” legal services can also be provided from abroad more readily than in the past due to advances in video telephony.²⁶ In completely online courts (which seem likely to proliferate²⁷), technology would allow a client to be represented by someone who has never set foot in England & Wales. This would constitute “the conduct of litigation” by a non-authorised person. The risk of non-authorised legal service provision does not depend on technology, and it is prohibited by s. 14 of the LSA. However, s. 14 offers no remedy regarding unauthorized offshore provision of reserved legal services, because the LSA Regime has no extraterritorial applicability and no method for controlling legal services imports. This risk

Tools: Discussion Paper 1” (Melbourne, Australia: UMNSI, 2018), online: <https://networkedsociety.unimelb.edu.au/__data/assets/pdf_file/0020/2761013/2018-NSI-CurrentStateofALAT.pdf> at 14.

²³ Organization for Economic Cooperation and Development, “Vectors Of Digital Transformation (OECD Digital Economy Papers No. 273, January 2019)” (Paris: OECD, 2019), online: <<https://www.oecd-ilibrary.org/docserver/5ade2bba-en.pdf?expires=1556229517&id=id&accname=guest&checksum=FB06DF8882B03CBDF20FDD84221D7843>> at 6: “Core digital products and services, notably software and data, have marginal costs close to zero. Combined with the global reach of the Internet, this allows these products and the firms and platforms that use them to scale very quickly, often with few employees, tangible assets and/or no geographic footprint.” See also Judith Bennett *et al.*, “Current State of Automated Legal Advice Tools: Discussion Paper 1” (Melbourne, Australia: UMNSI, 2018), online: <https://networkedsociety.unimelb.edu.au/__data/assets/pdf_file/0020/2761013/2018-NSI-CurrentStateofALAT.pdf> at 6.

²⁴ James Mancini, “Protecting And Promoting Competition In Response To "Disruptive" Innovations In Legal Service (OECD Working Party No. 2 on Competition and Regulation)” (Paris: 2016), online: <[https://one.oecd.org/document/DAF/COMP/WP2\(2016\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2016)1/en/pdf)> at 6.

²⁵ <https://www.donotpay.com/list/362>

²⁶ Stephen Mayson, “The Focus of Legal Services Regulation (Independent Review of Legal Services Regulation),” <<https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation>> at 5; James Mancini, “Protecting And Promoting Competition In Response To "Disruptive" Innovations In Legal Service (OECD Working Party No. 2 on Competition and Regulation)” (Paris: 2016), online: <[https://one.oecd.org/document/DAF/COMP/WP2\(2016\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2016)1/en/pdf)> at 5: “Communication technology is enabling an alternative to the traditional face-to-face model of legal service delivery. Legal professionals can now provide services to clients through increasingly- sophisticated online interactions, ranging from video conferencing to live chatting on specialised platforms. This means that market competition can be opened up to a much broader base of service providers who interact with clients remotely, including low-cost providers internationally.”

²⁷ Roger Smith, “Tribunals and Continuous Online Resolution: the devil in the detail (Law, Technology and Access to Justice, May 7, 2019),” <<https://law-tech-a2j.org/odr/tribunals-and-continuous-online-resolution-the-devil-in-the-detail/>>; Alison Hook, “The Use and Regulation of Technology in the Legal Sector beyond England and Wales: Research Paper for the Legal Services Board” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf>> at 30.

might be partially addressed by requiring each tribunal or public institution before which someone engages in a reserved legal activity to require an undertaking, or verify the authorization of the individual doing so.²⁸ This would include not only courts and tribunals, but also, for example, public offices dealing with conveyancing and probate. It is also salutary for the LSB and/or the approved regulators to collaborate with foreign legal services regulators abroad, in order to optimize regulation of technological legal services providers operating in multiple jurisdictions.²⁹

If deficient imported legal services become a source of significant risks, a more comprehensive regulatory approach could be deployed, perhaps through the approval of a new regulator. Of course, doing so would increase costs and the complexity of the LSA Regime. The size of the import market might not be large enough to justify a new approved regulator which has both (i) size and expense proportionate to the size of the market and (ii) sufficient capacity to regulate competently. An alternative would be to mandate the LSB itself, or the existing approved regulators, to regulate imported legal services. This would presumably require amendment to the LSA.

3.3. New Reservations of Activities too Cumbersome

The Regime assigns most functions to the approved regulators or to pan-sectoral entities (LSB, LSCP, LeO, CMA). However the list of six reserved activities is part of the Act itself, and additions can only be made by the Lord Chancellor.³⁰ As the LSB has noted, there is no evidence of a risk-based analysis or any other formal process underlying this list.³¹ The Lord Chancellor can only add to the list on the LSB's recommendation, but can decline to accept LSB recommendations, and actually did so regarding will-writing.³²

²⁸ Presumably, in matters where a litigant may be assisted by an unregulated "McKenzie Friend," if the procedure goes online then the litigant would have the right to use an unregulated individual not based in the UK in this capacity.

²⁹ Alison Hook, "The Use and Regulation of Technology in the Legal Sector beyond England and Wales: Research Paper for the Legal Services Board" (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf>> at 56.

³⁰ LSA, s. 12, s. 24.

³¹ Legal Services Board, "A vision for legislative reform of the regulatory framework for legal services in England and Wales" (2016), online: <https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2016/20160909LSB_Vision_For_Legislative_Reform.pdf> at 14.

³² Legal Services Board (England & Wales), "Sections 24 and 26 investigations: will-writing, estate administration and probate activities (Final reports, 13 February 2013)" (LSB, 2013), online: <https://www.legalservicesboard.org.uk/Projects/pdf/20130211_final_reports.pdf>; Neil Rose, "Government says

Technological change might generate new services that should be reserved, and the Regime's reliance on the Lord Chancellor to amend the list might allow serious risks to materialize.³³ For example, advice-giving is not reserved, but apps like DoNotPay generate complaint and appeal letters that are to be sent to public authorities. Given the risks involved (e.g. a flooding of public authorities with spurious claims), it is unclear whether this should be reserved for the same reasons that the conduct of litigation is reserved.³⁴

One under-regulation risk is that technological innovation makes a non-reserved activity riskier to consumers.³⁵ Another is that innovation creates new fields of practice in which the risks justify reservation. One plausible scenario involves advice-giving or document-drafting in a field – such as consumer or parenting disputes-- that was not economically viable in 2007 because consumers were not willing to pay the costs. Technological innovation might reduce the cost of service provision, creating a new market and a new set of risks to consumers.

Some risky services might not even fit within the LSA definition of “legal activities,” in which case they could not be reserved under the LSA s. 24 procedure. For example, it might be argued that the automated output of a chatbot does not constitute “the provision of legal advice or assistance” but is rather merely legal information. In such cases, Parliament would have to amend s. 24 before the activity could be brought within the LSA regime.

An alternative to the LSA regime would empower the LSB to make additions to the list of reserved activities. Such decisions might be prompter than those of the current process, and more closely based on analysis of the regulatory objectives and evidence. On the other hand, there are

‘no’ to will-writing regulation (Legal Futures, 14 May 2013),” <<https://www.legalfutures.co.uk/latest-news/government-says-no-will-writing-regulation>>.

³³ The opposite risk -- that the Lord Chancellor will fail to de-reserve activities whose risks have been reduced by technological innovation will be considered in section 4.2 below.

³⁴ Richard Moorhead, "LawTech: Time for a cybernetic legal ethics? (Oct. 19, 2018)," <<https://lawyerwatch.blog/2018/10/19/lawtech-time-for-a-cybernetic-legal-ethics/>> “These technologies and innovations tend to avoid regulatory categories. ... we could query whether DoNotPay’s services would fall under claims management if they did say housing disrepair or PI (are they advising? would they be representing [in writing] when they provide letters or advocacy scripts, as the US bot is reported to do). But if they were not claims managers, they are not, it seems, generally providing reserved services and so they are not a regulated provider.”

³⁵ Legal Services Board, “A vision for legislative reform of the regulatory framework for legal services in England and Wales” 2016), online: <https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2016/20160909LSB_Vision_For_Legislative_Reform.pdf> at 16: “Risks can also change over time.” See also Competition and Markets Authority (UK), “CMA demands greater transparency from legal service providers (15 December 2016),” <<https://www.gov.uk/government/news/cma-demands-greater-transparency-from-legal-service-providers>> at para 6.36.

broad drawbacks to transferring policy-making authority away from democratically accountable official. The author is not aware of any evidence that the Lord Chancellor has exercised this power capriciously or in bad faith, and these decisions are subject to judicial review.³⁶

3.4. Risks Created by Third Party Technology

The LSA Regime applies to providers of legal services. It does not directly apply to the technologies that providers use, or to the third parties who create those technologies. The assumption is that it is sufficient to hold the provider responsible for any deficiencies in the technology deployed.³⁷ This assumption is shared with legal services regulatory regimes elsewhere in the world,³⁸ but it is not shared by all other consumer protection regulatory regimes. For example, medical devices and drugs are regulated, even when they are prescribed and dispensed by licensed and regulated medical professionals who might in theory be required to take responsibility for them.³⁹

Legal services providers subject to the LSA regime may rely on artificial intelligence or algorithms to make predictions regarding legal outcomes, or assemble documents for their clients. Such technologies are often “black boxes” in the sense that grounds for their decisions are secret.⁴⁰ Indeed, the grounds for the decisions may not be known to *anyone*, including the creators of the technology. Automated legal services used to be “hand-coded” – a human would tell the system how to respond to various user inputs. However, some artificial intelligence now engages in “unsupervised learning” – sifting autonomously through data in order to identify

³⁶ See e.g. *The Institute of Chartered Accountants In England And Wales, R (On the Application Of) v The Lord Chancellor and Secretary of State For Justice* [2019] EWHC 461 (Admin) (05 March 2019). Online: <http://www.bailii.org/ew/cases/EWHC/Admin/2019/461.html>.

³⁷ Legal Services Consumer Panel (England & Wales), “Lawtech and consumers (22 May 2019)” (London: LSCP, 2019), online: <<https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2019/06/LSCP-Technology-Paper-2019.pdf>> at 7. See also Judith Bennett *et al.*, “Current State of Automated Legal Advice Tools: Discussion Paper 1” (Melbourne, Australia: UMNSI, 2018), online:

<https://networkedsociety.unimelb.edu.au/__data/assets/pdf_file/0020/2761013/2018-NSI-CurrentStateofALAT.pdf> at 35: “There are many questions about the reach of regulation. For example, should there

be oversight of the technology, or is it adequate to assess only the quality of service outcomes, however achieved?”

³⁸ Dana Remus and Frank Levy, “Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law” (2017) 30 *Geo. J. Legal Ethics* 501, online: “some commentators suggest that technologies that lawyers use and oversee are best addressed through the rules of lawyer oversight of non-lawyer service providers.” See also FN169.

³⁹ Alison Hook, “The Use and Regulation of Technology in the Legal Sector beyond England and Wales: Research Paper for the Legal Services Board” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf>> at 48.

⁴⁰ Legal Services Consumer Panel (England & Wales), “Lawtech and consumers (22 May 2019)” (London: LSCP, 2019), online: <<https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2019/06/LSCP-Technology-Paper-2019.pdf>> at 5.

patterns which are then used to make predictions.⁴¹ Bennett discusses a coming “fourth wave” of applications capable of making predictions and recommendations with very little human involvement:

the cutting edge of fourth wave applications is fundamentally different from second wave expert systems and third wave automated process technology that used more causal, defined logic. A key difference is that the rules by which machine learning technology recommends decisions are not explicitly programmed by a human (Lodewyke, 2017), rather the machines “self-learn” from data using statistical reasoning. The machines are provided with gigabytes of data from selected databases and use algorithms to find concepts and patterns in the data, form and test hypotheses, and develop recommendations with analysis of that data. The more intelligent systems can learn, adapt and potentially act autonomously rather than simply execute pre-defined instructions. The capacity for self-learning in turn enables these systems to build more complex, dynamic and adaptive models, and “improve” their performance over time on specific tasks (Surden, 2014).⁴²

Suppose a predictive algorithm reports that, if a taxpayer adopts a certain tax-minimizing structure, the risk of an audit is 15%. The technology provider may not be able to explain *why* it has reached this conclusion. It simply emerges from patterns in the data. If so, the legal service provider that accesses this service and passes the information on to a client cannot understand the basis for it either.⁴³ If the technology fails, large numbers of consumers might be exposed to risks. If such a technology succeeds “too well,” it could undermine the public interest by facilitating tax evasion. The technology would certainly not be bound by ethical precepts that, in the SRA Handbook’s phrase, require lawyers to “uphold the rule of law and the proper administration of justice.”⁴⁴

⁴¹ Dana Remus and Frank Levy, “Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law” (2017) 30 *Geo. J. Legal Ethics* 501, online: at 570.

⁴² Judith Bennett *et al.*, “Current State of Automated Legal Advice Tools: Discussion Paper 1” (Melbourne, Australia: UMNSI, 2018), online: <https://networkedsociety.unimelb.edu.au/__data/assets/pdf_file/0020/2761013/2018-NSI-CurrentStateofALAT.pdf> at 13.

⁴³ Regarding this “black box problem,” see *ibid.* at 33.

⁴⁴ Solicitors Regulatory Authority (England & Wales), “SRA Handbook,” <<https://www.sra.org.uk/solicitors/handbook/code/content.page>>; James Mancini, “Protecting And Promoting Competition In Response To “Disruptive” Innovations In Legal Service (OECD Working Party No. 2 on Competition and Regulation)” (Paris: 2016), online: <[https://one.oecd.org/document/DAF/COMP/WP2\(2016\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2016)1/en/pdf)> at 25

Such risks cannot be *directly* addressed by a regime which applies only to actual legal services providers.⁴⁵ Just as regulation of doctors who recommend and perform hip replacements is complemented by regulation of the artificial hips themselves, it could be argued that the LSA regime will be under-regulatory until it regulates non-client-facing providers of legal services technology.⁴⁶ If this risk is considered sufficiently large to justify direct regulation, amendments would be required as the LSA regime does not extend to entities that do not themselves provide legal services. Another potential approach is to issue guidance to regulated entities regarding specific technologies, as the Financial Conduct Authority has done.⁴⁷ Finally, if third party legal “regtech” providers emerge to manage regulatory compliance on behalf of legal services providers, then they themselves might require some form of regulation.⁴⁸

3.5. The LSA Regime Does not Regulate Digital Comparison Tools

Inexperienced legal services consumers looking for providers confront information scarcity and high search costs.⁴⁹ Digital comparison tools allow consumers to make more informed decisions. These are new technologies with significant potential for consumers.⁵⁰

⁴⁵ However, it is possible to respond to the risk with requirements on providers who choose to use the technologies. For example, Alison Hook suggests that a rule might state that a “legal service provider should only use AI when they have an appropriate understanding of the data on which the software application has been trained, an appropriate knowledge of how the underlying algorithm or deep learning works (or the ability to obtain an ex-post explanation).” (Alison Hook, “The Use and Regulation of Technology in the Legal Sector beyond England and Wales: Research Paper for the Legal Services Board” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf>> at 53. See also Roger Brownsword, “The Regulation of New Technologies in Professional Service Sectors in the United Kingdom: Key Issues and Comparative Lessons” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/Professions-RB-Report-VfP-4-Jul-2019.pdf>> at 3.3 regarding the different types of transparency, regarding AI-generated decisions, that regulation might require.

⁴⁶ E.g. “standards ... for legal services applications using AI in the provision of legal services to end users.” Alison Hook, “The Use and Regulation of Technology in the Legal Sector beyond England and Wales: Research Paper for the Legal Services Board” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf>> at 53.

⁴⁷ Legal Services Consumer Panel (England & Wales), “Lawtech and consumers (22 May 2019)” (London: LSCP, 2019), online: <<https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2019/06/LSCP-Technology-Paper-2019.pdf>> at 7.

⁴⁸ Regarding the potential of legal regtech, see Alison Hook, “The Use and Regulation of Technology in the Legal Sector beyond England and Wales: Research Paper for the Legal Services Board” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf>> at 59-60.

⁴⁹ Noel Semple, “Mystery Shopping: Demand-Side Phenomena in Markets for Personal Plight Legal Services” (2018) 27 International Journal of the Legal Profession 1, online: <https://www.tandfonline.com/doi/full/10.1080/09695958.2018.1490292>.

⁵⁰ Competition & Markets Authority (UK), “Legal services market study: Final Report” (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at para 3.152.

They include sites with customer reviews, peer rankings, and objective information about providers gleaned from regulators.⁵¹

The LSA regime does not apply to digital comparison tools (DCTs), which are also known as “marketplaces” for lawyers or legal services.⁵² There are two reasons why this might constitute under-regulation. First, the sites might deceive consumers, if for example they accept payments from legal services providers in order to skew the comparisons.⁵³ As Mancini notes, although consumer reviews of legal services can reduce information asymmetry regarding the service providers, they can also “create new information asymmetries related to the accuracy and legitimacy of reviews.”⁵⁴ These concerns are not unique to the legal sector; they apply to consumer DCTs generally. The CMA has proposed best practices for digital comparison tools.⁵⁵ However the complex quality and price attributes of legal services may justify regulatory attention to legal DCTs, perhaps through amendments to the LSA.

Second, these intermediaries could fail due to a dearth of objective and relevant information about legal services providers.⁵⁶ A case could be made that the LSA regime should more explicitly require regulators and providers to produce information about the quality and price attributes of offerings in this marketplace, which digital intermediaries could use to help consumers make better decisions. The CMA has strongly emphasized the need for transparency and data.⁵⁷ However, some progress has been made within the current regime, including the

⁵¹ E.g. The Law Superstore (www.thelawsuperstore.co.uk)

⁵² Alison Hook, “The Use and Regulation of Technology in the Legal Sector beyond England and Wales: Research Paper for the Legal Services Board” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf>> at 25.

⁵³ James Mancini, “Protecting And Promoting Competition In Response To “Disruptive” Innovations In Legal Service (OECD Working Party No. 2 on Competition and Regulation)” (Paris: 2016), online: <[https://one.oecd.org/document/DAF/COMP/WP2\(2016\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2016)1/en/pdf)> at 24.

⁵⁴ Ibid. at 19.

⁵⁵ Competition and Markets Authority (UK), “Digital comparison tools market study” (London: CMA, 2016), online: <<https://www.gov.uk/cma-cases/digital-comparison-tools-market-study>>.

⁵⁶ Noel Semple, “Measuring Legal Service Value” (2019) Forthcoming, University of British Columbia Law Review, online: <https://www.ssrn.com/abstract=3144771>, Noel Semple, “Mystery Shopping: Demand-Side Phenomena in Markets for Personal Pliant Legal Services” (2018) 27 International Journal of the Legal Profession 1, online: <https://www.tandfonline.com/doi/full/10.1080/09695958.2018.1490292>; Competition & Markets Authority (UK), “Legal services market study: Final Report” (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at para 3.160.

⁵⁷ Competition and Markets Authority (UK), “CMA demands greater transparency from legal service providers (15 December 2016),” <<https://www.gov.uk/government/news/cma-demands-greater-transparency-from-legal-service-providers>>.

SRA's price transparency requirements,⁵⁸ and improvements to the neutral Legal Choices website.⁵⁹ Although laurels should not be rested upon, England & Wales does appear to be a world leader in fostering healthy competition within the legal services marketplace.

3.6. Problematic Division of Authority Between Approved Regulators

Under the LSA Regime, every authorized person (title-holder or ABS) is regulated by at least one approved regulator. However, technology makes it increasingly possible that a legal service would be provided by authorized persons collaborating in a way that leaves it unclear where regulatory responsibility should lie as between them. In 2016, the LSB called for a single regulator to replace the LSA Regime, citing among other problems a blurring of "distinctions based on titles and types of providers."⁶⁰ Technology could exacerbate this blurring, if it leads to greater interprofessional collaboration.⁶¹ When one authorized person provides services that are packaged, resold, or hosted by another authorized person, which person (or which person's insurer⁶²) can be held responsible? The author is not aware of any specific instances of this problem, and the existing LSA might well be sufficient to deal with the problem. Under section 52 of the LSA, approved regulators must try to avoid regulatory conflicts, and section 53 gives the LSB the power to compel changes to resolve any that do occur. The LSB can also issue general guidance to the approved regulators on regulatory gaps arising from technological progress.

The division of authority between approved regulators might also lead to missed opportunities for collaboration between them, in responding to technological change. Notwithstanding differences in practice contexts, there might be some unnecessary "reinvention

⁵⁸ Solicitors Regulatory Authority (England & Wales), "Transparency," <<https://www.sra.org.uk/solicitors/resources/transparency.page>>.

⁵⁹ Nick Hilborne, "LSB: Regulators making "good progress" on publishing prices (Legal Futures, 17 October 2018)," <<https://www.legalfutures.co.uk/latest-news/lsb-regulators-making-good-progress-on-publishing-prices>>.

⁶⁰ Legal Services Board, "A vision for legislative reform of the regulatory framework for legal services in England and Wales" (2016), online: <https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2016/20160909LSB_Vision_For_Legislative_Reform.pdf>. This reform was also proposed for Scotland by the Robertson Review: Esther A. Robertson, "Fit for the Future: Report of the Independent Review of Legal Services Regulation in Scotland" (Government of Scotland, 2018), online: <<https://www2.gov.scot/Resource/0054/00542583.pdf>>.

⁶¹ Stephen Mayson, "The Focus of Legal Services Regulation (Independent Review of Legal Services Regulation)," <<https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation>> at 2.3.2.

⁶² Legal Services Consumer Panel (England & Wales), "Lawtech and consumers (22 May 2019)" (London: LSCP, 2019), online: <<https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2019/06/LSCP-Technology-Paper-2019.pdf>> at 8.

of the wheel” if, for example, the CLC, the SRA, and CILEx all create rules for the use of blockchain in real estate transactions. Interventions from non-sector specific regulators (e.g. the Information Commissioner) might similarly call for a joined-up response from the legal services regulatory community. The LSB might play a coordinating role to ensure that opportunities for regulators to work together, in responding to technological change, are not missed.

3.7. Too many small regulators, not able to “keep up”

Some of the legal professions in the LSA Regime are very small, and their approved regulators are likewise small. The Costs Lawyer Standards Board, for example, had only one employee as of 2016.⁶³ This has led to a concern about capacity to meet the LSA Regime’s expectations for optimal regulation.⁶⁴ The LSB’s 2019 Regulatory Performance Assessment found that the Costs Lawyer Standards Board had not met eight of the 26 regulatory performance expectations (although it reported that the CLSB was taking action on all of these shortcomings).⁶⁵

Technological innovation necessitates continuous regulatory change. It changes the risks involved in various practice activities, requiring amendments to many parts of the regulatory regime to avoid under- and over-regulation. It requires rules that are both detailed enough to offer certainty, and flexible enough to have some durability as the state of the art continues to evolve.⁶⁶ As other sources of regulation – e.g. the Information Commissioner, the *Data Protection Act*, and the EU’s *General Data Protection Regulation* – develop, sector-specific legal services regulation must be reformed in order to avoid regulatory conflicts (e.g. the impossibility of complying with all applicable rules). Even in the absence of overt conflicts, best

⁶³ Competition & Markets Authority (UK), “Legal services market study: Final Report” (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at para 5.127. CILEx Reg had 17 full-time equivalent employees in 2017.

⁶⁴ Legal Futures, “Panel questions future of underperforming regulator (23 January 2019),” <<https://www.legalfutures.co.uk/latest-news/panel-questions-future-of-underperforming-regulator>>.

⁶⁵ Legal Services Board (England & Wales), “Costs Lawyer Standards Board - Regulatory performance assessment ” <https://www.legalservicesboard.org.uk/Projects/developing_regulatory_standards/pdf/2019/FW__Web_update_for_12pm_on_Thursday/CLSB_-_current_performance_assessment.pdf>. CILEx Regulation employed 19 full-time equivalent staff in 2018: <https://cilexregulation.org.uk/wp-content/uploads/2019/05/Annual-Statement-of-costs.pdf>

⁶⁶ Roger Brownsword, “The Regulation of New Technologies in Professional Service Sectors in the United Kingdom: Key Issues and Comparative Lessons” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/Professions-RB-Report-VfP-4-Jul-2019.pdf>> at 13.

regulatory practice minimizes the frictions and unnecessary barriers to entry created by the concurrent operation of multiple regimes.

Going beyond the creation and enforcement of rules, best-in-class regulators can also provide support, guidance and education about emerging opportunities and risks attributable to technology.⁶⁷ They can, as Roger Brownsword's LSB paper suggests, "'de-risk' new technologies so that both providers and consumers are willing to adopt them."⁶⁸ All of this work falls to the approved regulators. However, making evidence-based reforms requires a research and implementation capacity which smaller regulators may lack. Consumers of the smaller professions' services may be exposed to excessive risks that were not ascertained or appropriately dealt with by overwhelmed regulators.

On the other hand, there may be advantages to having regulators dedicated to small but distinctive niches of the legal services marketplace. If costs lawyer practice, or notary practice, has distinctness that is inherent (and not merely a product of regulation), then the proper calibration of regulation in light of technological change within that niche may be best left to a regulator with detailed knowledge of it. This arguably manifests "flexible regulation," better tuned to specific niches, "more adaptable, and less one- size-fits-all."⁶⁹ The principle of subsidiarity holds that decisions should be made by the level of government which is "closest to the ground," unless that authority is unable to discharge the obligation effectively.⁷⁰ The LSA's two-level, quasi-federalist regime is harmonious with this principle, because the LSB can step in when and if the approved regulators fail.

The CMA received submissions to the effect that "separate frontline regulators better understand the particular needs of their regulated individuals," and therefore make better

⁶⁷ Alison Hook, "The Use and Regulation of Technology in the Legal Sector beyond England and Wales: Research Paper for the Legal Services Board" (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf>> at 37.

⁶⁸ Roger Brownsword, "The Regulation of New Technologies in Professional Service Sectors in the United Kingdom: Key Issues and Comparative Lessons" (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/Professions-RB-Report-VfP-4-Jul-2019.pdf>> at 9.

⁶⁹ Cristie Ford, *Innovation and the State* (Cambridge, UK: Cambridge University Press, 2017) at 84.

⁷⁰ ScienceDirect, "Principle of Subsidiarity," <<https://www.sciencedirect.com/topics/social-sciences/principle-of-subsidiarity>>

decisions about creating and enforcing regulation.⁷¹ However, the CMA Report also said that, if the regime moves toward risk-regulation and away from title-based regulation, the number of regulators might indeed be too large.⁷² In other sectors, a single regulator such as Ofcom is charged with regulating several sectors which seem to have little in common, and has methods to stay well informed about each of them.

The LSB’s Regulatory Performance Assessment process seems a suitable way to gauge the approved regulators’ work in responding appropriately to technological change. If the existing 26 performance criteria do not adequately cover this ground, then new ones could be added. Outcomes are currently divided into five categories;⁷³ a fifth category such as “Innovation-Readiness” could be added. New outcomes in this category would assess the regulator’s ability to appropriately deal with the sorts of technology-related under-regulation and over-regulation risks described in this paper. This suggestion, which dovetails with Alison Hook’s call for “a strategic legaltech challenge to regulators,”⁷⁴ would allow a fair test of the current regulators’ capacity, before decisions are made about them.

3.8. Systemic Risks

In addition to consumer protection, the LSA Regime aims to “deliver outcomes in the interests of society as a whole.”⁷⁵ Technology creates some under-regulation risks to those who are not legal services consumers. As Remus and Levy note, “the value of professional regulation lies not only in protecting clients from lawyers (or legal technologies), but also in protecting society from the ways in which clients may use lawyers (or legal technologies) to the detriment

⁷¹ Competition & Markets Authority (UK), “Legal services market study: Final Report” (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at para 5.129.

⁷² Ibid. at para 5.130.

⁷³ The existing categories are Regulatory Approach; Authorisation; Supervision; Enforcement; Well-Led.

⁷⁴ Alison Hook, “The Use and Regulation of Technology in the Legal Sector beyond England and Wales: Research Paper for the Legal Services Board” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf>> at 57.

⁷⁵ Legal Services Board, “A vision for legislative reform of the regulatory framework for legal services in England and Wales” (2016), online: <https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2016/20160909LSB_Vision_For_Legislative_Reform.pdf>; Roger Brownsword, “The Regulation of New Technologies in Professional Service Sectors in the United Kingdom: Key Issues and Comparative Lessons” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/Professions-RB-Report-VfP-4-Jul-2019.pdf>> at 8.

of others, including opponents, third parties, and the legal system itself.”⁷⁶ Legal services that are perfectly satisfactory to the client/consumer may be deficient if, for example, they subject third parties to groundless litigation.⁷⁷ Approved regulators can and do regulate to prevent legal services from damaging non-consumer public interests.

However, the LSA Regime’s division of primary responsibility between eight approved regulators may make it more difficult to detect *systemic* risks created by legal services technology. The idea of systemic risk is central in financial services regulation.⁷⁸ Regulators of banks must attend to the risks facing consumers (e.g. loss of one’s deposits in the event of bank failure). However, they must also attend the risk confronting other economic actors, who may not even be consumers of banking services, if the behaviour of banks precipitates a broad financial crisis.

Systemic risks could be created by deficient legal services, and these could plausibly be exacerbated by technological innovation. Perhaps a certain type of “smart contract” term will be adopted by providers in multiple legal professions. The risk to any individual consumer might not warrant intervention, and even the risks to all consumers of a certain reserved activity might not warrant intervention. Nevertheless, the risks to the entire justice system or economy of England & Wales might justify intervention. There are other plausible scenarios in which legal services technology generates systemic risks straining the capacity of approved regulators:

- The equal entitlement of all citizens to the benefit and protection of the law might be endangered if technology gives wealthy people and corporations access to highly effective legal services, which unfairly disadvantage parties of modest means who transact with or litigate against them.

⁷⁶ Dana Remus and Frank Levy, “Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law” (2017) 30 *Geo. J. Legal Ethics* 501, online: .

⁷⁷ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 27-33.

⁷⁸ Cristie Ford, *Innovation and the State* (Cambridge, UK: Cambridge University Press, 2017) at 15: “Sometimes we fail to see the effects of innovations until they collect, as if suddenly, in unexpected locations (much as risk collected in over-the-counter derivatives markets in 2007–2008). In fact, those innovations may have built up over time but only registered with us after they had reached a certain critical volume. In this way, innovation is like water: a single droplet is rarely remarkable on its own, but many droplets together matter quite a lot. ” See also page 143.

- Simpler and more profitable legal services move online, leading to the closure of brick-and-mortar solicitors' offices, undermining access to justice for low-income people and/or people with more complex needs⁷⁹
- Predictive algorithms manifesting racial bias will be incorporated into the justice system, thereby entrenching injustice.⁸⁰

It would be problematic if the LSA regime, by focusing each approved regulator on its own constituents, fails to permit pan-sectoral entities to assess and appropriately deal with systemic risks created by technological innovation in legal services. However, it is not clear that the LSB's broad powers under Part IV of the LSA – which include the power to guide, intervene in and sanction approved regulators – are insufficient to address whatever systemic risks may develop. The legal services most prone to create systemic financial risks – those related to large clients in the financial services industry – are also already subject to regulation by other entities.

3.9. Complexity and Indeterminacy Deterring Entrepreneurship

Given the modest pace of change among existing practitioners,⁸¹ entrepreneurs have a key role to play in delivering the benefits of innovation to consumers. Entrepreneurs contemplating market entry seek legal certainty about what will be permitted. The LSA regime's complexity could be problematic in this regard,⁸² creating a perception (if not the reality) that market entry would be difficult and risky. A new ABS venture is potentially subject to the rules of (i) the body that grants its ABS license, (ii) the regulators of all title-holders working within

⁷⁹ Roger Brownsword, "The Regulation of New Technologies in Professional Service Sectors in the United Kingdom: Key Issues and Comparative Lessons" (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/Professions-RB-Report-VfP-4-Jul-2019.pdf>> at 23.

⁸⁰ Legal Services Consumer Panel (England & Wales), "Lawtech and consumers (22 May 2019)" (London: LSCP, 2019), online: <<https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2019/06/LSCP-Technology-Paper-2019.pdf>> at 6; Citizens Lab and International Human Rights Program (University of Toronto), "Bots at the Gate: a Human Rights Analysis of Automated Decision-Making in Canada's Immigration and Refugee System" (Toronto: Citizen Lab, 2018), online: <<https://citizenlab.ca/wp-content/uploads/2018/09/IHRP-Automated-Systems-Report-Web-V2.pdf>>; Michael Cross, "Government probes justice algorithm bias (The Law Society Gazette, 20 March 2019)," <<https://www.lawgazette.co.uk/news/government-probes-justice-algorithm-bias/5069680.article>>..

⁸¹ Legal Services Board (UK), "Technology and Innovation in Legal Services – Main Report" (London: LSB, 2018), online: <<https://research.legalservicesboard.org.uk/wp-content/media/Innovation-survey-2018-report-FINAL-2.pdf>>: "overall 7% of providers had introduced new to the market services in the past three years.... Of these nearly two thirds had made use of new technology to change the way they deliver legal services."

⁸² Competition & Markets Authority (UK), "Legal services market study: Final Report" (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at 5.4.

it,⁸³ and, (iii) rules applicable to providers within the LSA itself.⁸⁴ It must also consider what the Legal Ombudsman will determine to be “fair and reasonable in all the circumstances of the case.”⁸⁵ Compared to a regime with a smaller number of regulators, and fewer sources of rules and expectations, the LSA regime may suppress entrepreneurship.

With regard to the scope of the reservations, the LSA does not always provide certainty. Schedule 3 states that a person is exempt, and therefore permitted to conduct litigation outside the LSA Regime, if that person “has a right to conduct litigation granted by a court in relation to those proceedings.”⁸⁶ Thus, the LSA Regime lets the court system grant authorisation to people on an *ad hoc* basis.⁸⁷ The CMA notes a similar ambiguity in the scope of the notarial practice reservation: “a provider undertaking a service commonly provided by an authorised notary may also escape the reservation, provided that, in doing so, it is not expressly holding itself out as being a qualified and an authorised notary.”⁸⁸ The LSA’s failure to precisely delineate the scope of the reservations may be a form of under-regulation that deters technological innovation, because it leaves potential innovative market entrants unable to accurately estimate the size of the market in which they would be able to compete with incumbents. This concern also applies to existing law firms considering expansion into new areas.⁸⁹ To improve legal certainty and offer clarity to potential market entrants, the LSA could be made more precise regarding the scope of the reservations.

⁸³ This is not a concern about direct regulatory conflict: section 52(4) of the LSA prevents conflict between these two sources of rules by making entity requirements paramount over individual requirements. However, the existence of overlapping regimes nevertheless increases complexity and perhaps perceived risk, especially for potential market entrants.

⁸⁴ E.g. s. 14 (“Offence to carry on a reserved legal activity if not entitled”), s.19 (“Exempt persons”), s. 176 (“Duties of regulated persons”).

⁸⁵ LSA, section 137.

⁸⁶ LSA Schedule 3 at paragraph 2(b).

⁸⁷ LSA Schedule 3 (“Exempt Persons.”). See also Competition & Markets Authority (UK), “Legal services market study: Final Report” (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at 5.67 : “wide judicial discretion with respect to advocacy services allows for unauthorised providers to be granted rights of audience in certain circumstances.”

⁸⁸ *Ibid.* at 5.67.

⁸⁹ Katie Miller, “Disruption, Innovation And Change: The Future Of The Legal Profession” Law Institute of Victoria, 2015), online: <<https://www.liv.asn.au/Flipbooks/Disruption--Innovation-and-Change--The-Future-of-t.aspx>> at 34: “The effect of regulation on innovation should also be considered. Lawyers are often risk averse and may be deterred from adopting new ways of practice if it is unclear whether the innovation complies with the regulations.”

4. Over-Regulation Risks

Emerging technology can allow legal services to be provided with lower risk, lower cost, and higher quality.⁹⁰ Access to justice stands to improve.⁹¹ However, the legal services sector is less innovative than other parts of the UK economy.⁹² Clearly, if approved regulators fail to recalibrate their rules as required, the potential of technological innovation will be diminished.⁹³ “The regulatory framework,” as the OECD puts the point, “is a critical factor affecting countries’ entrepreneurial performance.”⁹⁴ The task of “tuning” legal services regulation to maximize public interest benefits falls primarily to the approved regulators.

The focus of this paper remains on over-regulation risks posed by the overarching LSA regime, as opposed to the decisions of the approved regulators. Emerging legal services

⁹⁰Lawrence T. Gresser and Marvin J. Lowenthal, "Back to the Future: The Effect of AI on the Law Firm Model (New York Law Journal, May 10, 2019)," <<https://www.law.com/newyorklawjournal/2019/05/10/back-to-the-future-the-effect-of-ai-on-the-law-firm-model/>>.

⁹¹ Judith Bennett *et al.*, “Current State of Automated Legal Advice Tools: Discussion Paper 1” (Melbourne, Australia: UMNSI, 2018), online: <https://networkedsociety.unimelb.edu.au/_data/assets/pdf_file/0020/2761013/2018-NSI-CurrentStateofALAT.pdf>: “This “missing middle” constitutes a “latent market” should cheaper, quicker legal advice become available... Automation is, obviously, one way in which the access to justice gap may be narrowed. Automation may reduce existing cost barriers and make economic work that is not cost-effective to lawyers under existing service and pricing models.” See also Katie Miller, “Disruption, Innovation And Change: The Future Of The Legal Profession” (Victoria, 2015), online: <<https://www.liv.asn.au/Flipbooks/Disruption--Innovation-and-Change--The-Future-of-t.aspx>> at 19 and Tanina Rostain, "Techno-Optimism & Access to the Legal System" (2019) 148 *Daedalus*, online: https://www.mitpressjournals.org/doi/pdf/10.1162/daed_a_00540.

⁹² Competition & Markets Authority (UK), “Legal services market study: Final Report” (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at 3.198; Stephen Roper, Jim Love, Paul Rieger and Jane Bourke, “Innovation in legal services” (London, UK: ERC, 2015), online: <<https://research.legalservicesboard.org.uk/wp-content/media/Innovation-Report.pdf>>, citing Roper, S; J H Love; J Bryson and C Hales, “Measuring Sectoral Innovation Capability in Nine Areas of the UK Economy, Report for the NESTA Innovation Index project.” London: Nesta, 2009.

⁹³ Competition & Markets Authority (UK), “Legal services market study: Final Report” (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>>; Roger Brownsword, “The Regulation of New Technologies in Professional Service Sectors in the United Kingdom: Key Issues and Comparative Lessons” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/Professions-RB-Report-VfP-4-Jul-2019.pdf>> at 40.

⁹⁴ OECD, “Entrepreneurship at a Glance 2012” (Paris: OECD, 2012). See also Ana Maria Zárate Moreno, "Regulation, Innovation, & Entrepreneurship: A Review of the Literature (Regulatory Insight, December 8, 2015)" (2015), online: https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/RegInsight_AMZM-regulation-and-Innv%26entrep-literature-review120815.pdf: “Most empirical analyses confirm the existence of a negative relationship between regulatory restrictions (particularly, entry regulation) and entrepreneurship. In particular, regulations that hinder business operation or creation are found to have a negative and significant relationship with birth and death of firms, 13 self-employment rates, 14 annual change in the number of establishments in industries with increasing global demand, 15 total entrepreneurial activity by opportunity, 16 and high aspiration entrepreneurial entry in countries where regulations are more likely to be enforced, 17 among others.”

technology may render the LSA Regime unnecessarily onerous, for reasons to be considered in this section.

4.1. Regime Deters Alternative Business Structure Firms

Alternative business structure firms tend to be more innovative than other law firms.⁹⁵

There is also a correlation between the level of non-lawyer ownership in a law firm and investing capital in the firm.⁹⁶ There might be selection effects at work – the firms that are more innovative and willing to invest are also more likely to seek an ABS license. Nevertheless, it is plausible that the access to external investment and management which ABS structure permits does foster innovation.⁹⁷ One opportunity created by ABS is for established technologically sophisticated companies to launch legal services offerings.⁹⁸ The OECD has suggested that the digital economy may offer increased economies of scope.⁹⁹ Law firms might be partially or completely acquired by technology companies or publishers. Consumers might welcome the opportunity to obtain legal services from platforms and brands they are already comfortable with, such as Amazon or Facebook.¹⁰⁰

An over-regulation risk is that the LSA Regime will be excessively onerous regarding the regulation of ABS firms. Investors would be unnecessarily discouraged from investing in the UK legal services sector. Although ABS structure poses some genuine risks (e.g. conflicts of interest between investors and clients) that require regulatory intervention, the author is unaware of specific cases in which these risks have materialized in England & Wales. It is plausible that the

⁹⁵ Legal Services Board (UK), “Technology and Innovation in Legal Services – Main Report” (London: LSB, 2018), online: <<https://research.legalservicesboard.org.uk/wp-content/media/Innovation-survey-2018-report-FINAL-2.pdf>>; Stephen Roper *et al.*, “Innovation in legal services” (London, UK: ERC, 2015), online: <<https://research.legalservicesboard.org.uk/wp-content/media/Innovation-Report.pdf>>. Roper et al report that “All else being equal, ABS Solicitors are 13-15 per cent more likely to introduce new legal services,” and “while 24.2 per cent of non-ABS Solicitors had introduced new legal services in the last three years this was true of 36.2 per cent of ABS organisations.”

⁹⁶ Legal Services Board (England & Wales), “Evaluation: ABS and investment in legal services (June 2017),” <<https://research.legalservicesboard.org.uk/wp-content/media/Investment-research-2017-Report-Main-report.pdf>> at 4.

⁹⁷ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 157 et seq.

⁹⁸ Frank Stephen, *Lawyers, Markets and Regulation* (Cheltenham, UK: Edward Elgar, 2013) , Chapter 8.

⁹⁹ Organization for Economic Cooperation and Development, “Vectors Of Digital Transformation (OECD Digital Economy Papers No. 273, January 2019)” (Paris: OECD, 2019), online: <<https://www.oecd-ilibrary.org/docserver/5ade2bba-en.pdf?expires=1556229517&id=id&accname=guest&checksum=FB06DF8882B03CBDF20FDD84221D7843>>.

¹⁰⁰ *Ibid.*.

rules are stricter than they need to be. Although the number of ABS firms has grown steadily,¹⁰¹ the number using ABS structure to deploy large-scale capital and non-legal expertise (as opposed to simply providing shares to existing staff) has disappointed some observers.¹⁰² LSB research found that a large majority of ABS firms are not start-ups, but rather established firms that switched to this structure.¹⁰³ This survey also found that only 12% of ABS firms had accessed any form of external finance.¹⁰⁴

The Ministry of Justice published a consultation paper in 2016 proposing to relax some of the ABS rules in Schedule 13 of the LSA.¹⁰⁵ The proposed reforms include waiving the requirement for a business address in England & Wales, and giving the approved regulators (with LSB approval) more discretion to set the requirements for an ABS license. The CMA's 2016 report endorsed this proposal.¹⁰⁶ The public consultation period finished in 2016 but MoJ reports that it is still analyzing the feedback,¹⁰⁷ and none of the proposed changes have been made.

¹⁰¹ The number licensed by the SRA increased from 550 in 2016 to 791 in 2018: Solicitors Regulatory Authority (England & Wales), "Annual Review 2017/18," <<https://www.sra.org.uk/annualreview>> at 58.

¹⁰² John Hyde, "News focus: Five years on, did ABS really change anything? (Law Society Gazette, 24 April 2017)," <<https://www.lawgazette.co.uk/news-focus/news-focus-five-years-on-did-abs-really-change-anything/5060745.article>>. See also James Mancini, "Protecting And Promoting Competition In Response To "Disruptive" Innovations In Legal Service (OECD Working Party No. 2 on Competition and Regulation)" (Paris: 2016), online: <[https://one.oecd.org/document/DAF/COMP/WP2\(2016\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2016)1/en/pdf)>: "It appears that growth in ABS firms and entry by new competitors has been limited. In April 2015, only 375 legal entities in England and Wales were ABS entities – less than 4% of all solicitor firms (Sako, 2015). Further, most ABS entities appear to be small-scale, single professional firms, prompting the solicitor's regulatory body to adopt measures to facilitate the registration of new ABS firms and therefore promote competition (Dakers, 2014). Nonetheless, some innovators are taking advantage of ABS reforms – LegalZoom, described above, was approved in 2015 to operate in the UK as an ABS (LegalZoom, 2015).

¹⁰³ Legal Services Board (England & Wales), "Evaluation: ABS and investment in legal services (June 2017)," <<https://research.legalservicesboard.org.uk/wp-content/media/Investment-research-2017-Report-Main-report.pdf>>

¹⁰⁴ Ibid. at 5.

¹⁰⁵ Ministry of Justice (UK), "Legal Services: removing barriers to competition (Consultation on proposals to make amendments to the Legal Services Act 2007)" (London: MoJ, 2016), online: <https://consult.justice.gov.uk/digital-communications/legal-services-removing-barriers-to-competition/supporting_documents/legalservicesremovingbarrierstocompetition.pdf>

¹⁰⁶ Competition & Markets Authority (UK), "Legal services market study: Final Report" (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at 5.32.

¹⁰⁷ Ministry of Justice (UK), "Legal Services: removing barriers to competition (Consultation on proposals to make amendments to the Legal Services Act 2007)" (London: MoJ, 2016), online: <https://consult.justice.gov.uk/digital-communications/legal-services-removing-barriers-to-competition/supporting_documents/legalservicesremovingbarrierstocompetition.pdf>.

Nevertheless, the LSA regime's attitude toward non-lawyer investment and management in law firms is already among the most liberal among the OECD countries.¹⁰⁸ The CMA concluded that the ABS authorization process does not create substantial barriers to entry,¹⁰⁹ and it seems unlikely that an entrepreneur about to create an innovative new legal service business would choose a different jurisdiction to escape the LSA regime. In terms of facilitating external investment (a factor in technological innovation), the LSB's survey research found that "only 6% of ABS identified some aspect of legal services regulation that prevented them accessing finance."¹¹⁰ Thus, while opportunities should be taken to relax the ABS rules where possible, it would be difficult to conclude that the LSA regime's approach to ABS firms is significantly impeding technological innovation.

4.2. Opportunities to Redact Reserved List not Taken Up

As noted above, the LSA Regime's reliance on the Lord Chancellor for additions to the Reserved Activities list constitutes a potential under-regulation risk, in conditions of rapid technological change. A corresponding over-regulation risk lies in s. 26 of the Act, which allows the Lord Chancellor to decide whether to follow an LSB recommendation to remove an activity from the list.

Assuming that it is only the riskiest activities that should be reserved, technological innovation might reduce the level of risk involved in a certain activity, eliminating the justification for reservation.¹¹¹ The CMA has raised questions about the reservation of probate activities and administration of oaths, suggesting that the definitions of the reservations are not optimally targeted to the risks.¹¹² An elected official is perhaps more likely to err on the side of over-regulation (failure to de-reserve) than on the side of under-regulation (failure to reserve). This is because reservation is a market shelter for those who provide the activity in question, and

¹⁰⁸ Andy Boon and Noel Semple, "Fundamental Questions in Legal Services Regulation" in Abel et al. eds., *Lawyers in Society 30 Years After* (Oxford, UK: Hart, 2019) [forthcoming].

¹⁰⁹ Competition & Markets Authority (UK), "Legal services market study: Final Report" (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at 5.32.

¹¹⁰ Legal Services Board (England & Wales), "Evaluation: ABS and investment in legal services (June 2017)," <<https://research.legalservicesboard.org.uk/wp-content/media/Investment-research-2017-Report-Main-report.pdf>> at 5.

¹¹¹ Competition & Markets Authority (UK), "Legal services market study: Final Report" (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at para 5.8.

¹¹² *Ibid.* at para 5.75.

this constituency can be expected to lobby against de-reservation.¹¹³ Neither the CMA nor the LSB have ever called for an activity to be de-reserved, so it is difficult to assess this risk.

4.3. New Legal Orders Impeded

Gillian Hadfield writes about the role of law as a foundation for economic prosperity. She defines “legal infrastructure” as a “platform of rules and practices on which we build everything else in our economy.” Instead of always being the sole source of legal infrastructure, Hadfield argues that the modern state should in some cases “create rules for non-state entities that create the rules actually binding economic actors.”¹¹⁴ This, she argues, would “bring to our legal infrastructure the kinds of responsive innovation and investment that competitive markets bring to the rest of the economy.” The result would be competitive, innovative markets – not only for legal services but for law itself.¹¹⁵

Hadfield uses the example of the EU’s Right to be Forgotten ruling, which requires search engines, when requested, to remove personal information that is “inaccurate, inadequate, irrelevant or excessive.”¹¹⁶ In 2016, there were 500 such requests *per day* regarding information on Google. EU regulators lack the resources and/or inclination to adjudicate all of these requests. They have therefore required Google itself to handle them, even though it is obviously not a neutral party. Hadfield proposes a “third option” for situations like this – “rules and regulation supplied by competitive private regulators that are overseen as necessary by public regulators.”¹¹⁷ In short, Google’s compliance with the right to be forgotten would be regulated by private sector regulators which would in turn be regulated by state entities.

The UK’s legal services regulatory regime is better positioned than those of most countries to facilitate the emergence of new legal orders. Indeed, Hadfield has identified the

¹¹³ Andy Boon and Noel Semple, "Fundamental Questions in Legal Services Regulation" in Abel et al. eds., *Lawyers in Society 30 Years After* (Oxford, UK: Hart, 2019) [forthcoming].

¹¹⁴ Gillian Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It (Kindle Edition)* (New York: Oxford University Press, 2016) . See also Gillian K. Hadfield, "More Markets, More Justice" (2019) 148 *Daedalus* 37, online: https://doi.org/10.1162/daed_a_00533 .

¹¹⁵ Gillian Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It (Kindle Edition)* (New York: Oxford University Press, 2016) at location 185. See also location 1250: “along that path from simple law to the comprehensive legal infrastructure coordinated by the nation-state something also was lost: the vibrancy of competing systems of rules.”

¹¹⁶ European Commission, "Data protection: Rules for the protection of personal data inside and outside the EU," <http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf>

¹¹⁷ Gillian Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It (Kindle Edition)* (New York: Oxford University Press, 2016) at location 4,808.

Legal Services Act as a model for the type of reform needed in the USA and Canada. The LSA already fosters regulatory competition between approved regulators offering their packages of rules to practitioners and to consumers.¹¹⁸ They are overseen by the LSB – which is a “superregulator—a regulator of regulators” of the type that Hadfield envisions.¹¹⁹ The LSA regime permits the approval and designation of new regulators, for yet-unimagined types of legal service.

However, one impediment to this vision within the LSA is the s. 12(4) definition of legal activity, which excludes all neutral dispute-resolution work.¹²⁰ The assumption is presumably that other regulatory regimes will be responsible for all such matters. However, it might be opportune for a new legal order of the type Hadfield envisions to integrate dispute-resolution and other legal services under the bailiwick of a single approved regulator. A package of “legal infrastructure” – e.g. a dispute-resolution system for an online commerce platform – might advantageously include the services of mediators and/or arbitrators to resolve disputes. As Alison Hook observes in her paper for the LSB, “online private dispute resolution” is a fast-growing market segment.¹²¹

A hypothetical example might serve to illustrate this point. Suppose that, by 2025, distributed ledger technology (DLT) is widely used by corporations around the world to facilitate supply chains and regulatory compliance. However numerous disputes arise, due to divergences in DLT technology adopted in different jurisdictions and different industries. This creates a significant market demand for international DLT dispute resolution. Commercial and state parties want efficient, quick ways to mediate and arbitrate these disputes. The UK’s legal services sector is well-positioned to meet this demand.

Suppose further that the LSB and the Lord Chancellor decide to approve the Distributed Ledger Technology Dispute Resolution Professionals Board (DLTDPRB) under the LSA. This

¹¹⁸ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Cheltenham, UK: Edward Elgar, 2015) at 79; Frank Stephen, *Lawyers, Markets and Regulation* (Cheltenham, UK: Edward Elgar, 2013) at 119.

¹¹⁹ Gillian Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It* (Kindle Edition) (New York: Oxford University Press, 2016) at location 4743.

¹²⁰ “ ‘Legal activity’ does not include any activity of a judicial or quasi-judicial nature (including acting as a mediator).”

¹²¹ Alison Hook, “The Use and Regulation of Technology in the Legal Sector beyond England and Wales: Research Paper for the Legal Services Board” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf>> at 7, see examples at page 29.

emerging market segment requires very different rules than those applied to other legal professionals, including special requirements for language skills and cultural competence (because the practice involves such a diversity of parties around the world). DLT dispute resolution professionals want to offer their clients mediation and arbitration services, as well as partisan advocacy. However, the exclusion of dispute-resolution work from the LSA regime would prevent the DLTDPRB from regulating this aspect of their practice. While the LSA Regime is generally favourable to the emergence of competitive legal orders (certainly more so than other regulatory regimes in OECD countries), redrafting of s. 12(4) might be justified.

4.4. Exports of Legal Services Impeded by Regime's Lack of Independence from Government

UK-based firms already provide services to a worldwide clientele.¹²² Technological innovation is expected to increase the exportability of legal services, as well as their importability.¹²³ The legal infrastructure discussed by Hadfield is often exportable, and fostering exports (which create jobs and prosperity) is part of legal services regulators' public interest mandate.¹²⁴

The LSA gives the UK government a prominent place in the legal services regulatory regime. The Lord Chancellor appoints the Legal Services Board, and controls the list of reserved activities. Parliament ultimately has complete control over the LSA. By contrast, in countries such as the United States and Canada, the principles of self-regulation and independence from the state are deeply entrenched. In anglophone North America, legal services regulation is carried out by courts, bar associations and law societies, with very minimal involvement by elected branches of the state.¹²⁵

A perception that the LSA Regime is potentially subject to government interference might impede the export of technologically-advanced legal services. For example, a foreign government might consider contracting with a UK law firm to create a commercial code which

¹²² David Lidington, "Lord Chancellor speech at launch of TheCityUK's legal services report 2017 (24 November 2017)," <<https://www.gov.uk/government/speeches/lord-chancellor-speech-at-launch-of-thecityuks-legal-services-report-2017>>

¹²³ See section 3.2, above.

¹²⁴ Stephen Mayson, "The Rationale for Legal Services Regulation" (London: UCL, 2019), online: <https://www.ucl.ac.uk/ethics-law/sites/ethics-law/files/irlsr_wp_lsr-1_rationale_1903_v2.pdf>.

¹²⁵ Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015), Chapter 4.

would become law in that jurisdiction. Technological advance makes this more plausible, because codes can be designed, using data about the real economy, to maximize economic efficiency. According to a 2017 speech by the Lord Chancellor, the government was seeking to use “new technologies to ensure that English law and UK courts remain a competitive choice worldwide.”¹²⁶

However, foreign governments and clients might perceive a risk that the UK Government would exploit its influence in the LSA Regime to manipulate the UK firm, intending to ensure the code is drafted to advance UK national interests. The foreign government might therefore turn to an American firm instead. This scenario is plausible, but the author is not aware of any evidence that it has materialized.

4.5. Protectionism by Approved Regulators Due to Insufficient Independence

Technological innovation poses a competitive threat to market incumbents. A regulator that seeks to protect the entities it regulates has opportunities to over-regulate new technology in pursuit of this goal.¹²⁷ Risks posed by new entrants can be invented or overblown in order to exclude them from the market. Regulation which was previously justified by risk, but which has been rendered unnecessary by technological progress,¹²⁸ can be kept on the books by placing liberalization on the back-burner. Alternatively, a regulator might create rules that unnecessarily deter take-up of technology among its regulated firms with the goal of preserving “good jobs,¹²⁹”

¹²⁶ David Lidington, "Lord Chancellor speech at launch of TheCityUK's legal services report 2017 (24 November 2017)," <<https://www.gov.uk/government/speeches/lord-chancellor-speech-at-launch-of-thecityuks-legal-services-report-2017>>.

¹²⁷ James Mancini, “Protecting And Promoting Competition In Response To "Disruptive" Innovations In Legal Service (OECD Working Party No. 2 on Competition and Regulation)” (Paris: 2016), online: <[https://one.oecd.org/document/DAF/COMP/WP2\(2016\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2016)1/en/pdf)> at 12: “There is a risk that legal professional organisations may act to maintain the traditional market structure and business model of the legal services industry in a manner that exceeds their regulatory mandate. This includes efforts by licensing bodies to leverage their regulatory power in order to protect incumbents or proprietary services, such as digital platforms, from competition. Other concerns may arise when self-regulators encourage tying and bundling by professionals to protect ancillary (non-regulated) service revenues. See also Organization for Economic Cooperation and Development, “Vectors Of Digital Transformation (OECD Digital Economy Papers No. 273, January 2019)” (Paris: OECD, 2019), online: <<https://www.oecd-ilibrary.org/docserver/5ade2bba-en.pdf?expires=1556229517&id=id&accname=guest&checksum=FB06DF8882B03CBDF20FDD84221D7843>> at 16.

¹²⁸ See e.g. Katie Miller, “Disruption, Innovation And Change: The Future Of The Legal Profession” Victoria, 2015), online: <<https://www.liv.asn.au/Flipbooks/Disruption--Innovation-and-Change--The-Future-of-t.aspx>> at 34.

¹²⁹ Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (New York: Oxford, 2015) at section 6.6.

or employment generally.¹³⁰ Technology is predicted by some to significantly reduce law firms' demand for human labour.¹³¹

In addition to pecuniary protectionism, professional bodies may seek regulation that is overly “gold-plated.” A rule is over-regulatory if it mitigates real risks, but increases consumer costs (or eliminates consumer market options) to a disproportionate degree. It has been suggested that rules regarding trust funds and handling client money are vulnerable to this criticism, and it might also apply to rules about technology. This is another reason why regulators must make decisions that are rigorously dedicated to the public interest.

Under the LSA regime, regulation is not entirely independent of the professional bodies. The “approved regulators” under Schedule 4 of the LSA (e.g. the Law Society, the Bar Council) are effectively controlled by and accountable to their members. However, regulatory functions are, “so far as reasonably practicable,” to be “taken independently from decisions relating to the exercise of its representative functions.”¹³² Some approved regulators have therefore created separate regulators (e.g. the SRA and the BSB), while other approved regulators have other mechanisms for regulatory independence. As required by the LSA s. 30, the LSB created Internal Governance Rules to safeguard the regulators' independence from the representative bodies.¹³³

However, the independent regulatory authorities remain creatures of the Approved Regulators, and channels arguably remain by which the latter can influence the former. In 2013, the LSB found that the Bar Council had inappropriately interfered with the independence of the

¹³⁰ Judith Bennett *et al.*, “Current State of Automated Legal Advice Tools: Discussion Paper 1” (Melbourne, Australia: UMNSI, 2018), online: <https://networkedsociety.unimelb.edu.au/__data/assets/pdf_file/0020/2761013/2018-NSI-CurrentStateofALAT.pdf> at 30.

¹³¹ Lawrence T. Gresser and Marvin J. Lowenthal, “Back to the Future: The Effect of AI on the Law Firm Model (New York Law Journal, May 10, 2019),” <<https://www.law.com/newyorklawjournal/2019/05/10/back-to-the-future-the-effect-of-ai-on-the-law-firm-model/>>; Richard E. Susskind, *Tomorrow's lawyers : an introduction to your future* (Oxford, United Kingdom: Oxford University Press, 2013) ; Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (New York: Oxford, 2015)

¹³² LSA s. 30(b).

¹³³ Legal Services Board (England & Wales), “Internal Governance Rules 2009: Version 3: 30 April 2014,” <https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/Internal_Governance_Rules_Version%203_Final.pdf>

BSB.¹³⁴ In May of 2018, the LSB censured the Law Society for breaching the Internal Governance Rules, and thereby failing to sufficiently safeguard the SRA's independence.¹³⁵ Evidence of a "steady stream of disagreements about independence matters" can be found in the LSB's IGR consultation documents.¹³⁶ The CMA also noted some evidence that representative bodies have inappropriately interfered with the regulators.¹³⁷

Regarding technology, the risk here is that the LSA regime's lack of full independence might undermine the public interest by allowing protectionist over-regulation of new legal services technology. ABS firms are more likely than others to adopt technology that benefits consumers. Under the LSA Regime, the independent regulators are responsible for licensing ABS firms. If they over-regulate in order to protect legacy lawyer-owned firms (or their employees) from ABS competition, they will impede technological innovation and competition. The SRA was accused of imposing an unnecessarily slow and burdensome licensing process on ABS firms in 2011.

In 2016, the LSB argued in its "Vision for Legislative Reform" that "ongoing links between representative bodies and regulators slow the pace of reforms that would otherwise free up providers of legal services to innovate and grow and to deliver benefits for consumers."¹³⁸ For this among other reasons, the document called for a new system including full independence of regulators from representative bodies.

¹³⁴ Neil Rose, "LSB: Bar Council interfered with independence of BSB over cab-rank rule changes (Legal Futures, 25 November 2013)," <<https://www.legalfutures.co.uk/latest-news/lwb-bar-council-interfered-independence-bsb-cab-rank-rule-changes>>.

¹³⁵ Legal Services Board (England & Wales), "LSB finds that the Law Society broke internal governance rules (Posted on 21st May 2018)," <https://www.legalservicesboard.org.uk/news/20180530_lsb_finds_that_the_law_society_broke_internal_governance_rules>

¹³⁶ Legal Services Board (England & Wales), "Reviewing the Internal Governance Rules (November, 2017)" (London: LSB, 2017), online: <http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/2017/IGR_consultation_doc_-_final_version.pdf>; Legal Services Board (England & Wales), "Analysis of submissions received (Reviewing the Internal Governance Rules, 24 July 2018)" (London: LSB, 2018), online: <https://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/2018/20180724/Consultation%20response%20July%202018.pdf>.

¹³⁷ Competition & Markets Authority (UK), "Legal services market study: Final Report" (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at 5.150

¹³⁸ Legal Services Board, "A vision for legislative reform of the regulatory framework for legal services in England and Wales" (2016), online: <https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2016/20160909LSB_Vision_For_Legislative_Reform.pdf>.

Evaluating the case for complete structural independence is beyond the scope of this paper. No position can be taken here on the question of whether an alternative regime might secure regulatory independence, and input from practitioners, in a more efficient manner. However, no evidence appears that protectionist interference from the professional bodies is retarding the adoption of technology in the UK legal services sector. The current regime has mechanisms to deal with this risk. The LSB, as noted above, exercises oversight over all regulatory arrangements. The Law Society censure led to a series of reforms, and the LSB investigation was closed in February 2019. Regarding ABS licensing, the CMA seems satisfied with the SRA's efforts to address this problem,¹³⁹ and the other regulators have always had quicker and easier processes.¹⁴⁰ While the risk of protectionism by approved regulators impeding technological advance is a real one, it seems the current regime is able to control it.

4.6. Unregulated Provision Deterred

Recent LSB research has found that unregulated providers are two times more likely than regulated providers to introduce new and/or improved services, including those that are technologically innovative.¹⁴¹ Thus, the LSA regime's effect on unregulated providers is important vis-à-vis its effect on technological innovation. The regime, of course, imposes no direct costs or requirements on providers to which it does not apply.

However, title-based regulation does create a sharp dichotomy between those who have a title and those who do not. This might be misinterpreted by consumers comparing regulated and unregulated providers of unreserved activities. The CMA has suggested that professional titles "have the potential to distort competition if they result in consumers avoiding unauthorised providers, regardless of their quality, in providing unreserved legal activities."¹⁴² If so, and if

¹³⁹ Competition & Markets Authority (UK), "Legal services market study: Final Report" (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at 5.26.

¹⁴⁰ Ibid. at 5.27.

¹⁴¹ Legal Services Board (UK), "Technology and Innovation in Legal Services – Main Report" (London: LSB, 2018), online: <<https://research.legalservicesboard.org.uk/wp-content/media/Innovation-survey-2018-report-FINAL-2.pdf>>: "unregulated providers are twice as likely to have successfully introduced new or improved services."

¹⁴² Competition & Markets Authority (UK), "Legal services market study: Final Report" (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at 5.9; 5.91.

unregulated providers are more technologically innovative, the regime might be indirectly responsible for reducing the extent to which consumers benefit from technological progress.

Moreover, the LSA Regime allows frontline regulators to regulate their practitioners with regard to all of their legal activities, not just the reserved ones. Thus, a barrister is subject to the BSB's regulatory regime even when providing services that a non-barrister could provide without any regulation.¹⁴³ The regulation might suppress technological innovation by this barrister, without any clear rationale (given that the activities have been deemed insufficiently risky to warrant reservation). Eliminating title-based regulation would prevent this.

On the other hand, if titles such as "solicitor" and "barrister" really do offer meaningful protections to consumers, then there may be nothing misleading about them. Technological sophistication is not necessarily more important than trustworthiness, training, and insurance. Arguably the current approach justifiably offers consumers of unreserved legal services a choice between (i) more innovative but less regulated non-title-holders, and (ii) more traditional, more regulated title-holders.

5. Conclusions

5.1. Under-Regulation Risks

Under-regulation risks created by legal services technology were reviewed in Part 2 of this paper. Providers of tech-enabled, but deficient services may escape regulation because they are outside of the regime's scope (section 3.1) or outside of England & Wales (3.2). The LSA's system for extending regulation to new fields may be too slow or arbitrary (3.3). Third party suppliers of legal technology (3.4) and digital comparison tools (3.5) are increasingly prominent sources of risk, but they are apparently outside the regime's scope. The multiplicity of regulators in the LSA regime may mean that major risks to consumers fall through the gaps between them (3.6), or that some of the regulators are too small to deal appropriately with technological change (3.7). Looking beyond consumers, broader public interests may be endangered if technology

¹⁴³ By contrast, the SRA has chosen to allow solicitors to offer unregulated services while abiding by a different, lighter code than applies to solicitors doing reserved work: Solicitors Regulatory Authority (England & Wales), "News release: SRA confirms November launch for new regulatory model (20 March 2019)," <<https://www.sra.org.uk/sra/news/press/standards-regulations-start-date-2019.page>>. See also Neil Rose, "Tesco Law at last? SRA rules could herald "new breed of MDP" (Legal Futures, 3 April 2019)," <<https://www.legalfutures.co.uk/latest-news/tesco-law-at-last-sra-rules-could-herald-new-breed-of-mdp>>.

builds up systemic risks that divided and competing regulators cannot handle (3.8), or if the system's complexity deters entrepreneurship and market entry (3.9).

Several ways in which the LSA Regime could be reformed to better serve the public interest in light of changing legal technology were identified:

- Section 190 of the LSA could be revised to extend legal professional privilege to all information related to the provision of legal advice.
- Part 6 of the LSA (requiring firms to have formal complaints-handling processes, and establishing the Legal Ombudsman available to consumers as a fall-back) could be extended to cover all providers of legal services (Section 3.1)
- Courts or public institutions could be required to verify the authorization of individuals to offer reserved legal activities (Section 3.2)
- The complex quality and price attributes of legal services may justify regulatory attention to legal digital comparison tools, perhaps through amendments to the LSA (Section 3.5).
- The LSB might play a coordinating role to ensure that opportunities for regulators to work together, in responding to technological change, are not missed (Section 3.6).
- The LSB's Regulatory Performance Assessment can be used to evaluate the approved regulators' efforts to respond appropriately to technological change (Section 3.7), allowing an objective assessment

Other reforms do not yet seem to be necessary, but could be deployed in the future if technology-related risks materialize:

- Amending the LSA and/or approving regulators to deal with imported legal services (section 3.2). Another alternative is for the LSB itself to become an approved regulator with regard to such activities, pursuant to section 62 of the LSA.
- Risks sufficient to justify regulation might emerge from non-client-facing providers of legal services technology (section 3.4), or from digital comparison tools (section 3.5). Insofar as

these entities do not themselves provide legal services, they fall outside the current scope of the LSA and legislative amendment would be required.

However, on balance the picture in Part 2 is not one of major new risks requiring dramatic reform to the regime. A review of publications from the LSB, the LSCP, and the LeO reveals no evidence of a spike in consumer complaints related to legal services technology.¹⁴⁴ Consumer satisfaction with legal services was recorded at 84% in 2019 according to the Legal Services Consumer Panel, up from 79% in 2012.¹⁴⁵ After a rigorous study, which included full consideration of the effect of technological innovation, the Competition & Markets Authority called for ongoing review of the regulatory framework but did not identify any specific changes that need to be made.¹⁴⁶

5.2. Over-Regulation Risks

The possibility of an over-regulatory LSA regime, choking the flame of technological progress, must also be taken seriously. The regime might, in theory, deter ABS firms (4.1), fail to redact the reserved activities list after technology reduces risks (4.2), or impede the emergence of new legal orders (4.3). The LSA regime is not completely independent of the state, which might undermine export markets for some technologically advanced legal services (4.4). Nor is the regime completely independent of the professions, which creates risks of protectionism and gold-plating if regulatory decisions are not truly independent (4.5). Finally, the regime's sharp dichotomy between regulated title-holders and unregulated providers of non-reserved activities might throw unwarranted shade on the latter group, in consumers' eyes (4.6).

Although small amendments might be justified (see section 4.3), the author's conclusion is that technology-related over-regulation risks are currently manageable within the LSA regime.

¹⁴⁴ See e.g. Legal Services Consumer Panel (England & Wales), "Lawtech and consumers (22 May 2019)" (London: LSCP, 2019), online: <<https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2019/06/LSCP-Technology-Paper-2019.pdf>>

¹⁴⁵ Legal Services Consumer Panel (England & Wales), "Tracker Survey 2019 Briefing note: how consumers are using legal services (July 30, 2019)" (London, UK: LSCP, 2019), online: <<https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2019/07/2019-07-25-How-consumers-are-using-2019-FINAL.pdf>>. 78% of those who received services online were satisfied, compared to 88% of those who received services in a different way. However, this document suggests that this divergence might reflect the fact that the types of service more often received offline (will writing and power of attorney) are also the types of service that consistently generate higher satisfaction rates.

¹⁴⁶ Competition & Markets Authority (UK), "Legal services market study: Final Report" (London: CMA, 2016), online: <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> at 7.208.

The fact that advice-giving is not reserved is important, as much of the consumer-facing technological change is happening in that area.¹⁴⁷ As Alison Hook observes in her paper for the LSB’s Technology Project, a concept with significant success worldwide is the multi-disciplinary online service, in which legal and other information is bundled together for people going through a certain type of experience.¹⁴⁸

Empirical research suggests that regulation is not a major impediment to technological innovation in legal services. Roper et al. surveyed law firms about innovation and barriers thereto for their 2015 report. Around 20-25% of respondents identified regulation and legislation as barriers to innovation—it was the most frequently identified barrier. However, when asked whether specific aspects of regulation had negative, positive, or neutral effects on capacity to innovate, most aspects were more often identified as having positive influence as opposed to negative influence.¹⁴⁹ One interpretation of these results is that, while the respondents had a general hunch that regulation impedes innovation, they did not actually experience it as an impediment to their own practices.

To the extent that regulation is a real impediment to technological innovation, re-drafting the LSA to end title-based regulation or merge approved regulators would not necessarily reduce the impediment much if at all. The impediment might remain under any realistic regulatory regime for legal services. In the 2015 Enterprise Research Centre study, the aspects of regulation perceived to constitute the greatest impediments to innovation were “professional indemnity insurance requirements” (for barristers) and “managing client money” (for solicitors and other legal services providers). It is not clear that reforms to the LSA regime would lead to less-onerous regulation in these domains.

The LSB’s 2018 *Technology and Innovation in Legal Services* report closely examined the effect of regulation on technological and other innovation. It identified a significant positive development over time – “In 2018, two thirds of providers found regulation to be no constraint at

¹⁴⁷ Legal Services Consumer Panel (England & Wales), “Lawtech and consumers (22 May 2019)” (London: LSCP, 2019), online: <<https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2019/06/LSCP-Technology-Paper-2019.pdf>>.

¹⁴⁸ Alison Hook, “The Use and Regulation of Technology in the Legal Sector beyond England and Wales: Research Paper for the Legal Services Board” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf>> at 26-7.

¹⁴⁹ Stephen Roper *et al.*, “Innovation in legal services” (London, UK: ERC, 2015), online: <<https://research.legalservicesboard.org.uk/wp-content/media/Innovation-Report.pdf>> at 57.

all on new service development, compared to just under half in 2015.” This perceived lightening of the regulatory burden might be attributable to technology-friendly reforms such as the SRA’s Innovate program (which offers “sandbox” rule waivers to innovators, among other things).¹⁵⁰ It might also reflect growing familiarity among providers with the LSA regime. If so, this should perhaps make regulators more cautious about bringing in radical changes that would require market participants to acclimatize again to a new regime.

The LSB report also found that “overall, just 25% of providers agreed that legal services regulation stopped them from using technologies more widely.” 77% were unable to identify any specific regulation that had constrained their use of technology.¹⁵¹ A further 7% mentioned “Data protection and GDPR” – which are not part of the LSA regime – as a constraint on tech take-up. These reports do not suggest a legal services sector whose potential for technological innovation is being choked by the LSA Regime.

5.3. Conclusions regarding the LSA Regime

The LSA can be understood as an effort to secure the best of both worlds. Professional organizations were given a role, in order to contribute niche expertise about different forms of legal practice and uphold their distinctive traditions of professionalism. At the same time, the LSB was given plenary tools to ensure that regulatory decisions are free of nest-feathering, and the system remains aligned with the public interest. The pan-sectoral bodies mentioned by the Act (OLC, LeO, LSCP, OFT/CMA), which are independent of the professions, are meant to contribute to this goal.

Cristie Ford suggests that regulators can foster innovation by spreading learning about best practices, “in the service of ever more efficient and effective regulatory design.”¹⁵² The LSB

¹⁵⁰ See <https://www.sra.org.uk/solicitors/innovate/sra-innovate.page>. See also <https://legalaccesschallenge.org> and Legal Services Consumer Panel (England & Wales), “Lawtech and consumers (22 May 2019)” (London: LSCP, 2019), online: <<https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2019/06/LSCP-Technology-Paper-2019.pdf>> at 4. Regarding sandboxing as a regulatory strategy, see Roger Brownsword, “The Regulation of New Technologies in Professional Service Sectors in the United Kingdom: Key Issues and Comparative Lessons” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/Professions-RB-Report-VfP-4-Jul-2019.pdf>> at 45.

¹⁵¹ Legal Services Board (UK), “Technology and Innovation in Legal Services – Main Report” (London: LSB, 2018), online: <<https://research.legalservicesboard.org.uk/wp-content/media/Innovation-survey-2018-report-FINAL-2.pdf>> at 60.

¹⁵² Cristie Ford, *Innovation and the State* (Cambridge, UK: Cambridge University Press, 2017) at 15. See also “experimentalist governance,” which is somewhat harmonious with the LSA regime: Grainne De Burca, Robert O. Keohane and Charles Sabel, “New Modes of Pluralist Global Governance” (2013) 45 *New York University Journal of International Law and Politics*, 723, online: <https://www.ssrn.com/abstract=2225603>.

can serve this role, facilitating knowledge exchange between the front-line regulators about how to respond to technological innovation. Encouraging a diversity of voices, including those outside the normal ambit of the regulatory conversation, helps increase the prospects for innovation in the public interest.¹⁵³ Given the centrality of consumer interests in normative analysis of regulation and technology, the research capacity of the Legal Services Consumer Panel is a key aspect of the regime.

The LSA regime involves a very large number of regulatory bodies. The “friction” between them consumes significant time and money. It can certainly be argued that these costs are unnecessary or disproportionate: perhaps the cost of keeping the LSA regime up to date is too high. It would follow that a single regulator, or at least a consolidation of the front-line regulators, would be in the public interest. That argument might become stronger in the future, if there are more regulatory needs that cut across the bailiwicks of the different regulators. Assessing that argument is beyond the scope of this paper. The conclusion here is simply that legal services technology, as of mid-2019, has not, in of itself, rendered the LSA regime obsolete.

Proactive, or Premature Regulatory Reform?

What about the technology of the future? Technology can rapidly create new risks. It is important to closely monitor and respond to what is actually happening in the legal services marketplace. The LSA Regime – including the LSB, the LSCP, the CMA, and the LeO – has a capacity to do so which is impressive by the standards of other world jurisdictions. This is complemented by a healthy and vigorous community of independent scholars scrutinizing the system. Well-funded and comprehensive projects such as Independent Review of Legal Services Regulation, and the Legal Education and Training Review also contribute.¹⁵⁴

The author is not convinced that legal services regulation should try to “get out ahead” of technology-related risks before they materialize. Trying to reform regulation to respond to risks

¹⁵³ Alison Hook, “The Use and Regulation of Technology in the Legal Sector beyond England and Wales: Research Paper for the Legal Services Board” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf>> at 11, 53.

¹⁵⁴ This system is admired by legal services regulation scholars elsewhere in the world. See e.g. Bill Henderson, “Legal Market Landscape Report (Commissioned by the State Bar of California, July 2018)” (Sacramento: State Bar of California, 2018), online: <<https://taxprof.typepad.com/files/henderson.pdf>>; Gillian Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It* (Kindle Edition) (New York: Oxford University Press, 2016) ; Gillian K. Hadfield, “More Markets, More Justice” (2019) 148 *Daedalus* 37, online: https://doi.org/10.1162/daed_a_00533 .

that have not yet manifested, without doing more harm than good, is very difficult.¹⁵⁵ Hype about new technology – both regarding its benefits and dangers -- often leads to nothing.¹⁵⁶ This is a good reason not to over-react or reform prematurely.¹⁵⁷ Compared to other risks addressed by other regulators – e.g. climate change, epidemics, or nuclear plant meltdowns– the risks involved in legal services are not as catastrophic. Waiting for smoke before summoning the fire fighters may be reasonable. If legal services technology starts damaging consumer or public interests, and this is detected reasonably quickly, regulators can respond at that time.

England & Wales is a world leader in legal services regulation. At least in the anglophone world, the LSA regime is considered by many to be the world standard for regulation that protects the public interest while fostering innovation. While technology must undoubtedly be a spur to reform of legal services regulation, this report’s conclusion is that the necessary reform can occur within the broad framework established by the *Legal Services Act 2007*.

¹⁵⁵ However see Roger Brownsword, “The Regulation of New Technologies in Professional Service Sectors in the United Kingdom: Key Issues and Comparative Lessons” (London: LSB, 2019), online: <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/Professions-RB-Report-VfP-4-Jul-2019.pdf>> at 13 re “Collingridge’s dilemma” : “an early regulatory intervention might be inappropriate and counter-productive but that a later (more appropriate intervention) might encounter major resistance because the technology is now relied on and valued.”

¹⁵⁶ Regarding the technology “hype circle,” see Judith Bennett *et al.*, “Current State of Automated Legal Advice Tools: Discussion Paper 1” (Melbourne, Australia: UMNSI, 2018), online: <https://networkedsociety.unimelb.edu.au/__data/assets/pdf_file/0020/2761013/2018-NSI-CurrentStateofALAT.pdf> at 12.

¹⁵⁷ Organization for Economic Cooperation and Development, “Vectors Of Digital Transformation (OECD Digital Economy Papers No. 273, January 2019)” (Paris: OECD, 2019), online: <<https://www.oecd-ilibrary.org/docserver/5ade2bba-en.pdf?expires=1556229517&id=id&accname=guest&checksum=FB06DF8882B03CBDF20FDD84221D7843>> : “Ex ante regulation can be problematic if not fully grounded in experience and insight which is difficult to obtain in periods of rapid transformation that generate a stream of new technologies. “