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'Fit and proper' coders? How might legal service delivery by non-lawyers be regulated?

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ABSTRACT

With an upsurge of interest and investment in new legal technologies comes consideration of who is making them and whether these individuals or entities should be subject to regulation. This article looks at how such regulation might function in light of the existing regulatory regimes governing lawyers and the capacities of legal regulators. It considers the ramifications both of maintaining the existing system, or in extending some form of regulation to these new entrants to the legal services market.

KEYWORDS

Legal technology; LegalTech; regulation; legal services; legal profession; non-lawyers; unauthorized practice

1. Introduction

There is growing awareness of the potential for new technology, including artificial intelligence ('AI'), to change the practice of law in profound ways. One associated change is that new kinds of non-lawyer professionals – such as coders and software engineers, as well as entrepreneurs, industry experts and non-practising lawyers – are becoming involved in the delivery of legal services.[1] Regardless of whether a lawyer is relying on the non-lawyer or new legal service provider to do legal work or elements of it, or the new provider is offering these and other services direct to the public, there are implications for clients, the public, the legal profession and the system of justice.[2] One concern is that consumers might not be able to tell the difference between those providers who are lawyers and those who are not,[3] and there may be few or no redress mechanisms

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[1]Involvement of 'non-lawyers' per se in the delivery of legal services is not new: see, eg, Richard Zorza and David Udell, 'New Roles for Non-Lawyers to Increase Access to Justice' (2014) 41(4) *Fordham Urban Law Journal* 1259; Laurel Rigertas, 'USA: Regulating Non-Lawyers to Close the Access to Justice Gap (Note)' (2013) 16(2) *Legal Ethics* 384. As with terms like 'unregulated' or 'unauthorised' used especially in the UK context, we use the term 'non-lawyer' in a non-pejorative sense to emphasise that they are outside the legal profession's regulatory jurisdiction, though we recognise that any binary term has hierarchical or exclusive implications. We therefore also use the terms 'new legal service provider' 'new provider' and variants. We note that non-lawyers as a group, including those in administration, management, finance, marking, and IT, represent roughly half of the legal services industry and would be better termed, certainly in everyday speech, 'legal service professionals'.

[2]Justine Rogers and Felicity Bell, 'The Ethical AI Lawyer: What is Required of Lawyers When They Use Automated Systems?' (2019) 1 *Law, Technology and Humans* 80.

[3]See, eg, Legal Services Board, *The State of Legal Services 2020: Evidence Compendium* (2020) 84 [211].

if loss is suffered as a result of choosing the 'Lawtech' or 'LegalTech'[4] option. Important questions then emerge about whether it is necessary to bring them within the regulatory fold, and if so, how to regulate them (alongside, the ongoing challenges of regulating lawyers themselves).[5]

This article takes the perspective of 'legal regulators', whether professional associations, co-regulators or state regulators, in contemplating what they might do about the arrival of non-lawyers providing legal services via technology. It looks at how and on what basis they might bring them into the regulatory tent. As this article examines, these new entrants and their technologies represent significant challenges to the public interest, while – and complicating the discussion – presenting opportunities too, primarily in enhancing access to justice. At the same time, the ways in which new legal service providers may operate, across jurisdictions and industries, are tests to current regulatory approaches and capacity. Moreover, to the extent to which they are competitors to lawyers (and this article considers the relationship between them), these new providers disrupt the special protections that keep lawyers, at least in theory, submitting to the demands of professional regulation. In other words, they unsettle the traditional 'regulative bargain' between the professions and the state.[6] As this article shows, an investigation of regulatory strategies for new technologies raises aggregate and compounding issues.

In looking at the regulation of new technologies, such as LegalTech, it is worth noting at the outset that such regulatory activity does depend, to an extent, on the nature and qualities of the technology itself.[7] There are also distinctions in regulating software products (such as through product liability regimes) as opposed to services delivered by individuals. Further, as Scherer has noted (in the context of AI specifically) some technology

[4]LegalTech encapsulates 'technology and software tools, and products and services … created for clients, law firms and key stakeholders in the legal industry': Kirk Mahoney, 'Legal Tech Market Report' (*Catalyst Investors*, 29 November 2017) <https://catalyst.com/research_item/legal-tech-market-overview/> accessed 15 May 2020. It includes those products intended for use by lawyers themselves (whether practising in firms, or as corporate counsel); and those marketed directly to businesses or consumers: Rebecca L Sandefur, *Legal Tech for Non-Lawyers: Report of the Survey of US Legal Technologies* (Report, American Bar Foundation 2019) <http://www.americanbarfoundation.org/uploads/cms/documents/report_us_digital_legal_tech_for_nonlawyers.pdf>. Elizabeth Chambliss reports: 'In 2012, investors put $66 million dollars into legal service technology companies. By 2013, that figure was $458 million': Elizabeth Chambliss, 'Evidence-Based Lawyer Regulation' (2019) 97(2) *Washington University Law Review* 297, 317. Note also Alison Hook's reasoning for preferring the term 'LegalTech' over 'LawTech': *The Use and Regulation of Technology in the Legal Sector beyond England and Wales* (Research Paper for the Legal Services Board, Hook Tangaza, 2019) 18–19.

[5]This study does not assume that lawyer regulation has been realised; in other words, that there is no unethical conduct among lawyers or legal practices, and that now it remains, for instance, the sole or even primary task of the regulators to oversee new entrants. Regulatory bodies should have defined processes by which to ensure competence of members and impose sanctions, and maintain impartiality when investigating, among other things: David Benton, Maximo González-Jurado and JV Beneit-Montesinos, 'Defining Nursing Regulation and Regulatory Body Performance: A Policy Delphi Study' (2013) 60 *International Nursing Review* 303, 308. For a study on the complexities of lawyer regulation and its value, strengths (including relative to the independent co-regulator), and serious limitations (including issues of relevance, impact and suitability), see: Deborah Hartstein and Justine Rogers, 'Professional Associations as Regulators: An Interview Study of the Law Society of New South Wales' (2019) 22(1–2) *Legal Ethics* 49; and for a review of the studies on the workings and impacts of professional associations as regulators: Justine Rogers and Deborah Hartstein, *The Value of Contemporary Professional Associations* (Report, Professional Standards Councils, 2018).

[6]'The interdependence between state and professions has been described as a "regulative bargain" in which the state grants professions autonomy and a monopoly over a defined jurisdiction in return for self-regulation and reciprocal assistance in maintaining state authority': Roy Suddaby, David J Cooper and Royston Greenwood, 'Transnational Regulation of Professional Services: Governance Dynamics of Field Level Organizational Change' (2007) 32(4–5) *Accounting, Organizations and Society* 333, 337. For further discussion of the term, see Justine Rogers, Dimity Kingsford Smith and John Chellew, 'The Large Professional Service Firm: A New Force in the Regulative Bargain' (2017) 40(1) *University of NSW Law Journal* 218, 218 n 1.

[7]Lyria Bennett Moses, 'Regulating in the Face of Sociotechnical Change' in Roger Brownsword, Eloise Scotford, and Karen Yeung (eds) *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press, 2017) ch 49.

may be characterised as both, dependent on how it is used.[8] Our focus in this article, though, is the regulation of people. Software does not arise in a vacuum but is deliberately designed and put to market by people implementing a specific idea or purpose. We are interested in the people involved in LegalTech enterprises, including the strength of their connection to the legal profession.

Perhaps because of its liberal regulatory regime allowing for their easier integration into the profession, the influx of 'tech' people to the Australian legal services market has not been as dramatic or obvious as in some other jurisdictions. As we expand on below, we might find them located within law firms (including 'New Law' practices), at LegalTech enterprises selling tech products to lawyers or law firms, or as non-law practice entities that are nevertheless using technology such as document automation to offer services directly to clients/consumers.[9] Law firms themselves may choose to develop LegalTech in-house; to license its use from providers; or to invest directly in, or acquire, LegalTech entities.[10]

We note too that we have written elsewhere on the ethical (and by extension, regulatory) effects of lawyers making use of LegalTech, specifically automation, in their own work.[11] In that analysis we considered how lawyers' ethicality might be put to the test by their own use of automated systems. Many of the ethical risks we raise in this paper also pertain to lawyers' uses of LegalTech. We identified, though, that individual lawyers continue to bear the professional responsibility and liability for work undertaken using such systems.[12] Accordingly, while many legal start-ups seek to serve 'law firms and legal departments',[13] we are less concerned in this article with the regulation of those entities, products and persons. Sometimes, 'Lawtech' is adopted as the preferred term for technology which seeks to provide legal services directly to consumers[14] but here we prefer the term 'LegalTech' as importing a broader meaning. The array of LegalTech available, and the rapidity of its growth, have demanded the development of taxonomies or classification systems.[15] Many LegalTech products are marketed to lawyers as means of performing their own legal work or managing their business more efficiently.[16] However, our interest in this paper is in those people or entities often seeking to 'disrupt' the profession through the creation of products or services offered direct to

[8]Matthew U Scherer, 'Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies' (2016) 29 (2) *Harvard Journal of Law and Technology* 353, 390.

[9]See Susan Saab Fortney, 'Online Legal Document Providers and the Public Interest: Using a Certification Approach to Balance Access to Justice and Public Protection' (2019) 72(1) *Oklahoma Law Review* 91.

[10]Eric Chin, '0 to 111: Is Australia's LegalTech Having a Cambrian Moment?' (Legal Innovation and Tech Fest, Sydney, 12–13 June 2019); Marianna Papadakis, 'Legacy Structure Holds Innovation Back' *The Australian Financial Review* (Sydney, 30 October 2015); Marianna Papadakis, Michael Bailey and Nick Abrahams, 'Gilbert + Tobin raises stake in tech start-up' *The Australian Financial Review* (Sydney, 5 August 2016); Joseph M Green, 'Legaltech and the Future of Startup Lawyering' in Antoine Masson and Gavin Robinson (eds) *Mapping Legal Innovation: Trends and Perspectives* (Springer, 2021) 189.

[11]Rogers and Bell (n 2).

[12]ibid 86.

[13]Daniel W Linna Jnr, 'What We Know and Need to Know About Legal Startups' (2016) 67 *South Carolina Law Review* 389, 402–3.

[14]Eg, Legal Services Consumer Panel, *Lawtech and Consumers* (22 May 2019) 2; note also Mayson referred to 'substitutive legal technologies' in *The Focus of Legal Services Regulation*; IRLSR Working Paper LSR-3, at [2.3.2]; <https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-reviewlegal-services-regulation>

[15]Eg, Hook (n 4).

[16]See, eg, Legal Geek, *LegalTech Startup Report 2019 – A Maturing Market* (Thomson Reuters, 2019) https://legalsolutions.thomsonreuters.co.uk/content/dam/openweb/documents/pdf/uki-legal-solutions/report/tr-legaltech-startup-report-2019.pdf

consumers of legal services. For this reason, we do not look closely at those elements of the market that are intended for lawyer use (such as practice management or legal research), or at marketplace or matching services where potential clients can seek to be matched with lawyers. Whether or not these types of services or technologies should be subjected to regulation, and if so of what type, is an issue of a different order to the questions that we focus on here.

Our reference point is Australia, where, as mentioned, there is a liberal regulatory regime permissive of, for instance, incorporated legal practices and external investment in and public listing of law firms. However, we seek to make general points about LegalTech regulation which are broadly applicable. We therefore draw examples from several different jurisdictions, notwithstanding their different regulatory regimes (and indeed, the differing regimes that prevail within nations). By comparison with Australia, the regime in England and Wales is even more permissive, as a wide range of entities are able to undertake legal work.[17] Conversely, in most of the United States a less liberal regime prevails, and Arizona recently became the first State to permit non-lawyer co-ownership of law firms and legal service providers.[18] Notwithstanding, Perlman notes that, in the US,

> people without a law degree are playing an increasingly valuable and pervasive role in the delivery of legal and law-related services outside of law firms and [alternative business structures]. Examples include automated document assembly services, expert systems, electronic discovery, and legal process outsourcing.[19]

The article is structured as follows. Part II looks at what professional regulation seeks to do, focusing on its public interest and other, more self-serving goals, and how legal regulators currently pursue those goals. We identify the strengths and weaknesses of this model, those that exist even without the complicating presence of the 'non-lawyers' or new providers. Canvassing the current regulatory landscape is also important to lay out the probable starting point for the governance of LegalTech; the regulation of the new providers is, and will likely continue to be, grafted onto these structures, practices, and beliefs, with their biases and limitations. Moreover, this account provides a sense of the regulatory burden lawyers take on (in exchange for their privileges) and therefore, as a motivational issue, what burdens they might expect, on fairness grounds, to apply equally to non-lawyers. Part III surveys the information available about non-lawyers who are becoming involved in legal service delivery through the design and manufacture of new technologies. We then discuss the ethics risks – and opportunities – presented by their activities, under the themes of quality control, consumer choice and access, redress mechanisms, and rule of law concerns. Part IV turns to regulatory options. The first option is to continue as is; and we therefore examine what the current tools and approach of legal regulators mean for the oversight of the new, non-lawyer providers. We then discuss two *possible* means of regulating these new providers, which we demarcate as 'passive' and 'active' to signal the level of activity required from legal regulators. We

[17]Andrew Boon and Avis Whyte, 'Lawyer Disciplinary Processes: An Empirical Study of Solicitors' Misconduct Cases in England and Wales in 2015' (2019) 39(3) *Legal Studies* 455, 455.

[18]Bloomberg Law, 'Arizona First State to OK Nonlawyer Ownership of Law Firms', 29 August 2020 <https://news.bloomberglaw.com/business-and-practice/arizona-first-state-to-allow-nonlawyer-co-ownership-of-law-firms>

[19]Andrew M Perlman, 'Towards the Law of Legal Services' (2015) 37(1) *Cardozo Law Review* 49.

do not advocate one approach or another, as our purpose is to analyse the strengths and weaknesses inhering in each. In highlighting the merits of different approaches, we identify where these are transferable across jurisdictions, despite differing regulatory regimes.[20] In conclusion, we mention the potential negative consequences of a failure to place any regulatory burden on non-lawyers and LegalTech, or in uneven distribution of responsibility, though there are risks also in over-regulation. The result is a complex series of choices which must be made, and which may well have impacts and effects that cannot be anticipated.

2. What are legal regulators trying to do? And how?

In this Part, we look at the varied goals of legal regulators and how these goals are typically pursued and achieved. Regulatory goals can reveal the standards that legal regulators aim to attain and balance, through the rules imposed on lawyers and, arguably now, on the new providers too. By examining these goals, we show that these regulatory tasks are complex and historically embedded, with certain weak spots that pre-date the arrival of non-lawyers. The regulatory players and their arrangements and circumstances have changed; indeed, the emergence of LegalTech might be seen as an extension of this shifting landscape. These characteristics of lawyers' regulation are important as the likely foundation for any non-lawyer regulation. Yet many of its features contrast with the ongoing evolution of LegalTech, thereby raising queries about regulatory capability. Finally, lawyers are heavily regulated, in contradistinction to those non-lawyers increasingly involved in legal service delivery via technology – a situation that would seem unsustainable.

Professional regulation seeks to achieve a set of public interest goals as well as other, more self-serving, 'market closure' objectives for the benefit of the profession, the practitioners, and the regulatory body itself.[21] As we show, these goals are at certain points connected and mutually supportive. Indeed, as further elaborated, the traditional, self-regulatory arrangement is predicated on an exchange of these interests – or that the public interest goals are in return for (and ideally, supported by) the other, non-public ones. Remus and Levy write that all forms of legal professional regulation have 'three essential' public service 'functions' that are especially significant, being '(1) protecting consumers in the face of information asymmetries; (2) ensuring that negative externalities do not undermine the integrity of our legal systems; and (3) ensuring universal access to legal services'.[22] Remus and Levy are writing in the context of AI and new technologies in law, but these would appear to represent the general standards that legal regulators seek to realise. As mentioned, legal regulators, or traditionally the professional associations, have historically also tried to maintain the interests of the profession, specifically its work jurisdiction and cohesive identity.

[20]Noting that similar questions about the regulation of new legal service providers arise in jurisdictions such as Canada, the United Kingdom and the United States. See Crispin Passmore, 'The Solicitors Regulation Authority: Looking to the Future' (2016) 19(1) *Legal Ethics* 145.

[21]For an in-depth, empirical analysis of an association's multiple objectives, see Justine Rogers and Deborah Hartstein, 'You, Us and Them: The Multiple Projects of the New South Wales Law Society' (2019) 45(3) *Monash University Law Review* 716.

[22]Dana Remus and Frank Levy, 'Can Robots Be Lawyers: Computers, Lawyers, and the Practice of Law' (2017) 30(3) *Georgetown Journal of Legal Ethics* 501, 545.

Contemporary professional regulation is typically a combination of regulatory controls along a spectrum: from self-regulatory (and then, in the case of law, court oversight); to co-regulatory (joint or mixed) regulation; state agency; to, at the other far end, government regulation.[23] In England and Wales, associations lost professional regulatory control and an independent body was created for this function.[24] In states of Australia and in New Zealand, co-regulatory arrangements, wherein disciplinary functions are shared between independent regulators and associations, prevail.[25] In New South Wales, for instance, the Law Society and Bar Association work in conjunction with the independent regulator. Co-regulation means that there is a sharing of responsibilities between the professional bodies (which predominantly deal with more complex conduct and disciplinary issues)[26] and the independent regulator (which tends to deal with consumer-facing disputes). A range of disciplinary outcomes are possible, from cautioning through to imposition of conditions on legal practise, culminating in removal from the Roll (withdrawal of rights to practise). Moreover, these relationships and the careful divvying up of authority now fit within a wider regulatory network at the national level, 'each covering different aspects of admission, practice and discipline'.[27] The intricacies of these arrangements are important both as the foundations for a scheme that must potentially expand to encompass non-lawyer providers, and as an illustration of the legal regulators' strengths and frailties if it does.

Meanwhile, in return for their public interest functions, the state has historically granted to the profession some form, more or less limited, of monopoly over legal work wherein certain kinds of work are 'reserved' to it exclusively. In Australia and North America, non-lawyers may permissibly provide legal information but not legal advice.[28] As we return to in Part IV, non-lawyer individuals or companies who develop software and offer it in lieu of legal services thus technically risk prosecution for unauthorised legal practice, a criminal offence. This outcome is also possible in England and Wales, though relaxation of the reservation of work rules means that the range of legal work that can be legitimately performed by non-lawyers has increased.[29] There, 'reserved legal activities' are limited to conducting litigation and rights of appearance, as well as specific activities around instruments, probate, administration of oaths and notarial services.[30] Other legal services can legally be provided by non-lawyers (referred to as 'unauthorised providers') in an unregulated context, meaning providers

[23]Adapted from Boon (n 56) 12.
[24]ibid 25; *Legal Services Act 2007* (UK) pt 2.
[25]Selene E Mize, 'New Zealand: Finding the Balance between Self-Regulation and Government Oversight' in Andrew Boon (ed), *International Perspectives on the Regulation of Lawyers and Legal Services* (Hart Publishing, 2017) 115, 124, 138.
[26]Law Society of New South Wales, *Professional Standards Annual Report 2017/2018* (Report, 2018) 10.
[27]Rogers and Hartstein, 'You, Us and Them' (n 23) 192, and at 222–23 on seeing some efforts at international coordination too.
[28]Emma Beames, 'Technology-based Legal Document Generation Services and the Regulation of Legal Practice in Australia' (2017) 42(4) *Alternative Law Journal* 297; Derek A Denckla, 'Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters' (1999) 67 *Fordham Law Review* 2581, 2587; Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Edward Elgar, 2015) 47–50.
[29]*Legal Services Act 2007* (UK) s 14 criminalises unauthorised practice of the reserved activities. See also Laurel S Terry, Steve Mark and Tahlia Gordon, 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2012) 80(6) *Fordham Law Review* 2661, 2676; Judith Bennett et al, *Current State of Automated Legal Advice Tools* (Networked Society Institute Discussion Paper 1, University of Melbourne, 2018) 19.
[30]*Legal Services Act 2007* (UK) s 12.

are not subject to the same disciplinary oversight, though they must abide by the consumer laws which govern all businesses.

Other powers of the profession, via its association, are the setting of rules of admission and practice, provision of practising certificates, enforcement of requirements for professional indemnity insurance, and the exercise of disciplinary and other controls over members;[31] axiomatic of 'professionalist-independent regulation'[32] or self-regulation. The higher courts have also played a role in lawyers' regulation, having power, now statutory, over entry and exit to the profession.[33] The purpose of judicial oversight is to ensure that only 'fit and proper' individuals can practise. Historically, 'fit and proper' has tended to mean honest, trustworthy, courteous, and 'gentlemanly'. It has come to explicitly include competence and skill, with admissions somewhat supplanted by statutorily-required qualifications and procedures.[34] Contemporary associations now monitor lawyers' compliance with these legislated requirements for competence, specifically, their fulfilment of continuing professional development obligations. After admission, this good character requirement is ongoing, and is central to the (now) statutory tests of professional misconduct and disciplinary sanction. Lawyers owe paramount duties to the Court and the administration of justice, they promise custodianship of the rule of law, and to enact duties to the court and their colleagues to carry out this function.[35] Lawyers must also honour certain fiduciary and other duties towards the client, recognising the typical power and informational imbalances signalled in Remus and Levy's scheme, including the duty of confidentiality and in the 'no-profit, no-conflict' rules.[36] These duties entail access to justice commitments too, including in the form of the 'cab rank' principle (for barristers, who must accept any work in their field that comes to them), elaborate rules pertaining to fees and costs (ensuring their fair disclosure and reasonableness), and aspiration to pro bono service.[37] Lawyers' regulators might also publish (in more or less easily accessible ways) the disciplinary decisions concerning their practitioners.

For almost its entire history, and to flag one of its potential limitations when it comes to LegalTech, professional regulation has been of the individual practitioner – the lawyer – and only recently have efforts been made to regulate legal practices or lawyers' workplace organisations. In legal services, 'entity regulation' came with the move to allow

[31]For example, trust account inspection: *Legal Profession Uniform Law 2015* (NSW) pt 4.2; *Legal Profession Uniform General Rules 2015* (NSW) pt 4.2.

[32]Noel Semple, Russell G Pearce and Renee Newman Knake, 'A Taxonomy of Lawyer Regulation: How Contrasting Theories of Regulation Explain the Divergent Regulatory Regimes in Australia, England and Wales, and North America' (2013) 16(2) *Legal Ethics* 258, 274.

[33]See, eg, *Legal Practitioners Act 1898* (NSW) s 4; *Legal Professional Uniform Law 2014* (NSW) ss 16(4), 23(1).

[34]As per note 5 above, we do not take these aims, principles, and arrangements as evidence themselves that the regulation of lawyers was, or is, entirely achieved or without flaws. Indeed and for example, in research into the New South Wales Law Society, contemporary professional development (CPD) was singled out by many interviewees (lawyer-members) as a highly valued offering and obligation. Nonetheless, 'when discussing renewal of registration, one participant felt that there was no rigorous checking' of whether the CDP requirements had in fact been met or simply checked off: Rogers and Hartstein (n 5) 58. For discussion of some of the regulatory changes generally, see Linda Haller and Francesca Bartlett, 'Views from Inside: A Comparison of Admission Process in New South Wales and Victoria Before and After the Uniform Law' (2016) 42(1) *Monash University Law Review* 109.

[35]Semple, Pearce and Newman Knake (n 34) 272.

[36]See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–7 (Mason J).

[37]For example, some 14,000 Australian lawyers have, individually or via their organisations, signed up to deliver a certain amount of pro bono (free or low cost) legal services each year via the Australian Pro Bono Centre: 'National Pro Bono Target' (*Australian Pro Bono Centre*, 2020) <https://www.probonocentre.org.au/provide-pro-bono/target/>.

lawyers to work in firm structures other than the traditional professional partnership. As lawyers were first permitted to enter into partnerships with non-lawyers and then to adopt corporate structures involving non-lawyer ownership,[38] it was recognised that these structures would comprise people in leadership and ownership roles who are not subject to the same professional regulation and controls imposed on members of the legal profession.[39] Entity regulation seeks to address this by regulating the organisation itself: some jurisdictions, for instance England and Wales, require the entity that is providing legal services to also be licensed, in addition to the licensing of individual lawyers working within it.[40] For this reason, McMorrow describes it as a 'parallel system of regulation alongside regulating the individual legal professional'.[41] Thus, this has taken the form of an additional layer of regulation over and above the regulation of individuals, rather than a substitute for it. Such attempts have not met with great success across all jurisdictions, though as we discuss in Part IV, some have had more success than others.[42]

In regulating the individual, that person is relied upon to internalise the profession's ideals and engage in self-discipline and peer-sanctioning, rather than requiring managerial oversight. The oath lawyers make to the court at admission, for instance, is a personal commitment be 'a particular sort of person for others, in this case the public, clients and peers'.[43] It is 'a pledge to a self-controlled "collectivity orientation"'.[44] Noting there are shortcomings of an individualist regime generally, the diffuse way that LegalTech is developed and commercialised, typically involving multiple professionals and non-professionals working in teams, would appear incongruent with professional regulation as purely a personal responsibility.[45]

Meanwhile, though its form and extent differs, typically, in return for this 'collective' body of individual regulatory commitments, the state gives professions (often but not exclusively via their associations) the significant regulatory autonomy just outlined and a monopoly or quasi-monopoly over their professional jurisdiction.[46] To pursue

[38]This has happened at different times around the world, and not at all in some jurisdictions (including most of the US States, Canada, Germany, France and New Zealand). For some of the differences in approach, see American Bar Association, *For Comment: Issues Paper Regarding Alternative Business Structures* (Issues Paper, 8 April 2016) 5 <www.americanbar.org/content/dam/aba/images/office_president/alternative_business_issues_paper.pdf> accessed 16 May 2020.

[39]The move to include non-lawyers was an acceptance by the legal regulators that their presence was not inherently an intrusive, overwhelming or corrosive one, as was the fear – and as underpins the ongoing arguments against incorporated or multidisciplinary legal practices. See for e.g. James W Jones and Bayliss Manning, 'Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practices' (2000) 84 *Minnesota Law Review*, 1159, 1186–1189. For some of the US debate, see Edward S Adams and John H Matheson, 'Law Firms on the Big Board: A Proposal for Nonlawyer Investment in Law Firms' (1998) 86 *California Law Review* 1, 3-14; Paul D Paton, 'Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America' (2010) 78(5) *Fordham Law Review* 2193, 2207–11; Ted Schneyer, '"Professionalism" as Pathology: The ABA's Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities' (2013) 40(1) *Fordham Urban Law Journal* 74.

[40]See, eg, Iain Miller, Peter Steel and Ciara Brannigan, 'Entity Focused Regulation of the Legal Sector' (2013) *Professional Negligence* 172 (discussing the *Legal Services Act 2007* (UK)).

[41]Judith A McMorrow, 'UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the US' (2016) 47(2) *Georgetown Journal of International Law* 665, 677.

[42]Rogers, Kingsford Smith and Chellew (n 6) 226.

[43]John R Boatright, 'Swearing to be Virtuous: The Prospects of a Banker's Oath' (2013) 71(2) *Review of Social Economy* 140.

[44]Dietrich Rueschemeyer, 'Doctors and Lawyers: A Comment on the Theory of the Professions' (1964) 1 *Canadian Review of Sociology* 17, 17.

[45]Stephen Mayson, *Independent Review of Legal Services Regulation: The Focus of Legal Services Regulation* (Working Paper LSR–3, UCL Centre for Ethics and Law, March 2019) 7.

[46]See, eg, Deborah L Rhode, 'Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions' (1981) 34(1) *Stanford Law Review* 1.

monopoly, professional bodies have traditionally been allowed to make other rules too, such as restrictions on advertising and restraints on trade designed to limit competition between practitioners.[47] It is such guaranteed protections that are said to incentivise professionals to prioritise high quality expertise and ethicality, in recognition of the vulnerabilities of the client, who cannot assess the value and impact of their services;[48] again, the 'informational asymmetry' from Remus and Levy's list.[49] 'Getting on with being a professional … with true, independent judgment, client fidelity, collegiality, and the development of professional institutions, is something professionals cannot do if they are preoccupied with competition and status'.[50] In other words, the regulative bargain relies on a (nominally fair) exchange of individual privileges and burdens.

Even without the addition of LegalTech, the justification of the regulatory bargain is not straightforward. Professional self-regulation has for a long time been criticised as simple monopolisation, furthering the interests of the profession itself, for which the supposed protection of clients is just a cover (or at least, that protection is secondary and subject to the profession's self-interest).[51] Particularly in the United States, the legal profession's monopoly has been decried as diminishing access to justice and stifling innovation.[52] It may be, too, that regulation of any kind is not the ideal path forward, and that new legal service providers are fulfilling needs that lawyers cannot or have not been willing to accommodate. However perceived,[53] self-regulation has been eroded to varying degrees across jurisdictions. One of the main consequences of the competition and consumer movements since the 1980s[54] has been diminished control wielded by the associations.[55] Professions are no longer seen by governments as capable of effective self-regulation or meeting their end of the bargain to protect 'consumers' – the new term for 'clients'[56] – and most associations have lost their regulatory functions to state regulators or co-regulatory arrangements.[57] Whatever the precise arrangements (i.e. associations or state/independent bodies or a mixture), alongside the new emphasis

[47]These included scale costs (or fixed prices), rules against advertising, and rules compelling the enlisting of a junior barrister in addition to a senior barrister (a silk, Queen's Counsel or Senior Counsel). See Edward Shinnick, Fred Bruinsma and Christine Parker, 'Aspects of Regulatory Reform in the Legal Profession: Australia, Ireland and the Netherlands' (2003) 10(3) *International Journal of the Legal Profession* 237.

[48]Gillian K Hadfield, 'The Price of Law: How the Market for Lawyers Distorts the Justice System' (2000) 98(4) *Michigan Law Review* 953, 968.

[49]Remus and Levy (n 24) 545.

[50]Rogers, Kingsford Smith and Chellew (n 6) 230, citing Eliot Freidson, *Professional Powers: A Study of the Institutionalization of Formal Knowledge* (University of Chicago Press, 1986).

[51]See the summary in Julia Evetts, 'Professionalism beyond the Nation-State: International Systems of Professional Regulation in Europe' (1998) 18(11/12) *International Journal of Sociology and Social Policy* 47, 50.

[52]Gillian K Hadfield and Deborah L Rhode, 'How to Regulate Legal Services to Promote Access, Innovation and the Quality of Lawyering' (2016) 67 *Hastings Law Journal* 1191; Benjamin H Barton, *Glass Half Full: The Decline and Rebirth of the Legal Profession* (Oxford University Press, 2015).

[53]Noting that other writing sees self-regulation or co-regulation as an effective (and relatively cheap) means of combining state-sanctioned power with administration of professional norms. Indeed, governments in many jurisdictions still rely on professional associations, either solely or in co-regulatory arrangements, and even where they are without formal authority, they may exercise 'soft' regulatory control, through education and identity-building, so that lawyers continue to see themselves as a group with certain responsibilities. For extensive discussion see Hartstein and Rogers (n 5); and Rogers and Hartstein, (n 5)

[54]See, eg, Shinnick, Bruinsma and Parker (n 49) 237; Andrew Boon, 'The Regulation of Lawyers and Legal Services' in Andrew Boon (ed), *International Perspectives on the Regulation of Lawyers and Legal Services* (Hart Publishing, 2017) 1, 18.

[55]See, eg, Hartstein and Rogers (n 5) 55.

[56]Or in medicine, 'patients'.

[57]For example, NSW entered into a co-regulatory arrangement via the *Legal Profession Reform Act 1993* (NSW), amending the *Legal Profession Act 1987* (NSW). Victoria and Queensland have a co-regulatory scheme; South Australia and Western

on consumer remedies, 'legal regulators' face somewhat contradictory and, some argue, even greater pressures[58] to de-regulate.[59] This impetus comes from the pursuit of a national (and international) competition agenda and, in Australia, a common legal services market.[60] These 'twin agendas' have resulted in the loss of protection over certain monopolies or areas of work (such as conveyancing and direct access work); and the lifting of advertising prohibitions and other price-stabilising measures (including the prohibition on conditional cost agreements, allowing 'no win, no fee' arrangements). There is continued pressure for regulatory goals to support greater freedom of trade at national – and international – levels.[61]

The importance of this scene-setting for our discussion is, in addition, that LegalTech emerges in a context in which introducing additional regulation must be justified, representing as it does a restraint on free trade. Indeed, LegalTech's development might be seen, in some sense, as in part an outcome of that relaxation. Webb has explained that both over- and under-regulation carry risks for consumers. The former increases costs and limits consumers' choice and access to justice, as well as reducing innovation.[62] On the other hand, and to foreshadow some of our discussion in Part III, 'excessive deregulation' also brings risks, including

> 'adverse selection' whereby quality declines as cheaper, poorer quality services drive out the good, but more expensive, providers in an unregulated race to the bottom … and 'moral hazard,' as unresolved information asymmetries and the lack of regulation and/or enforcement reduce external incentives to deliver high quality services.[63]

Meanwhile, and posing another test to regulatory capacity, there has been a more severe splintering of the profession, based on variables such as client-type, organisational size and form, practice area, and scope (local, national and global). Lawyers and their firms are now subject to intense competitive pressures, from other firms and in-house counsel, other professionals providing multidisciplinary services, overseas lawyers, and now, non-lawyers providing legal services.[64] Commentators have observed more aggressively for-profit, competitive orientations within the commercial/corporate sector especially. It is in this sector that certain firms have begun to develop or support the development of LegalTech;[65] the rise of such technology could be seen a culmination of this tech-enabled, hyper-competitive and global practice environment. There is,

Australia have independent regulators; and Tasmania and the legal professions in the two territories are self-regulated: see, eg, Hartstein and Rogers (n 5) 60 n 107.

[58]Shinnick, Bruinsma and Parker (n 49) 246–47.

[59]John Flood, 'The Re-landscaping of the Legal Profession: Large Law Firms and Professional Reregulation' (2011) 59 *Current Sociology* 507; Chambliss, 'Evidence-Based Lawyer Regulation' (n 4).

[60]The program culminated in the current regime, the Legal Profession Uniform Law, which commenced in July 2015: Rogers, Kingsford Smith and Chellew (n 6) 222 (citations omitted).

[61]Hartstein and Rogers (n 5) 205; Rogers, Kingsford Smith and Chellew (n 6) 237–38.

[62]Julian Webb, 'Regulating Lawyers in a Liberalized Legal Services Market: The Role of Education and Training' (2013) 24 (2) *Stanford Law and Policy Review* 533, 542.

[63]ibid 542–43. The same points are identified by Frank H Stephen, 'Regulation of the Legal Professions or Regulation of Markets for Legal Services: Potential Implications of the Legal Services Act 2007' (2008) 19(6) *European Business Law Review* 1129, 1131; Noel Semple, 'Tending the Flame: Technological Innovation and the Legal Services Act Regime' (Paper for the Legal Services Board, 6 August 2019) 2.

[64]Felicity Bell, Justine Rogers and Michael Legg, 'Artificial Intelligence and Lawyer Wellbeing' in Michael Legg, Prue Vines and Janet Chan (eds) *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020) 239, 261.

[65]Vicki Waye, Martie-Louise Verreynne and Jane Knowler, 'Innovation in the Australian Legal Profession' (2018) 25(2) *International Journal of the Legal Profession* 213, 221.

meanwhile, increased use of managerialist, 'efficiency' practices across the sectors, contributing to the increased centring of 'professionalism' within the organisation rather than the wider profession.[66] In these circumstances, legal regulators (especially association-regulators) have had to become more responsive to, and creative in, their efforts to reach the diverse parts of the profession to bring them under the regulatory tent,[67] where 'professional' practice is becoming both more organisational and, as LegalTech exacerbates, more diffuse or extra-jurisdictional.[68]

In this way, it is already difficult to balance professional regulation, high standards and monopoly, and now free trade, even without the presence of new legal service providers. There is evidence that associations, those with continued, formal regulatory control, have 'doubled-down' on public interest commitment and disciplinary authority.[69] Yet there remains scepticism about the 'true' purposes of self-regulation[70] and about its capacity, beset as it is by convoluted pressures. This discussion has indicated a few of those concerns, which could be rendered more problematic if the regulation of new, non-lawyer providers is simply bolted on: concerns about self-regulation's individualistic approach and reactive nature; its weakened grip, including as a result of the fragmentation of the profession, where professionalism might often work as an organisational rather than personal commitment; and the broad push towards de-regulation as part of competition reform and innovation. Any expanded legal service regulation likely needs to work within and be agreed upon in light of these existing arrangements, and play to the capacities and reach of the regulatory scheme. Alternatively, as the comparator system that lawyers work within when providing legal services, it may need rough equivalence for those who are not lawyers but are providing legal services.

Indeed, it would appear to be desirable to impose some form of regulation on non-lawyers or the new providers making and/or deploying LegalTech. Besides direct risks to consumers or clients, which we analyse below, to expand on this just mentioned 'equivalence' point, an argument in favour is that a failure to do so will unfairly 'tilt the playing field' toward those non-lawyers offering products and services in an unregulated context.[71] This might disrupt the regulatory bargain. On one level this is 'just' about protecting lawyers' work, but there are also broader consumer protection and rule of law considerations. There is also possible detriment to lawyers' sense of, and motivations for, their own professionalism. Non-lawyer providers likely act as competitors to lawyers,[72]

[66]Flood (n 67) 510; Rogers, Kingsford Smith and Chellew (n 6) 259; Justine Rogers, Peter Dombkins and Felicity Bell, 'Legal Project Management: Projectifying the Legal Profession' (2021) 2(2) *Law, Technology and Humans* https://doi.org/10.5204/lthj.1610.

[67]Hartstein and Rogers (n 5); Rogers and Hartstein, 'You, Us and Them' (n 23).

[68]For more on the difficulties of regulating multi-national law firms, see Flood (n 67); Rogers, Kingsford Smith and Chellew (n 6).

[69]Rogers and Hartstein, 'You, Us and Them' (n 23) 226.

[70]Abel argues, for instance, that various 'turf wars' both within the legal profession, and against other professions, 'dramatically exposed the self-interested nature of professional claims': Richard L Abel, *English Lawyers between Market and State: The Politics of Professionalism* (Oxford University Press, 2003) 118. See the summary of Julia Evetts, 'The Concept of Professionalism: Professional Work, Professional Practice and Learning' in S Billett, C Harteis and H Gruber (eds), *International Handbook of Research in Professional and Practice-based Learning* (Springer, 2014) 29, 38; and further M Burrage, 'Revolution and the Collective Action of the French, American and English Legal Professions' (1988) 13(2) *Law and Social Inquiry* 225, 228; Rogers and Hartstein, *The Value of Contemporary Professional Associations* (n 55) 20, 27–28.

[71]Frank Pasquale, 'Toward a Fourth Law of Robots: Preserving Attribution, Responsibility, and Explainability in an Algorithmic Society' (2017) 78(5) *Ohio State Law Journal* 1243, 1244. ('Fourth Law')

[72]Passmore (n 22) 146–47.

potentially making it harder for lawyers to accept and commit to their duties as professionals, including those public obligations to the wider legal system and access to justice.[73] While non-lawyers may act as service-partners with lawyers, they do so as partners free of ethical commitments and regulation, and the regulatory load is left on lawyers. It may be that lawyers' own ethical motivations are compromised by the addition of unregulated competitors: it is unclear whether the influx of non-lawyers and technology will make lawyers more inclined to be ethical (as a point of distinction, if not a reaffirmation of their professionalism) or less, as a result of low morale or sense of futility.[74]

Alternatively, non-lawyer legal services may be a solution to the crisis of access, an answer to one of Remus and Levy's essential regulatory goals, with LegalTech enabling clients to attain legal services cheaply and accessibly.[75] This could be through direct-to-consumer products or those enabling non-lawyers to complete legal work or parts of it. They may even make lawyers' professional offering more enticing and important, marking it out in a crowded services market. This effect might, in turn, then better incentivise lawyers to enact their altruistic commitments as professionals. But these scenarios – of greater access and/or increased trust in lawyers – still involve risks.[76] In any case, there is a lack of information on the people involved in LegalTech and their relationships to the legal profession. As we detail in the following section, many of these individuals would seem to be legally educated,[77] and could therefore be expected to have some understanding of the profession's values and obligations. However, when looking at the risks they pose, we treat them as if they do not have practising certificates, do not work in legal practices such that they might be supervised by a lawyer; and are not themselves part of a profession, let alone a profession with the institutional controls of an established one like law.

3. Non-lawyer legal service providers and the risks of provision of legal services via technology

Our interest in this paper is, as noted, in those new legal service providers offering their wares direct to the public, rather than in lawyers' own use of technology in their delivery of legal services. But who are these new providers, and what risks do they pose?

3.1. Who are the 'non-lawyers'?

Identification of the 'non-lawyers' founding and/or running LegalTech companies and building their products is difficult due to a lack of clear data. A 2019 survey by consultants Alpha Creates found that of 111 Australian LegalTech enterprises, just over half

[73]Rogers and Bell 'The Ethical AI Lawyer' (n 2) 90–91.
[74]ibid; Dana Ann Remus, 'Reconstructing Professionalism' (2017) 51(3) *Georgia Law Review* 807, 872.
[75]Raymond H Brescia et al, 'Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice' (2014) 78 *Albany Law Review* 553; Lauren Moxley, 'Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer's Monopoly and Improving Access to Justice' (2015) 9(2) *Harvard Law and Policy Review* 553; Miguel Willis and Aurora Martin, 'Tech Justice: A Conversation about Making Justice more Accessible' (2016) *Clearinghouse Review* 1.
[76]Nick Robinson, 'When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism' (2016) 29 (1) *Georgetown Journal of Legal Ethics* 1; Tania Sourdin, Bin Li and Tony Burke, 'Just, Quick and Cheap? Civil Dispute Resolution and Technology' (2019) 19 *Macquarie Law Journal* 17.
[77]Dan Jackson, 'Human-Centered Legal Tech: Integrating Design in Legal Education' (2016) 50(1) *The Law Teacher* 82, 84.

were founded by one person and nearly 30 per cent by two people.[78] Generally, founders and employees, and presumably contractors, appear to be a mixture of entrepreneurs (who are sometimes former lawyers or practising lawyers), software developers, scientists, and industry experts.[79] A proportion of these organisations were founded and are run by lawyers: Thomson Reuters reported in 2017 that 45 per cent of UK LawTech start-up CEO were former lawyers.[80] Often, those with legal training are corporate lawyers and/or litigators, either on their own or in formal partnership with software engineers, scientists and/or government staffers. US company LegalZoom, for example, was founded by two 'refugees from corporate law practice';[81] its management today is comprised mostly of non-lawyers though it employs lawyers to develop the 'guided forms' used by clients to create legal documents.[82] UK-based CaseCrunch was begun by law graduates who had never practised.[83] In Australia, 83 per cent of LegalTech founders came from within the legal services industry.[84] This is relevant because, for now, most LegalTech leaders have legal qualifications and potential practice experience, and thus an understanding of law and the profession's values and obligations. Indeed, a high level of legal knowledge is needed, especially when LegalTech offerings are becoming more sophisticated.[85] For instance, contract review company LawGeex has 'several experienced lawyers on staff, who conduct quality checks on the reports being delivered by the algorithm'.[86]

Nevertheless, the products and services on offer are 'built in software',[87] through the expertise of coders and knowledge engineers who typically do not have law degrees, let alone legal practice experience. Where lawyers have a presence within these entities, they may be few or they may be consulted only at intervals.[88] Some of the entities in Artificial Lawyer's 'Legal Tech Top 100'[89] listings note their founding or co-founding by lawyers, who, in the companies' descriptions, are often said to have noticed a need

[78]Chin (n 10).

[79]See Jan Lacobowitz and Justin Ortiz, 'Happy Birthday Siri: Dialing in Legal Ethics for Artificial Intelligence, Smartphones and Real Time Lawyers' (2018) 4(5) *Texas A&M Journal of Property Law* 407, 418–19, citing David Hricik, 'Machine Aided Patent Drafting: A Second Look' (*PATENTLYO*, 25 August 2017), <https://patentlyo.com/hricik/2017/08/machine-patent-drafting.html> accessed 15 May 2020; David Hricik, 'Augmented Patent Drafting and Ethics' (*PATENTLYO*, 8 June 2017) <https://patentlyo.com/hricik/2017/06/augmented-patent-drafting.html> accessed 15 May 2020.

[80]Legal Geek and Thomson Reuters, *Movers and Shakers: UK Lawtech Startups* (2017); see also Jackson (n 85) 84: 'Also noteworthy in this regard are the lawyer/programmers who are starting to build tech solutions to support their own practice when they are unable to find an application on the market'.

[81]Daniel Fisher, 'Entrepreneurs Versus Lawyers' (*Forbes*, 5 October 2011) <www.forbes.com/forbes/2011/1024/entrepreneurs-lawyers-suh-legalzoom-automate-daniel-fisher.html#199fb5cf5226> accessed 15 May 2020.

[82]Robinson (n 84) 35, citing Fisher (n 89).

[83]'Case Crunch Team Splits Up, CourtQuant is Born' (*Artificial Lawyer*, 25 July 2018) <www.artificiallawyer.com/2018/07/25/casecrunch-team-splits-up-courtquant-is-born/> accessed 15 May 2020.

[84]Chin (n 10).

[85]Green (n 10) 16.

[86]Alice Kohn, 'An AI Law Firm Wants to "Automate the Entire Legal World"' (*Futurism*, 30 January 2017) <https://futurism.com/an-ai-law-firm-wants-to-automate-the-entire-legal-world> accessed 15 May 2020.

[87]Tanina Rostain, 'Robots versus Lawyers: A User-Centered Approach' (2017) 30(3) *Georgetown Journal of Legal Ethics* 559, 571–72.

[88]For example, within Fenwick Labs' 'group of IT and legal professionals', eight of its ten full time staff are software developers: 'Fenwick Labs – Legal Technology that Matters to You' (*Fenwick and West LLP*, 2020) <https://www.fenwick.com/about/Pages/fenwick-labs.aspx> accessed 15 May 2020; Green (n 10) 17.

[89]This is a list curated by Artificial Lawyer website, building toward a total of 100 listings. It aims 'to showcase the best and most progressive legal technology from around the world': Richard Tromans, 'AL 100 Legal Tech Directory' (*Artificial Lawyer*, 2020) <https://www.artificiallawyer.com/al-100-directory/> accessed 15 May 2020.

for legal tech in their own practice.[90] 'By lawyers, for lawyers' is likely a selling point for firms considering using these products (and those lawyers involved, we would assume, are regulated as other lawyers are), but most profiles do not also include information about the people actually producing or maintaining the products, or whether they too are legally educated.[91]

3.2. What risks (and opportunities) do non-lawyer providers pose?

The risks of non-lawyer involvement in legal services are numerous, but as demonstrated, regulation must be balanced, including against other goals. Technology then adds a complicating layer to an already complex regulatory scene. Among other things, technology of all kinds is capable of reaching a mass audience – promising ease of access, yet possibly remaining out of jurisdictional reach and creating a regulatory problem of extraterritoriality.[92] The risks of LegalTech are exacerbated by the risks of AI technologies: AI may bring in additional concerns such as technological opacity, risks of bias or error, and lack of accountability or problems with regulatory attachment.[93] We here illustrate the challenges to the existing regulatory regime or any of its future mutations that might seek to bring LegalTech providers within its fold.

3.2.1. Quality control and consumer choice

A key argument for allowing non-lawyers to provide legal services is to increase the range of opportunities and means by which consumers can access such services; a legitimate regulatory goal.[94] Lawyers are effectively gatekeepers to accessing justice and, it is claimed by the consumer movement detailed above, have done a poor job of ensuring accessibility – the primary target of criticism being lawyers' fees.[95] Moreover, there is well-founded criticism that current regulatory systems for lawyers are themselves not an especially effective means of ensuring quality control, and that there is little ongoing testing or auditing to ensure competence.[96] As Mayson notes, 'The claims from those who are regulated that they are necessarily and inevitably better placed

[90]For example, Finnish cloud-based document automation platform 'Contract Mill was founded by two lawyers … to solve … personal frustration of a legal service provider related to inability to improve access to legal services … [and] personal irritation of a general counsel [about paying] too much for low value-adding legal commodity work'. A UK document automation platform, 'Clarilis', says it's 'often said that the best products are those designed by the people who actually use them. Clarilis was co-founded by a practising lawyer … '. Neither profile elaborates on the lawyer-input into the working products: 'Contracting Platforms (Document Automation)' (*Artificial Lawyer*, 2020) <https://www.artificiallawyer.com/al-100-directory/contracting-platforms/> accessed 15 May 2020.

[91]Some listings give a vague idea of the broader 'team' involved – but also hint at the development process, which is in some cases an apparent adaptation of existing technology to legal contexts. For example, INTELLEX, a Singapore-headquartered machine learning and natural language processing company with a contextual legal search product, says its 'lawyers work closely with data scientists and AI engineers to ensure that unstructured legal data is processed in meaningful ways. The latest machine learning and natural language processing technologies are customised to best serve the legal industry': 'Legal Research + Analytics' (*Artificial Lawyer*, 2020) <https://www.artificiallawyer.com/al-100-directory/legal-research-analytics/> accessed 15 May 2020.

[92]See Mayson (n 47) 6–9.

[93]See generally Michael Legg and Felicity Bell, *Artificial Intelligence and the Legal Profession* (Hart, 2020) Pt III.

[94]Remus and Levy (n 24).

[95]Hadfield (n 50).

[96]Eg, Solicitors Regulation Authority (2019b) Criminal Advocacy: Thematic Review; <https://www.sra.org.uk/globalassets/documents/sra/research/criminal-advocacy-thematicreview.pdf>

than others to provide competent and ethical legal services, and offer better protection, are often difficult to sustain in practice'.[97]

Some US commentators argue therefore that non-lawyer, technology-driven legal services are 'the only workable solution to the access to justice gap',[98] and that this will, in turn, dismantle the traditional monopoly.[99] The value of monopoly in supporting the relationship with 'professional' standards (access to services, ethicality and competence) that benefit the client and the wider society, is put to the test by increasingly sophisticated technology deployed effectively by non-lawyers.[100] In some settings, such as classification of documents in discovery, technology may provide more accurate, and certainly more efficient, means of undertaking legal work.[101] It is also challenged when lawyers themselves seek to use technology to their own benefit[102] yet decry non-lawyers from doing so.

A further issue relates to informed choice, as a key function of professional regulation is, as indicated, the protection of consumers who suffer from information asymmetry in a domain in which the professional is expert.[103] While some argue that consumers should be free to choose cheaper legal service options even if those services lack the professional obligations of a lawyer,[104] information asymmetry may mean that those least well-placed to evaluate the quality of non-lawyer legal services will be more reliant on them for reasons of affordability.[105] Corporate clients may be able to calculate whether using non-lawyer services is worth the risk, but, as Rostain puts it:

> Unlike corporate clients, individual clients have little capacity to judge the quality of legal services. To an individual client, who typically does not have legal expertise, a lawyer's legal analysis is no easier to assess than a legal technology. Nor can a client judge the quality of the result obtained.[106]

Rostain notes that information asymmetry arises in relation to both lawyer-provided and non-lawyer provided legal services – the difference being the professional obligations owed by the lawyer which make the lawyer accountable. In England and Wales, it appears that many consumers of legal services are unaware whether their provider is a

[97]Stephen Mayson, *Reforming Legal Services Regulation Beyond the Echo Chambers* (Final Report of the Independent Review of Legal Services Regulation, June 2020) 2; and also at 182.

[98]Remus and Levy (n 24) 544, citing John O McGinnis and Russell G Pearce, 'The Great Disruption: How Machine Intelligence Will Transform the Role Of Lawyers in the Delivery of Legal Services' (2014) 82(6) *Fordham Law Review* 3041, 3066; Benjamin Barton, *Glass Half Full: The Decline and Rebirth of the Legal Profession* (Oxford University Press, 2015); Benjamin Barton, 'The Lawyer's Monopoly: What Goes and What Stays' (2014) 82(6) *Fordham Law Review* 3068, 3068; Tanina Rostain, Roger Skalbeck and Kevin G Mulcahy, 'Thinking Like a Lawyer, Designing Like an Architect: Preparing Students for the 21st Century Practice' (2013) 88(3) *Chicago-Kent Law Review* 743.

[99]McGinnis and Pearce (n 106) 3065–66. For more on consumer use programs, see also Moxley (n 83). For a more critical view see Emily Taylor Poppe 'The Future is Complicated: AI, Apps and Access to Justice' (2019) 72(1) *Oklahoma Law Review* 185.

[100]McGinnis and Pearce (n 106) 3064–65 discussing the impact of 'machine intelligence'.

[101]Eg, Maura R Grossman and Gordon V Cormack, 'Technology-Assisted Review in e-Discovery Can Be More Effective and More Efficient than Exhaustive Manual Review' (2011) 17 *Richmond Journal of Law & Technology* 1; Mayson (n 105) 10; Michael Legg and Felicity Bell, 'The AI-Enhanced Lawyer' (2019) 38(2) *University of Tasmania Law Review* 34.

[102]See, eg, Waye, Verreynne and Knowler (n 73).

[103]Remus and Levy (n 24) 545. Legal services are 'credence goods', where individuals cannot independently assess the quality of what is provided: see Rostain (n 95) 572. For an overview of arguments about professional regulation, see Hartstein and Rogers (n 55) 53–54; and for fuller discussion and bullet-point summary, Rogers and Hartstein, *The Value of Contemporary Professional Associations* (n 55) 12–28.

[104]Hadfield (n 50).

[105]Webb (n 70) 564; Waye, Verreynne and Knowler (n 73) 222.

[106]Rostain (n 95) 572.

lawyer or not.[107] Chambliss argues that '[r]esearch on the regulation of the unauthorized practice of law finds … little evidence of consumer harm from unauthorized practice', though she notes the challenges of researching in this area.[108] However, if non-lawyer LegalTech services are substandard to those provided by lawyers, the result may be 'a digital divide that institutionalizes a two-tiered system incapable of delivering appropriate justice to low-income persons'.[109] While ostensibly increasing access, overall loss of quality may flowand the gap between sophisticated and unsophisticated litigants will be widened.[110] Waye, Verreynne and Knowler note:

> While lower prices may be good for the legal consumer, they may not accurately reflect the value of the work or the risk associated with poor quality work. It remains uncertain how consumers will be able to discriminate effectively between the plethora of different service providers that are likely to emerge.[111]

As we explain below, in section (iii), some big providers of online legal services in the US have also taken measures to substantially limit ordinary consumer remedies in relation to their products, thus skirting even this more limited regulation.

3.2.2. New information asymmetries

In the case of LegalTech, additional information asymmetry arises – as well as the domain of knowledge, the technology itself is a challenge.[112] Lurie and Mark explain:

> Our increasing dependence on computers and software packages in essential infrastructures, on the one hand, together with the profound lack of understanding (i.e. a knowledge gap) among most end users regarding the operation of the software package, on the other hand, entails a critical dependence of the end-user/consumer on the professionalism of the software experts.[113]

An additional problem arising in the case of new legal technologies being developed and made available to the market, including direct to consumers, inheres in the nature of AI – particularly machine learning – and is sometimes abbreviated to 'FAT': fairness, accountability and transparency.[114] Machine learning systems have various limitations, such as an inability to transfer learning from one task to another, a need for large datasets, and heavy reliance on good quality datasets. Some of the quality control concerns about AI[115] stem from these limitations – that users might be relying on AI *despite* them, or be unaware of them or their implications. The potential for biased, incorrect

[107]Legal Services Board, *Evidence Compendium* (n 3) 84.
[108]Chambliss, 'Evidence-Based Lawyer Regulation' (n 4) 322–23.
[109]Remus and Levy (n 24) 551.
[110]Remus (n 82) 815–18, 863.
[111]Waye, Verreynne and Knowler (n 73) 222.
[112]OECD Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No. 2 on Competition and Regulation, *Protecting and Promoting Competition in Response to "Disruptive" Innovations in Legal Services* (Issues Paper, DAF/COMP/WP2(2016)1, 13 June 2016).
[113]Yotam Lurie and Shlomo Mark, 'Professional Ethics of Software Engineers: An Ethical Framework' (2016) 22 *Science and Engineering Ethics* 417, 424.
[114]See, eg, 'Fairness, Accountability, and Transparency in Machine Learning Conference' (*FAT/ML*, 2018) <https://www.fatml.org/> accessed 16 May 2020.
[115]Ryan Calo, 'Artificial Intelligence Policy: A Primer and a Roadmap' (2017) 51(2) *U.C. Davis Law Review* 399; Thomas Redman 'Data's Credibility Problem' (2013) 91(12) *Harvard Business Review* 84; Harry Surden, 'Values Embedded in Legal Artificial Intelligence' (2017) University of Colorado Law Legal Studies Research Paper No. 17–17 <https://ssrn.com/abstract=2932333> accessed 16 May 2020.

or imperfect outputs[116] creates difficulties when it comes to assuring high standards for consumers. While a machine learning system is capable of acting with a degree of autonomy, humans still design, build and train the system,[117] and human biases may be present from the beginning.[118] Indeed, there have also been various complaints about tech industries in general being the preserve of particular groups (with women and minorities underrepresented) which also risks embedding, whether consciously or not, a particular viewpoint.[119] It is reported for instance that over 80 per cent of Australian LegalTech company founders are male.[120]

In addition, the technology used may be opaque, meaning it is difficult or impossible for laypeople or those unversed in the technology to understand its functioning.[121] Many legal scholars have made criticisms along these lines about the use of AI.[122] Rostain has explained:

> Legal technologies are built in software; without technical expertise, lawyers cannot determine whether the code has flaws. Legal technologies create a second form of opacity as well. Legal rules and concepts are not available on the surface, but are represented as code 'under the hood.' It is impossible to tell from the user interface whether the underlying software accurately replicates the law's formal rules and concepts.[123]

Opacity may stem from the proprietary nature of many programmes which may mean that the makers are not required to disclose information which is patented or commercially sensitive.[124] This makes reverse-engineering tricky, creating difficulties in working out how a particular output was arrived at. The result is that '[d]efects in the design of a complex AI system might be undetectable not only to consumers, but also to downstream manufacturers and distributors'.[125] This also diffuses responsibility, leading to accountability issues. While it is argued that humans may also exhibit bias,[126] and opacity,[127] in

[116]Will Knight, 'Biased Algorithms are Everywhere, and No One Seems to Care', (*MIT Technology Review*, 12 July 2017) <https://www.technologyreview.com/s/608248/biased-algorithms-are-everywhere-and-no-one-seems-to-care/> accessed 16 May 2020; Legg and Bell (n 101) ch 10.

[117]David C Vladeck, 'Machines without Principals: Liability Rules and Artificial Intelligence' (2014) 89(1) *Washington Law Review* 117, 120.

[118]David Lehr and Paul Ohm, 'Playing with the Data: What Legal Scholars Should Learn About Machine Learning' (2017) 51(2) *U.C. Davis Law Review* 653, 668.

[119]See, eg, Kate Crawford and Ryan Calo, 'There is a Blind Spot in AI Research' (2016) 538(7625) *Nature* 311; Kate Crawford, 'Opinion: Artificial Intelligence's White Guy Problem' (*The New York Times*, 25 June 2016) <www.nytimes.com/2016/06/26/opinion/sunday/artificial-intelligences-white-guy-problem.html> accessed 16 May 2020; Lee Rainie and Janna Anderson, 'Code-Dependent: Pros and Cons of the Algorithm Age' (*Pew Research Center*, 8 February 2017) <www.pewinternet.org/2017/02/08/code-dependent-pros-and-cons-of-the-algorithm-age/> accessed 16 May 2020.

[120]Chin (n 10).

[121]See the examples given by Deven R Desai and Joshua A Kroll, 'Trust But Verify: A Guide to Algorithms and the Law' (2017) 31(1) *Harvard Journal of Law & Technology* 1; Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Cambridge University Press, 2015).

[122]See, eg, Rebecca Wexler, 'Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System' (2018) 70 (5) *Stanford Law Review* 1343; Danielle Keats Citron and Frank A Pasquale, 'The Scored Society: Due Process for Automated Predictions' (2014) 89(1) *Washington Law Review* 1; Solon Barocas and Andrew D Selbst, 'Big Data's Disparate Impact' (2016) 104(3) *California Law Review* 671; Tong Wang et al, 'Learning to Detect Patterns of Crime' in Hendrik Blockeel et al (eds) *Machine Learning and Knowledge Discovery in Databases* (Springer, 2013) 515.

[123]Rostain (n 95) 571–72.

[124]See, eg, Adam Liptak, 'Sent to Prison by a Software Program's Secret Algorithms' (*New York Times*, 1 May 2017) <https://www.nytimes.com/2017/05/01/us/politics/sent-to-prison-by-a-software-programs-secret-algorithms.html> accessed 16 May 2020.

[125]Scherer (n 8) 371–72.

[126]Andrew J Wistrich and Jeffrey J Rachlinski, 'How Lawyers' Intuitions Prolong Litigation' (2013) 86 (3) *Southern California Law Review* 571; Daniel Kahneman et al, 'Reducing Noise in Decision Making' (2016) 94 (12) *Harvard Business Review* 18.

[127]Lawyers' regulation recognises this, that, from the perspective of clients, legal services / lawyers' work is typically esoteric and corresponds to lawyers' profits. Lawyers have therefore continuing duties to disclose their cost structures and provide costs estimates, and to educate their clients on legal processes and options for dispute-resolution.

the case of lawyers this is mitigated to an extent by the extensive duties they owe to client, the court and the administration of justice.[128]

3.2.3. Redress mechanisms

Consumers who obtain documents or services directly from non-lawyers do not get the associated benefits of a lawyer-client relationship in consumer, discipline, and liability recourse. Instead, they are limited to seeking assistance from general consumer law enforcement bodies, taking private action or making a claim under any applicable insurance cover. The Organisation for Economic Co-operation and Development's ('OECD's') Directorate for Financial and Enterprise Affairs Competition Committee has noted that 'it is not clear how online services, automated systems or non-lawyers providing legal services can be held accountable, through consumer protection laws, for their behaviour to the same standards as current legal professionals'.[129]

An especial challenge of regulating AI is that its outputs may be autonomously generated and unpredictable, making the attribution of liability complex.[130] The sticking point is around 'intent' – once a system is acting autonomously, its creators cannot be said to have intended its outputs or outcomes.[131] A further issue is what Scherer describes as the 'diffuseness' problem.[132] That is, the final product may be the result of efforts by different people or entities who work together but are located in different parts of the world, and may not even have any 'legal or formal contractual relationship with one another'.[133] This may contribute to the evasion of regulation[134] and it makes it challenging to impose regulation on the way that products are made.

It is difficult to quantify the extent of the risk to consumers who are accessing legal services in the absence of obligations comparable to the fiduciary duties of lawyers.[135] In the United States, there have been cases where consumers have pursued complaints against non-lawyer, online providers.[136] Some of these early 'unauthorised practice of law' cases against providers of legal software were simplified by the fact that they took place before the internet became commonly available. Now, enforcing unauthorised practice of law statutes is difficult when the provider may be located in a different jurisdiction to the consumer.[137] The characterisation of some services as 'self-help' also allows online providers to avoid the imposition of lawyer-like obligations,[138] and in other

[128]The research on lawyers' biases, notwithstanding and sometimes because of their duties, includes: Jennifer K Robbennolt and Jean R Sternlight, 'Behavioral Legal Ethics' (2013) 45 *Arizona State Law Journal* 1107; Douglas N Frenkel and James H Stark, 'Improving Lawyers' Judgment: Is Mediation Training De-Biasing' (2015) 21 *Harvard Negotiation Law Review* 1.

[129]OECD Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No. 2 on Competition and Regulation (n 120) 25–26.

[130]Desai and Kroll (n 130) 8–9.

[131]Jack M Balkin, 'The Three Laws of Robotics in the Age of Big Data', Sidley Austin Distinguished Lecture on Big Data Law and Policy (2016) 78(5) *Ohio State Law Journal* 1217; Pasquale, 'Fourth Law' (n 79) 1254.

[132]Scherer (n 8) 370.

[133]ibid 372.

[134]It would also complicate attempts to seek redress for anyone wronged or harmed by the LegalTech product in question.

[135]See, eg, Chambliss, 'Evidence-Based Lawyer Regulation' (n 4).

[136]See, eg, *In re: Jayson Reynoso: Frankfort Digital Services et al., v Sara L Kistler, United States Trustee et al* (2007) 447 F.3d 1117. For a discussion of some of this history, see Fortney (n 9) 97–104.

[137]McGinnis and Pearce (n 106) 3057. See also Mayson (n 47) 5.

[138]Moxley (n 83) 570.

instances, State Bar Associations have reached agreements with online providers.[139] Additionally, the use of disclaimers and restrictive terms of use by online providers may limit even general consumer rights.[140] Pasquale has argued that US regulators 'appear committed to promoting software as a substitute for attorneys, even though the sellers of such software often include exculpatory clauses (or other limitations of liability) that severely disadvantage users'.[141]

In England and Wales, where the regulatory system differs, Passmore identifies a growing 'alternative legal market', which is 'providing everything from will writing, social welfare and housing law to advice on media law, commercial contracts, corporate finance and tax'.[142] This sector is comprised of those offering non-reserved legal activities, who are referred to as 'unauthorised providers'. In a 2016 market study, the UK's Competition and Markets Authority ('CMA') found that they make up a relatively small proportion of the market for legal services: 4.5–5.5 per cent of 'problems for which advice was sought and paid for'.[143] Meanwhile, the size of any equivalent Australian market is unclear. Importantly, as a point about the urgency of regulation, the CMA also found 'very few' consumer complaints being made about unauthorised providers.[144] Data on complaints is limited, however, as there is no specific body responsible for managing such complaints.[145] Moreover, there remains a 'potentially large redress gap' wherein consumers using unauthorised providers may have few or no redress mechanisms if loss is suffered.[146] The CMA also found that consumers did not readily understand the distinction between authorised and unauthorised providers, and tended to assume that all providers are regulated in some way,[147] as noted also by others.[148]

3.2.4. Rule of law

As Stephen has explained, legal services, when properly provided, have external benefits:

> The quality of a legal service not only affects the welfare of the direct consumer of the service but also the welfare of other persons including those of the purchaser of the service, neighbours, future purchasers of the assets concerned, the courts etc. In economic terms there are potential external benefits associated with the appropriate level of service being provided.[149]

Clearly, there are risks for consumers in using 'unauthorised' or non-lawyer generated legal services. They may be incorrectly advised that they do not have a valid claim or case; they may be provided with inadequate or substandard services; or they may be incorrectly advised that they *do* have a valid claim. This then generates risks for other

[139]See, eg, the cases discussed by Caroline Shipman, 'Unauthorized Practice of Law Claims against LegalZoom ? Who Do These Lawsuits Protect, and Is the Rule Outdated' (2019) 32(4) *Georgetown Journal of Legal Ethics* 939.
[140]Moxley (n 83) 570. Robinson reports that in Arkansas, a court upheld LegalZoom's arbitration clause and bar on class actions, thus limiting the action which disgruntled consumers can take against the company: Robinson (n 84) 37.
[141]Pasquale, 'Fourth Law' (n 79) 1244–45.
[142]Passmore (n 22) 146, 148.
[143]Legal Services Board, *Mapping of For Profit Unregulated Legal Services Providers* (Report, 28 June 2016) 1. This was, however, variable across practise areas, with high use for instance in family law matters (10–13%).
[144]Competition and Markets Authority, *Legal Services Market Study* (Report, 16 December 2016) 11 [29].
[145]Competition and Markets Authority (n 152) 11 [29].
[146]Legal Ombudsman, *Response to Competition and Markets Authority: Legal Services Market Study Final Report* (Statement, 5 February 2018) 3 [10] <https://www.legalombudsman.org.uk/wp-content/uploads/2017/11/LeO-Response-to-CMA-Final-Report.pdf> accessed 16 May 2020.
[147]Competition and Markets Authority (n 152) 106–7.
[148]Mayson, *Beyond the Echo Chambers* (n 105); Legal Services Board, *Evidence Compendium* (n 3) 84.
[149]Stephen (n 71) 1131.

parties – those on the receiving end of a person's use of, for example, an online service to generate a civil application. A claim may be baseless or even malicious – something which a lawyer could identify and prevent from being filed (or would suffer disciplinary and civil consequences for a failure to do so). As Mayson has noted,

> it is important that any future changes to the regulatory framework are assessed to determine whether or not they might undermine that basis of trust. If there is such a risk, it could create a corresponding detriment to consumer confidence or weaken a signal to some occasional or vulnerable consumers about the availability or reliability of legal services.[150]

As well as risks for individual consumers, the cumulative effect of these types of errors is to undermine the trust which professionals must have in one another and in the functioning of the justice system: what Remus and Levy describe as the creation of negative externalities.[151] As Stephen explained, if consumers seek only the bare minimum or cheapest legal services options, the marginal benefit accruing to society generally may be lost.[152] Put another way, Remus suggests that 'a framework of clear, certain, and predictable laws requires lawyers who view themselves as public as well as private agents'.[153] This is ensured by the system of professional obligations that lawyers have, including, as mentioned, the duty to the Court and the administration of justice.

Finally, there are potentially even more rule-of-law threatening elements of machine analytics when applied to law. For instance, in their critique of the use of machine learning to 'predict' decisions of the European Court of Human Rights,[154] Pasquale and Cashwell identify issues such as the software taking into account irrelevant considerations or being used to pre-emptively triage or classify cases prior to their being heard.[155] There is therefore a need for close scrutiny of the ways that such new technologies may reshape the operation of law altogether.[156]

4. Avenues for regulation

Even without the complicated set of traditions, purposes and stakeholders that beset a legal regulator, all technology regulation, for any regulator, is particularly challenging. The technology regulation literature identifies, as a primary example, the 'Collingridge dilemma': regulation is problematic at an early stage of the technology's development, due to the lack of information about its likely impact; but problematic also at a later

[150]Mayson (n 47) 22.
[151]Remus and Levy (n 24).
[152]Stephen writes: 'Thus the marginal social benefit of the legal service being provided at the appropriate level of quality is greater than the marginal benefit to the direct consumer of the service. The implication of this is that even if the direct consumer could evaluate the marginal private benefit (s)he would not choose the socially optimal quality of the legal service because some of the marginal benefit accrues to members of society other than the direct consumer': Stephen (n 71) 1131.
[153]Remus, 'Reconstructing Professionalism' (n 82) 867.
[154]Nikolaos Aletras et al, 'Predicting Judicial Decisions of the European Court of Human Rights: A Natural Language Processing Perspective' (2016) 2 *PeerJ Computer Science* 92; *c.f.* Frank Pasquale and Glyn Cashwell, 'Prediction, Persuasion, and the Jurisprudence of Behaviourism' (2018) 68(1) *University of Toronto Law Journal* 63, 69 (referring to media headlines) ('Prediction, Persuasion').
[155]Pasquale and Cashwell, 'Prediction, Persuasion' (n 162) 74–77.
[156]Law Society of England and Wales (Law Society Commission on the Use of Algorithms in the Justice System and The Law Society of England and Wales), *Algorithms in the Criminal Justice System* (June 2019) 70 <https://www.lawsociety.org.uk/support-services/research-trends/algorithm-use-in-the-criminal-justice-system-report/> accessed 18 May 2020.

stage as the technology has become more entrenched.[157] It may then be too late to fix problems already created through the way the technology was developed.[158] In relation to LegalTech, an array of different people who are not lawyers may be involved in development (giving rise to issues of regulatory attachment and extraterritoriality) and there are potential challenges related to the technology itself (opacity, fairness and accountability[159]). As we have shown, legal regulators already operate in a practice environment where a complex mix of maintaining high standards and monopoly, in an atmosphere of free trade and commercialism, all intersect. It can be queried whether legal regulators have the capacity to extend the regulatory system further. If it is to be so extended, further questions arise, as we explain below, as to which incidents of legal services regulation should be expanded to those involved in LegalTech.

As we have detailed, traditionally, the focus has been on those who have submitted to professional regulation – individual lawyers.[160] Yet there are multiple options when it comes to regulatory targets. Aside from persons who have so submitted (i.e. lawyers), they could include the activities undertaken; persons or entities who provide legal services (whether or not those persons or entities are qualified in some way); or, more broadly, on 'providers' of legal services (which might include technology).[161] We proceed on the basis that a regulatory burden will attach to individuals – or perhaps their entities – while recognising that there may be other approaches, including an absence of regulation. The need for regulation in some form, however, is described by Perlman, who says of non-lawyer services:

> Labeling these services as the unauthorized practice of law does not make good policy sense and is in many cases inaccurate, but permitting all of them to operate without any regulatory oversight is also potentially problematic, particularly with regard to consumer facing services. It is thus becoming more important to consider the possibility of regulation where it is needed while ensuring that these new services can flourish and meet marketplace demands.[162]

In this Part we address three avenues for regulation of LegalTech which are attempts to address the risks presented in Part III. These would require different levels of activity on the part of legal regulators. The first, a continuation of the current approach, means continuing as things presently are, or further deregulating legal services. We then turn to two more possibilities. The first we term 'passive', because it relies, first and foremost, on the actions of governments or other regulators. Under this approach, regulation would occur via piggybacking on any forthcoming regimes aiming to regulate either artificial intelligence applications more broadly, or would seek to sync with a separate regime regulating individuals within the tech industry. The second possibility we refer to as 'active', as it relies on an expansion of the legal regulatory system to encompass LegalTech, utilising a form of entity regulation (which, as highlighted, has not been the typical approach).

[157]Bennett Moses (n 7) 8.
[158]Lehr and Ohm (n 126) 657; see also Pasquale, 'Fourth Law' (n 79) 1254 (advocating 'responsibility-by-design'); Jon Kleinberg, et al, 'Discrimination in the Age of Algorithms' (2018) 10 *Journal of Legal Analysis* 113.
[159]This arises in relation to lawyers' use of it too: Rogers and Bell (n 2).
[160]Semple, Pearce and Newman Knake (n 34) 275 ('with minor exceptions, American and Canadian legal services regulation applies to individual lawyers, and not to law firms'). Mayson points out that this need not be the case: Mayson (n 47) 3.
[161]Mayson (n 47) 9.
[162]Perlman (n 10) 87–88.

We here also briefly canvas the extent to which existing duties and obligations owed by lawyers could be extended to new legal service providers.

4.1. Continuation of current approach

When lawyers are intermediaries between clients and LegalTech products or services, or use such technologies themselves, 'the legal regulator makes the lawyer responsible for ensuring that the tools they select and their competence in using them are of sufficient quality to protect the end consumer'.[163] This offers, then, a means of increasing protection for the client or consumer via existing regulation of lawyers. It does not assist, however, where LegalTech products and services are offered to consumers directly. In jurisdictions such as Australia and North America, actions for unauthorised legal practice remain the primary means regulators have at their disposal to regulate legal services offered direct to consumers by non-lawyers.

However, the line between providing legal information (permitted) and legal advice (prohibited) is already a blurry one[164] and what constitutes the provision of legal advice is something generally determined on a case-by-case basis (thus leading to inconsistency, and therefore uncertainty and potential harm). Typically, the distinction rests on the degree to which legal information is tailored to a particular client or consumer, whereby legal information that is significantly customised is deemed to be unauthorised legal advice. The regulatory model relies on the regulator taking successful action against the LegalTech provider. In the US, at least, this approach has met with only limited success.[165] In early cases, some American courts held developers of legal software – such as automated completion of forms – liable for errors.[166] Yet this regulatory approach is challenged by the ubiquity of the internet and the increasing size and power of some online providers.[167] More recently, there have been attempts to widen the regulatory tent: for example, the American Bar Association released 'Best Practices Guidelines for Online Legal Document Providers'.[168] In England and Wales, a more collaborative approach has been adopted, as LegalTech companies are encouraged to engage with the regulatory authorities. For example, the Solicitors Regulation Authority has created a regulatory sandbox for LegalTech to enable trials of new kinds of legal service delivery, and a 'sandbox' approach is also underway in Utah.[169]

Suffice to say that some of the risks of non-lawyer involvement remain in a deregulated environment, and some may be heightened. In particular, as identified,

[163]Lisa Webley, 'Ethics, Technology and Regulation' (Paper for the Legal Services Board, 6 August 2019) 13. For instance, SRA Code of Conduct for Solicitors, RELs and RFLs (2018) r 3.5; and Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 37.

[164]Remus and Levy (n 9) 542.

[165]McGinnis and Pearce (n 106) 3062; Moxley (n 56) 570; Mike Sullivan, 'Competition from Non-Lawyers in the "Practice of Law"' (2016) 80(5) *Bench & Bar* 2.

[166]See, eg, *Unauthorized Practice of Law Committee v Parsons Technology, Inc,* No. Civ.A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), vacated and remanded per curiam, 179 F.3d 956 (5th Cir. 1999); *In re: Jayson Reynoso: Frankfort Digital Services et al, v Sara L Kistler, United States Trustee et al* (2007) 447 F.3d 1117, 1123–24; *c.f. In re Boyce*, 317 B.R. 165 (Bkrtcy. D. Utah 2004) 171–72.

[167]See, eg, Moxley (n 83) 570.

[168]Fortney (n 9) 95–96, citing American Bar Association and New York State Bar Association, *Report to the House of Delegates: Resolution 10A* (Report, June 2019) 17.

[169]See Solicitors Regulation Authority, 'SRA Innovate' (*Solicitors Regulation Authority*, November 2015) <www.sra.org.uk/solicitors/resources/innovate/innovation-report/> accessed 16 May 2020; Chambliss, 'Evidence Based Lawyer Regulation' (n 4) 337.

deregulation carries the risk that those least able to be discerning consumers of legal services will be those impelled toward the lowest quality options. Moreover, Perlman has suggested that making no change signals the increasing irrelevance of the current legal regulatory system, given the undeniable influx of non-lawyers into the market.[170] Hunter makes a similar point, saying:

> As more and more legal service providers solve legal problems from outside the legal profession, we will see a growing legal services market that is dominated by those who do not bring with them the shared understanding of what it means to operate within a learned and honourable profession, and who do not automatically respect or uphold the rule of law. These operators can exist outside the profession as they do now; or the profession can adapt and expand to include them, and use its power to ensure the maintenance of values that we all as lawyers revere and which are necessary for the proper functioning of our society. This choice is, essentially, up to the profession. To this point it has chosen the former; but it would be better for it and all of us if it were to choose the latter.[171]

4.2. New avenue (passive)

The first new regulatory option is that legal regulators could 'piggyback' on certification processes developed by government or supranational regulators and applied to LegalTech products. Piggybacking might entail imposing a requirement that lawyers use only certified programmes, or that their own professional liability will only be limited if they use certified programmes. For direct-to-consumer offerings, it might impose a licensing system corresponding to certification, with penalties for operating absent a license or requirements for insurance; a voluntary register (similar to registers of foreign lawyers in a jurisdiction); or the expansion of consumer remedies if the product does not meet certain quality standards.

This is not an entirely unrealistic possibility. There is considerable interest in the regulation of AI: codes and principles for ethical AI have proliferated,[172] and there has also been consideration of self-regulatory options.[173] Despite this interest though, the pursuit of ethical AI is still in a nascent phase and lacks regulatory teeth. The Australian Human Rights Commission, in partnership with the World Economic Forum on AI, is investigating human rights issues that arise in relation to new technologies.[174] Data 61, the computer science arm of the Commonwealth Scientific and Industrial Research Organisation, is also examining Australia's ethics framework around AI.[175] Development of principles

[170]Perlman (n 19). See also Chambliss, 'Evidence Based Lawyer Regulation' (n 4) 317–18; Frank Pasquale and Glyn Cashwell, 'Four Futures of Legal Automation' (2015) 63 *UCLA Law Review Discourse* 26.

[171]Dan Hunter, 'The Death of the Legal Profession and the Future of Law' (2020) 43(4) *UNSW Law Journal* 1199, 1225

[172]See, eg, High-Level Expert Group on Artificial Intelligence, *Ethics Guidelines for Trustworthy Artificial Intelligence* (European Commission B-1049 Brussels, 8 April 2019); OECD, *Principles on Artificial Intelligence* (OECD/Legal/0449, 22 May 2019); IEEE Global Initiative on Ethics of Autonomous and Intelligent Systems, *Ethically Aligned Design: A Vision for Prioritizing Human Well-being with Autonomous and Intelligent Systems* (IEEE, 2019). See also Anna Jobin, Marcello Ienca and Effy Vayena, 'The Global Landscape of AI Ethics Guidelines' (2019) 1 *Nature Machine Intelligence* 389; Brent Mittelstadt, 'Principles Alone Cannot Guarantee Ethical AI' (2019) 1 *Nature Machine Intelligence* 501.

[173]Kate Crawford and Meredith Whittaker, *The AI Now Report: The Social and Economic Implications of Artificial Intelligence Technologies in the Near-Term* (AI Now Institute, 2016) 20–1.

[174]Australian Human Rights Commission, 'Human Rights and Technology' (*AHRC Human Rights and Technology*, 2020) <https://tech.humanrights. gov.au/our-work> accessed 16 May 2020.

[175]See Data 61, 'Artificial Intelligence: Australia's Ethics Framework' (*CSIRO*, 2020) <https://data61.csiro.au/en/Our-Research/Our-Work/AI-Framework> accessed 16 May 2020.

is, however, still some way off, let alone implementation of a regulatory framework. Some steps toward more focused statutory or governmental regulation of AI, overseen by agencies responsible for certification, have been taken at domain-specific levels. The US Food and Drug Administration ('FDA'), for example, has now provided 'guidance' for the assessment of AI systems used in health.[176] Regulation varies dependent on whether the product is classified as a medical device, medical imaging, or a clinical decision support tool.[177] Regulation is complex for the reasons noted above. To take the example of opacity, Scherer implies that this is what makes many AI systems profitable. If opacity is somehow prohibited, there might be a chilling effect on innovation. Meanwhile, regulatory attempts that aim at counteracting opacity by requiring explanation are already difficult to implement, and likely to only become more so as the volumes of data used in machine learning increase. There is also the problem that demanding *transparency* may not give rise to useful outcomes.[178] Remus and Levy explain: 'Certainly, an application's programmers can view the code … but the code is not always interpretable by the programmer, much less a lay person'.[179] Thus, something more than just 'seeing' source code might be needed, but this 'full explanation' could be expensive and time consuming to implement.[180]

In terms of industry self-regulation, 'prominent figures' within the tech industry have begun to take some steps toward self-regulation, in the absence of any noteworthy government action.[181] The Partnership on AI, whose members include Google, Facebook and Amazon, is the most obvious example.[182] Though these bodies might be capable of acting as 'regulatory surrogates',[183] some suggest that any steps taken will be minimalist, as the true goal is to avoid serious regulatory oversight from government or other external bodies.[184] Guihot, Matthew and Suzor comment that 'self-regulation [may] be effective in mitigating the most important risks of the development and deployment of AI systems. However, there is also a risk that self-regulation may not be sufficient'.[185] For instance, despite the steps taken by the FDA toward regulating AI in healthcare, it has been argued that still higher standards ought be imposed on the creators of AI used in medicine, such as developers sharing responsibility if an AI system gives inappropriate healthcare advice.[186] General issues around industry self-regulation arise –

[176]US Food and Drug Administration, *Proposed Regulatory Framework for Modifications to Artificial Intelligence* (Discussion Paper, 2 April 2019).
[177]For example, 'Arterys' medical imaging platform, designed to help cardiologists to diagnose cardiac diseases, became the first FDA-approved deep learning clinical platform': Fei Jiang et al, 'Artificial Intelligence in Healthcare: Past, Present and Future' (2017) 2 *Stroke and Vascular Neurology* 230, 241.
[178]Desai and Kroll (n 129) 10.
[179]Remus and Levy (n 24) 550.
[180]ibid.
[181]Michael Guihot, Anne F Matthew and Nicolas P Suzor, 'Nudging Robots: Innovative Solutions to Regulate Artificial Intelligence' (2017) 20(2) *Vanderbilt Journal of Entertainment and Technology Law* 385, 431. See also Future of Life Institute, 'Asilomar Conference Principles' (*Future of Life Institute*, January 2017) <https://futureoflife.org/ai-principles/> accessed 16 May 2020.
[182]See Partnership on AI, 'Research, Publications & Initiatives' (*Partnership on AI*, 2020) <https://www.partnershiponai.org/>.
[183]Carolyn Abbot, 'Bridging the Gap – Non-state Actors and the Challenges of Regulating New Technology' (2012) 39(3) *Journal of Law and Society* 329, 332.
[184]Guihot, Matthew and Suzor (n 192) 433.
[185]ibid 435.
[186]Blay Whitby, 'Automating Medicine the Ethical Way' in Simon Peter van Rysewyk and Matthijs Pontier (eds), *Machine Medical Ethics* (Springer International Publishing, 2015) 231.

in practice, self-regulatory efforts need constant updating and vigilance to be useful, as well as direction from a centralised, authoritative body. In her proposal for a private certification regime for online legal document providers, Fortney explains that '[t]he process for developing the standards and certification process must be both inclusive and rigorous. Otherwise, the certification approach could be viewed as a form of toothless regulation designed to serve the interests of industry'.[187]

A different but also 'passive' avenue for regulation centres on the individuals involved in the creation of LegalTech. Specifically, if they were subject to their own professional controls, this could assuage some concerns of legal regulators. As we have noted, these people may be diverse in terms of their occupation and role:[188] their connection is in the products they are involved in creating. There is disagreement as to whether any of these occupations may be characterised as professions. Davis argued that software engineering is neither engineering nor a profession;[189] Lurie and Mark advocate for the development of an ethical framework for software engineering which, they suggest, would bring it 'one step closer to becoming a professional occupation'.[190] These authors draw particular attention to the need to integrate ethical considerations throughout the process of design, development, testing and maintenance of software.[191] In terms specifically of data analytics, Mayer-Schönberger and Cukier put forward a suggestion for a new profession of 'algorithmist' who would 'be experts in the areas of computer science, mathematics, and statistics [and] act as reviewers of big-data analyses and predictions'.[192] They envisage such persons as acting rather as auditors of data analytics, but explain that they would be subject (in a self-regulatory model) to a code of conduct and to 'tough liability rules' to enforce their 'impartiality, confidentiality, competence and professionalism'.[193]

Despite the arguments for professionalisation in tech industries – particularly the ethical significance of the work of software engineers, computer scientists and data analysts, and the large knowledge gaps between those designing and building software and those using it – there is also scepticism around the suitability and susceptibility of the tech industry to professionalisation. Calo has commented that 'the unfolding development of a professional ethics of Al, while at one level welcome and even necessary, merits ongoing attention', suggesting that efforts to adopt voluntary ethical codes are likely a means of avoiding regulation.[194] Professionalisation implies accountability, too: commentators have argued that accountability, even for unpredictable or unforeseen outputs, should be imposed on developers or programmers.[195] Yet there is likely little appetite for taking on responsibilities or liabilities – like those proposed by Mayer-Schönberger and Cukier – which are not currently imposed. This is particularly so when there

[187]Fortney (n 9) 122.
[188]Ed Yourdon, 'A Tale of Two Futures' (1998) 51(1) *IEEE Software; Los Alamitos* 23, 23 ('Although it's convenient to think of the term "software developer" as a generic job description, like carpenter or plumber, the field actually encompasses dozens of different specializations, many so divergent their practitioners can barely communicate with one another').
[189]Lurie and Mark (n 121) 421, citing Michael Davis, 'Defining "engineer": How to do it and why it matters' (1996) 85 *Journal of Engineering Education* 97.
[190]Lurie and Mark (n 121) 426.
[191]ibid 428–29.
[192]Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data* (First Mariner Books, 2014) 180.
[193]ibid 181.
[194]Calo (n 123) 408.
[195]Scherer (n 8) 365–66; Pasquale, 'Fourth Law' (n 79) 1248.

is a scarcity of machine learning experts.[196] Regulation is not incentivised both, from the regulatory perspective, because of their small number, and from the market's, where high demand means they will be hired whether regulated or not.

In many respects, the creation and regulation of a new tech-related profession or professions would sync most effortlessly with the existing regulation of legal professionals, transferring or spreading responsibility for 'tech' to an individually-responsible, fellow professional, the tech person, using similar controls. It would also alleviate the difficulties of 'retro-fitting' LegalTech products, if the non-lawyer, new providers were mindful of professional-type obligations from the outset. Some problems would, however, likely continue to arise: entities might choose to operate without such individuals; and the entire web of people involved in creation of products would not be adequately captured. While it has been argued that professional standards and ethical codes ought to be imposed on those developing legal AI products,[197] regulation of LegalTech is less advanced than regulation of AI generally or regulation of AI used in other domains. The complex stakes, division of roles, and reliance on individuals to internalise the objectives of the profession that we described in Part II would not be easily emulated.

These kinds of separate or independent regulation of AI or of tech professionals would be useful for legal regulators seeking to regulate LegalTech but fall short of being complete solutions. They could overcome some issues related to the 'boundaryless' nature of the online environment, the challenges of transparency and accountability associated with regulating AI, and (perhaps most importantly) the need for expertise on the part of the regulator. Neither option would, however, assist in regulating the 'legal' of LegalTech – in other words, ensuring that the quality of legal advice was adequate, and remedying rule of law and consumer concerns.

4.3. New avenue (active)

As authors have noted, it is not clear (despite increasing interest) that external regulation *will* be imposed on AI technologies in the near future.[198] Moreover not all LegalTech products utilise AI. Even if independent regulation were imposed, LegalTech providers might be able to conform to regulatory standards related to technology without mitigating the 'jurisprudential' risks described.[199] For example, a system generating legal documents might have been programmed to omit key clauses; or a system generating predictions as to case outcome might have been trained on old, biased or inappropriate data, and therefore lack accuracy in its predictions.[200] These are not 'technological' issues

[196]In 2011, the McKinsey Global Institute estimated that the US would need, by 2018 140,000-190,000 more machine learning experts than would be available: James Manyika et al, *Big Data: The Next Frontier for Innovation, Competition and Productivity* (Report, McKinsey Global Institute, 2011) 104. For further discussion see Pedro Domingos, *The Master Algorithm: How the Quest for the Ultimate Learning Machine Will Remake Our World* (Basic Books, 2015) 9.

[197]See the comments of Kate Crawford in interview with Scott Rosenberg, 'Why AI Is Still Waiting for its Ethics Transplant' (*WIRED*, 1 November 2017) <www.wired.com/story/why-ai-is-still-waiting-for-its-ethics-transplant/> accessed 16 May 2020.

[198]Urs Gasser and Carolyn Schmitt, 'The Role of Professional Norms in the Governance of Artificial Intelligence' in Markus D Dubber, Frank Pasquale and Sunit Das (eds) *The Oxford Handbook of the Ethics of AI* (Oxford University Press, forthcoming); Paula Boddington, *Towards a Code of Ethics for Artificial Intelligence* (Springer, 2017) ch 1.

[199]As noted by Rostain (n 95); Rosenberg (n 208).

[200]See generally Pasquale and Cashwell 'Prediction, Persuasion' (n 162).

per se. This section accordingly explores a more 'active' and targeted means of regulating LegalTech, via all the individuals involved in its creation or more specifically, their organisations.

As noted above, entity regulation has had mixed success. Yet it is argued to be significant because it is a shift toward recognising the importance of organisational context to regulation,[201] a trend mentioned earlier, where the organisation is now a key site for the enactment of professionalism. In the existing form of entity regulation, however, licensed practitioners – lawyers – continue to play a pivotal role in supervising, and taking individual responsibility for, legal advice.[202] In other words, their individualised professional responsibility is still a foundational aspect. Any non-lawyers who might be involved in, say, developing and deploying legal services technology, do not carry any regulatory burden, even within a licensed entity.[203] While entity regulation regimes broaden the focus beyond individuals, lawyers are still required to play a key role in maintaining professional standards, resulting in a continuing unevenness when it comes to the distribution of regulatory burden.

An alternative pathway is to use entity regulation without the necessity for individual regulation as well, if no lawyers are involved. Mayson terms this 'provider regulation': if an entity is engaged in a regulated legal activity, its status (i.e. legally qualified or not) is not relevant – only whether it is providing legal services.[204] He explains: 'Once it is decided that a legal activity should be within the scope of regulation, any form of provision by any provider could then fall within the regulatory framework'.[205] California considered this option, whereby authorised entities could be permitted to practise law but without the requirement of lawyer ownership or management.[206] While such entities would nevertheless be subject to regulatory standards, whether those standards would be the same, or lower than, the standards to which lawyers are presently held, is unclear. The nature of the standards to be applied and enforced is a central question, regardless of whether a form of entity regulation is used to bring non-lawyers into the regulatory fold, or a more individualised mechanism. We have detailed above in Part II some of the duties owed by lawyers and the logic of legal regulatory schemes, in particular

[201] Joan Loughrey, 'Accountability and the Regulation of the Large Law Firm Lawyer' (2014) 77(5) *Modern Law Review* 732, 744, citing Christine Parker, Tahlia Gordon and Steve Mark, 'Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales' (2010) 37 *Journal of Law and Society* 466, 470 and Julia Black, 'Paradoxes and Failures: "New Governance" Techniques and the Financial Crisis' (2012) 75 *Modern Law Review* 1037, 1045–46. See also Flood (n 67); Rogers, Kingsford Smith and Chellew (n 6).

[202] Mayson (n 47) 31. Christine Parker noted that co-regulators and the court possess 'little capacity or skill to examine the extent to which firm management practices and cultures may have [led] to misconduct where responsibility for that misconduct is fragmented throughout the firm': 'Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible' (2004) 23(2) *University of Queensland Law Journal* 347, 360.

[203] Steven Mark, 'Harmonization or Homogenization? The Globalization of Law and Legal Ethics – An Australian Viewpoint' (2001) 34(4) *Vanderbilt Journal of Transnational Law* 1173, 1204 (pointing out that the rules appear to place restrictions on MDPs and ILPs themselves but there is no provision for them to be regulated or disciplined as firms).

[204] Mayson, *Beyond the Echo Chambers* (n 105) 121–22.

[205] Mayson (n 47) 37.

[206] Robert Ambrogi, 'California Task Force to Vote this Week on Sweeping Changes to Legal Services Delivery', (*Above the Law*, 24 June 2019) <https://abovethelaw.com/2019/06/california-task-force-to-vote-this-week-on-sweeping-changes-to-legal-services-delivery/> accessed 16 May 2020; Anthony E Davis, 'Rethinking Lawyer Regulation: The California Way' (*New York Law Journal*, 30 August 2019) <https://www.law.com/newyorklawjournal/2019/08/30/rethinking-lawyer-regulation-the-california-way/?slreturn=20200415201647> accessed 16 May 2020. Ultimately, the California State Bar Task Force on Access Through Innovation of Legal Services recommended the development of a regulatory sandbox to trial any changes: State Bar of California, *Final Report and Recommendations* (Report, 6 March 2020) 31–41 (Recommendation 5).

their focus on the individual practitioner. Seeking to make new legal service providers subject to the same ethical rules as lawyers would likely be unnecessary and unrealistic, presaging a modified or diluted regulatory regime. In this vein, Semple has noted that low-risk legal activities could have 'light touch' regulation applied.[207] In the final report comprising his review, Mayson also advocates an approach based on the risk attached to the particular activity to be conducted.[208]

This means of regulating LegalTech providers would be an active step towards bringing non-lawyer, technology-based legal service offerings within the regulatory fold. However, it would throw up new challenges – as mentioned, the question of the standards to be applied and how these would be measured, being key. As Chambliss has written of traditional entity regulation, '[t]he design and evaluation of firm-level ethics controls requires firm-specific knowledge and ongoing access to [individuals'] conduct within the firm'.[209] In the case of LegalTech, it may also require technical know-how on the part of regulators. Further, while it would increase the scope of regulation, expansion of the legal regulatory system to new providers will not change the feasibility issues related to providers who might continue to operate on an unauthorised basis – either as the new regulation is not well-enforced, or because they exist outside of regulatory reach (such as external to the jurisdiction).[210]

There is also the issue of losing or eliding the distinction between lawyer and non-lawyer services. Some indication of the significance of the title 'lawyer' is shown by preliminary reviews of the deregulatory changes implemented in England and Wales. These changes included enabling non-lawyers to provide certain legal services without regulation, as well as non-lawyer ownership of legal service provider entities.[211] As noted, some research suggests that consumers may be incorrectly assuming that all providers of legal services are solicitors.[212] Yet there appears to be general reluctance to embrace 'unauthorised provider' status,[213] as noted by McMorrow, who comments:

> Surprisingly, there are firms that could potentially provide services without being licensed as an [alternative business structure], but instead choose to submit themselves to regulation. This suggests that the lawyer/solicitor 'brand' has value both in terms of quality and some protection to clients/consumers through regulation.[214]

Mayson reiterates this finding, explaining that '[i]t is not always appreciated that entrepreneurs and investors (especially those from outside the traditional sector) often welcome regulation and access to it because it provides more certain parameters for their decision-making and helps them to define and manage risk'.[215] Of course, it is not clear that the same value attached to the label of 'lawyer' would simply adhere to LegalTech entities complying with some lesser or different form of regulation. Yet

[207]Semple, 'Tending the Flame' (n 71) 9.
[208]Mayson, *Beyond the Echo Chambers* (n 105).
[209]Elizabeth Chambliss, 'MDPs: Toward an Institutional Strategy for Entity Regulation' (2001) 4(1) *Legal Ethics* 45, 55; Parker (n 217). For a discussion of the, in many respects, short-lived experiment with entity-regulation in NSW, see Parker, Gordon and Mark (n 216) and Rogers, Kingsford-Smith and Chellew (n 6).
[210]Mayson notes this: (n 47) 37.
[211]See Jakob Weberstaedt, 'English Alternative Business Structures and the European Single Market' (2014) 21(1) *International Journal of the Legal Profession* 103 for a comprehensive description.
[212]Mayson (n 47) 20; citing Competition and Markets Authority (n 152) [6.87].
[213]Legal Services Board (n 151) 1 (estimating that for-profit unauthorised providers account for around 3% of all legal problems where assistance was sought and up to 5.5% of services paid for).
[214]McMorrow (n 43) 679.
[215]Mayson, *Beyond the Echo Chambers* (n 105) 126.

being able to point to some form of regulation is clearly desirable, hence the creation in England and Wales of new bodies such as the Institute of Professional Will-Writers offering some regulatory oversight to those unauthorised providers who seek membership.

5. Conclusion

The entry to the market of non-lawyer legal service providers via LegalTech thoroughly challenges regulatory controls, controls that are already part of a complicated and attenuated regulatory landscape. Remus and Levy maintain a belief in the need for the 'values, norms and structures of the legal profession' in the face of new technologies,[216] yet their maintenance is arguably harder than ever before.

Regulation of providers of legal services is needed for many reasons, including to widen access, protect consumers, and to support the legal system, though these goals have a less-than-straightforward relationship with the monopoly protections historically given to lawyers. Indeed, as we illustrated, perhaps LegalTech is positive for access to legal services. Though we also showed how the proliferation of LegalTech might create a two-tiered system in which only sophisticated clients can afford regulated legal services; know when to mix and match with cheaper online options; and take on the risks of limited forms of redress against LegalTech where things do go wrong. While there are contexts in which non-lawyers or the 'computerized services' they create, may play a useful part in the delivery of legal services, Remus specifies that 'carefully designed ethical rules or other forms of regulation will be critical'.[217]

In our analysis, we questioned whether the individualised approach of legal regulation is suited to the diffuse, discrete way in which LegalTech is developed and marketized. In addition to established risks of non-lawyer provision of legal services, the use of AI in LegalTech also generates new challenges due to its autonomy, potential for error or bias, and opacity. These are systems for which accountability is not clear cut, and whose developers have no obligation to 'build in' accountability mechanisms. It is argued that developers or programmers could be accountable for intentionally programming something with unforeseeable outputs:[218] Pasquale points out that developers should, by now, be well-aware of the potential pitfalls.[219] Yet, as noted, there is little, if any, incentive for those not presently subject to regulation or liability to seek it out. Indeed, big legal service providers may be more inclined to resist even general consumer law regulation. Given these risks and challenges, it may be that no amount of regulation of the 'non-lawyers' could guarantee professional standards – or ethicality, efficiency and effectiveness – for clients.

We ended our discussion by presenting two possible approaches for legal regulators, should they decide that leaving things as they are, or even more fully in the hands of the market, are not desirable. These two approaches we term passive and active, to signal the nature of the action required on the part of legal regulators. Each approach has the potential to address some of the risks and feasibility issues we discussed, yet each also has

[216]Remus and Levy (n 24) 545.
[217]Remus (n 82) 876.
[218]Scherer (n 8).
[219]Pasquale, 'Fourth Law' (n 79) 1248.

limitations. A passive approach has the benefit of blending most effortlessly with existing regulation but there is doubt around the capacity and willingness of the tech industry to self-regulate, submit to external regulation, or professionalise. An active approach, trying to bring a multitude of different individuals within the regulatory fold via entities, might overlook the significance of individuals' 'fitness, suitability and integrity'[220] in maintaining professional commitment and community.

As a final point of tension revealed by our analysis, legal professionals' concerns about non-lawyer providers relate to the tilted playing field and the motivation to retain and enact one's professional status if others can offer similar services without regulatory controls. But regulating non-lawyers raises a paradox – if non-lawyers are regulated similarly to lawyers, lawyers may be rendered less differentiable. In other words, regulation of the new providers involved in legal services could increase their similarity to lawyers, and hence might have the effect of further undercutting the legal monopoly, in which formal accountability is emblematic. The choice of entrants to the UK market to submit to regulation rather than exist as unauthorised providers, is a salient example. Passmore has noted that '[t]he research on consumers' legal need and decision making is wide ranging and complex. But it does lead the [Solicitors Regulation Authority] to conclude that the solicitor brand remains the most powerful signal to consumers about competence and protection.'[221] Thus, vestiges of traditional professionalism may be proving more robust than previously anticipated – in particular, the trust associated with the 'brand' (or identity) of legal practitioner.[222] The issue for the legal profession is that if non-lawyers are regulated to a similar degree as lawyers, the distinguishing elements of the profession itself may be diminished or lost.

In the professional regulatory landscape, these are not simple decisions.

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[220]Mayson (n 47) 22.
[221]Passmore (n 22) 150.
[222]See, eg, Mayson (n 47) 19–22.