The Dynamics of Professionalism: The Moral Economy of English Legal Practice – and Some Lessons for New Zealand?

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In the sociology of the professions, the emergence of the modern legal profession is often told as a story of political economy; a reflection on the capacity of the profession, by political means, to mobilise the state, structure its market and legitimate certain productive relations by techniques of professional governance and self-regulation.[2] In the language of political economy professionalism itself thus exists as part of that process of legitimation, as a 'peculiar type of occupational control rather than an expression of the inherent nature of a particular occupation'.[3]

In this paper, however, I want to turn our attention away from professionalism as an expression of political economy, to consider it more as a matter of *moral economy*. This particular notion has been much less explicit in the professions literature, though early sociological work in the field tended to take at face value professional claims about the moral and ethical dimensions of professionalism,[4] and much later scholarship on professional ethics has also tended to use professionalism as a way of capturing certain key features of the role morality.[5] But this is not my concern. Rather, I want to focus on the nexus between the economic and the moral.[6] For the pur-

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1 This paper draws in part on a number of presentations reflecting on the reform of the English legal services market and given at the First International Conference on Legal Ethics at the University of Exeter, UK, in July 2004, the Socio-Legal Studies Association Annual Conference, Liverpool, UK, 2005, and at a seminar organised by Duncan Webb at the University of Canterbury in June 2006. I am grateful to participants at each of these events for their observations. My considerable thanks also go to John Flood for sharing wisdom and references. The usual disclaimers apply.

2 Richard L Abel, 'The Political Economy of Lawyers' (1981) *Wisconsin Law Review* 1117, 1121; see also Abel, The Legal Profession in England and Wales (1988), chapter 1.

3 Terence Johnson, Professions and Power (1972), 45.

4 A Carr-Saunders and P Wilson, The Professions (1933), 497.

5 The literature on professionalism as a moral value or set of values is vast, particularly in the US. Useful examples include Colin Croft, 'Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community', (1992) 67 *New York University Law Review* 1256; Steven Lubet, 'Professionalism Revisited' (1993) 42 *Emory Law Journal* 197; Burnele V Powell, 'Lawyer Professionalism as Ordinary Morality' (1994) 35 *South Texas Law Review* 275; W Bradley Wendel, 'Morality, Motivation and the Professionalism Movement' (2001) 52 *South Carolina Law Review* 557.

6 The relationship between the moral and political is also significant. As Halliday observes, the 'normative professions' like law have been able to blur the boundaries between moral and technical authority, and have used this to exploit opportunities for (political) influence – Terence C Halliday, 'Knowledge Mandates: Collective Influence by Scientific, Normative and Syncretic Professions' (1985) 36 *British Journal of Sociology* 421, 429-31.

poses of this paper, I therefore adopt the definition of moral economy used by Sayer,[7] as the study of how economic movements and pressures may shape and influence, and in turn be shaped by, moral norms.[8]

While the focus on political economy has told us much about the 'professional project'[9] of lawyers, like all master discourses, it has its limits. The moral discourses of the profession will undoubtedly provide legitimation for certain moves within the professional project, but to treat all moral discourses as such threatens both to underplay the extent to which such discourses may have a wider social rationale, and to blur distinctions that may be of genuine moral importance to the actors involved. The language of moral economy, needs to be understood as part of what Bourdieu would call the *habitus*, or 'feel for the game' of being a lawyer.[10] Much of this modern moral economy is therefore embedded not just in the political discourse of the profession *qua* profession, which tends still to reflect traditional values, such as professional autonomy and independence, collegiality, and social service, but in the day to day work and organisation of law firms. 'Professionalism' in this context, I suggest, needs to be explored in political and cultural terms, as a dynamic, contingent and contested *practice*, responsive to a range of ideological, economic and situational factors.[11]

In the following pages I set out to discuss a number of current developments within the world of English legal practice which are, I suggest, indicators of a continuing and fundamental transformation of the professional project and cultural practices of lawyering. English lawyers have, until relatively recently, been extremely successful at maintaining the *status quo*. But, over the past twenty to thirty years the profession has also experienced considerable challenges. It has ceded control over the supply of new lawyers to independent universities and colleges. In the face of political opposition from both Conservative and Labour governments, it has lost many of its traditional market controls and monopolies. It has faced a rising tide of apparent consumer dissatisfaction; its leadership has, at times, displayed breathtaking levels of political incompetence and an exceptional ability to shoot itself in the collective foot.[12] In the latest chapter of the story, it has been obliged to divest itself of much of its regulatory autonomy, and prepare for further deregulation of an already highly deregulated legal services market.

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7 Andrew Sayer, 'Moral Economy and Political Economy' (2000) 61 *Studies in Political Economy* 79. It should be noted that the concept of moral economy as used by Sayer and in this article has both a descriptive and normative dimension.

8 For these purposes the notion of moral norms should be construed as all those outward-facing values and dispositions that imply a conception of the good. That is, we are not here concerned with the internal (self)perception of what it is to lead a good life, but with values, etc, manifesting in behaviour affecting others.

9 The term professional project was coined by Magali Larson to characterise the deliberate political action of professions, converting their technical and cultural capital into an institutionalised system of financial and social rewards – The Rise of Professionalism: A Sociological Analysis (1977), xvii.

10 Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805, 811.

11 Donald Nicolson and Julian Webb, 'Editorial: Public Rules and Private Values: Fractured Profession(alism)s and Institutional Ethics' (2005) 12 *International Journal of the Legal Profession* 166, at 166; Herbert Kritzer, 'The Professions are Dead, Long Live the Professions: Legal Practice in a Post-Professional World' (1999) 33 *Law and Society Review* 713, 749; Robert Nelson and David Trubek, 'Arenas of Professionalism: the Professional Ideologies of Lawyers in Context' in Robert Nelson, David Trubek and Raymond Salomon (eds), *Lawyers Ideals/Lawyers' Practices* (1992), 176.

12 The story of the turbulent decade from 1989-99 is recounted in depth and with some relish in Richard Abel's monumental work, English Lawyers Between Market and State: The Politics of Professionalism (2003).

By way of a *caveat* I should say that, in a number of ways, this paper is only a preliminary foray into a much larger field. It does not purport to present a complete 'model' of a moral economy approach to the study of the legal profession; that would be a paper in its own right. Nor can it pretend that its perspective on some of the trends discussed in the following pages goes much beyond informed speculation. While a number of these developments are already well-established within the legal services market of England and Wales, others are only just beginning, and, many of the regulatory changes have yet to be implemented. It will take time for the real market effects of these to become apparent. Nevertheless, I think one can say with a high degree of confidence that the changes discussed in these pages are significant, not just in the UK context, but more widely. As I will demonstrate in this paper, many of the challenges confronting the English legal profession today reflect the logic of the new, global, political and moral economy. What is happening in the UK therefore has implications not just for the UK legal profession, but for the future of legal professions internationally, perhaps even for professions in general as a distinctive kind of occupational system and culture.

I. The Context: the 'New Economy' as a Moral Economy

The term 'new economy' was coined by the media in the mid 1990s to describe the sense of deep economic transformation that was starting to be experienced at that time.[13] Looking beyond much of the early hype associated with the term, it still serves usefully to describe the convergence of five broad and interrelated trends that have been under way for some years, and together were said to herald an 'age of social transformation'.[14] These trends are now too well known to require lengthy discussion here. The first is the internationalisation of trade, particularly the rise of the big multi-national enterprises, and with it the increasing dominance of certain global brands for both goods and services (globalisation is as much about the spread of McKinsey as McDonalds). The second trend is the revolution in information technology, particularly in the way it has enabled the digitization of information, and the creation of '24/7' transnational information flows. Thirdly, the rise of the new economy has been built on new modes of economic production and new ways of working, that are largely characterised in terms of both a shift from an industrial economy to a knowledge economy, and also as a shift from conventional 'Fordist' (standardised mass-production) systems, to more flexible 'post-' or 'neo-Fordist' modes of production, involving trends such as flexible working, outsourcing, and 'Just in Time' production processes. Fourthly, there has also been a significant ideological shift, reflected in the widespread commitment to free market discourses, of competitiveness, market liberalisation, rationalisation, and de-regulation. This has been driven not just by national governments, but by international institutions such as the World Trade Organisation and the large regional trading blocs, such as NAFTA and the European Union. This has meant, lastly, that the new economy has come also to signify a very different form of political economy, one which has fundamentally changed the relationship between state and

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13 See, eg, John Huey, 'Waking Up to the New Economy' *Fortune Magazine,* 27 June 1994, <http://money.cnn.com/magazines/fortune/fortune_archive/1994/06/27/79465/index.htm>; Stephen Shepard, 'The New Economy: What it Really Means' in *Business Week,* 17 November 1997, <http://www.businessweek.com/1997/46/b3553084.htm> at 14 August 2008. For a major analysis of the legal implications of the new economy, see Harry W Arthurs and Robert Kreklewich, 'Law, Legal Institutions and the Legal Profession in the New Economy' (1996) 34 *Osgoode Hall Law Journal* 1-60.

14 Peter F Drucker, 'The Age of Social Transformation' *The Atlantic Monthly,* November 1994, 53.

civil society, and with it the distribution of wealth and power in society, creating an environment in which states have moved away from using Keynesian strategies to manage the economy, and have, to a degree, rejected welfarist notions of social justice, and many of the interventionist/redistributive strategies of the classical welfare state era.

The implications of these trends for law and the legal profession have been, and continue to be, substantial. The point I want to make here, however, is to highlight, briefly, the ways in which the new economy has also come to imply a new moral economy. The new economy brings with it a strongly value-laden rhetoric. It expresses aims of liberating and democratising social relations, largely through market mechanisms. It stresses the importance of choice and individual freedom, and seeks to enhance access to both material goods, and, indeed, to non-material goods, such as justice, through competition.[15] At the same time, even if we take these virtues at face value, we must also acknowledge that they seem to come with certain other moral costs. The new economy model has certainly intensified the extent to which the market itself has become disembedded from the traditional moral economy of social life. The market has taken on a life of its own, with a consequent commodification of many aspects of our culture and society. Ideals of civic culture have given way, increasingly perhaps, to consumer culture, and consumer sovereignty[16] itself has become reframed as a moral imperative.[17] Paradoxically, almost, the new economy seems also to have both contributed to and sought to prevent the decline in trust in social institutions that has been a feature of late modernity.[18] Numerous commentators have written of the loss of trust in government, the professions and corporations.[19] Even the law itself has been regarded as part of the problem, as it has increasingly become the means by which the state seeks to guarantee trust, or even replaces trust, as the foundation for social relationships.[20] At the same time new economy thinking has sought to respond to the crisis by using state power to create increasingly marketised systems of accountability and regulation in an attempt to construct new forms of institutionalised trust.[21]

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15 See, eg, Christine Parker's argument, developing a metaphor constructed by Mauro Capelletti, that competition policy constitutes the 'fourth wave' of the access to justice movement – Just Lawyers: Regulation and Access to Justice (1999), 38-41.

16 Consumer sovereignty means that individual consumers are free to choose as they wish, subject to constraints imposed by the price system, and according to their current wants and needs. In addition to its descriptive function in free market economics, it has a strongly normative dimension as a theory about who should exercise power and for what purposes.

17 See Paul Du Gay, Consumption and Identity at Work (1996), 76-80.

18 Anthony Giddens, The Consequences of Modernity (1990), 29-30; Robert D Putnam, Bowling Alone: The Collapse and Revival of American Community (2000).

19 Under conditions of complexity the state becomes the central guarantor of trust in expert systems - Boaventura de Sousa Santos, Toward a New Legal Common Sense (2nd ed, 2002) 76-7. Logically it would seem to follow that any loss of trust in the state is likely to have a knock-on effect on other social institutions where trust in those institutions is premised, at least in part, on the capacity and availability of the state to monitor their activities and manage risks associated with their operation.

20 Cf Santos, ibid, and Frank B Cross, 'Law and Trust' (2005) 93 *Georgetown Law Journal* 1457, 1459.

21 Techniques of audit and, despite the early deregulatory rhetoric, regulation have become an increasing feature of the new economy, though with a greater emphasis on principles of co-regulation (or 'regulated self-regulation') and public participation: see Trevor Purvis, 'Regulation, Governance, and the State: Reflections on the Transformation of Regulatory Practices in Late-Modern Liberal Democracies' in Michael Mac Neil, Neil Sargent and Peter Swan (eds), *Law, Regulation and Governance* (2002); Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) 54 *Current Legal Problems* 103.

The legal profession, I suggest, is both a beneficiary and victim of the new economy. And in this it has only a limited amount of choice. As Heinz and Laumann have argued, the legal profession is an 'overdetermined social system'.[22] It cannot escape from the larger transformations that make up the new economy, and the profession's need to be responsive to those often competing economic, political and cultural changes can sometimes make it difficult for firms to be other than reactive. But if it is to be more than a victim of the process of change, it needs to understand what is actually involved in that transformation, and much of the (anecdotal) evidence is that it still does not – or at least not fully enough.[23] With the current pace of change, particularly in the UK, this of itself should be a matter of some concern.

II. The Legal Services Act 2007: Background and Implementation

Any discussion of changes to the English legal profession must now be understood in the context of the Legal Services Act 2007, which received the Royal Assent on 30th October 2007. Although very little of the Act relevant to this discussion is currently in force, the Act is the culmination of a process that began six years earlier, and the profession has been maneuvering to position itself in readiness for the reforms for at least the last two years.

The 2007 Act reflects three converging forces. First, there was the competition agenda driven, at a national level, by the Office of Fair Trading (OFT), the UK's consumer and competition authority.[24] The OFT's agenda, however, was itself much influenced by the European Competition Commission's concerns at the extent of anti-competitive practices in European professions, and its conviction that European professional services markets had to be made more competitive.[25] The OFT agenda in England and Wales was focussed on two areas of potentially restrictive practice: restrictions on the supply of services (including advertising, constraints on price competition, and restrictions on forms of business organisation), and restrictions on conduct, notably legal professional privilege, though ultimately changes to lawyer-client privilege were not pursued.

22 John Heinz and Edward Laumann, Chicago Lawyers: The Social Structure of the Bar (1982), 213.

23 I can only justify this conclusion on the basis of conversations with practitioners, and with other observers of the legal profession. A number of other scholars have come to a similar conclusion: see, eg, Richard Susskind, Transforming the Law: Essays on Technology, Justice and the Legal Marketplace (2000), 55; Richard Devlin, 'Breach of Contract? The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession' (2002) 25 *Dalhousie Law Journal* 335, 338.

24 Notably in the Office of Fair Trading's report, Competition in the Professions - A Report by the Director General of Fair Trading (2001).

25 The European Commission Competition Directorate has issued two reports on the subject: 'Report on Competition in Professional Services', COM(2004) 83 of 9 February 2004, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0083:EN:NOT>, and 'Professional Services - Scope for more reform', COM (2005) 405, of 5 September 2005, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0405:EN:NOT>, both at 14 August 2008. By 2005 competition-led reform was established on the agenda in a number of other European jurisdictions, notably in Ireland, where proposals very similar to Clementi had been published. National reviews were also ongoing in Germany, Denmark and Poland (as regards ownership and structure of law firms), Italy and Hungary (advertising restrictions), and the Netherlands (rights of audience; legal professional privilege and Bar Association structure) – see Richard Parnham, 'The Clementi Reforms in a European Context – Are the Proposals Really That Radical?' (2005) 8 *Legal Ethics* 195. The Scottish Government had commenced its own review of complaints against the legal profession in 2002, and subsequently commissioned a detailed research review of the Scottish legal services market in 2006 (see Scottish Executive, Report by the Research Working Group on the Legal Services Market in Scotland, April 2006, <www.scotland.gov.uk/Resource/Doc/111789/0027239.pdf> at 14 August 2008). A new Legal Profession Bill is likely to be on the Scottish Government's legislative programme for 2008-09.

Secondly, there was genuine recognition that, even if it was not wildly anti-competitive, regulation of the legal services market was, at best, unwieldy and unduly complex, and that such complexity could create unintended market distortions.

The market for legal services in England and Wales has involved a mix of regulated and unregulated groups, and regulated and 'unregulated' activities. The result is a complicated matrix of rights to conduct work and corresponding regulatory responsibilities. Added to that, legal professional bodies themselves have also been answerable to an additional layer of 'second tier' or 'supervisory regulators' for some areas of work.[26] The effects of this require some explanation.

Professional occupations are, as is well known, traditionally characterised by their practice of self-regulation *via* a formal association. Solicitors and barristers, and members of the Institute of Legal Executives (ILEX) are the key occupational groups in the legal services market, and all broadly fit that pattern. In respect of some services, they are joined also by patent agents, trade mark attorneys, and licensed conveyancers – all of whom have their own independent professional bodies, with representative and self-regulatory functions. Other paralegals and clerks employed by solicitors and barristers are regulated only indirectly, insofar as the employing lawyer is answerable to his/her professional body for their conduct. Other legal occupational groups such as will writers and certain trust managers are, at present, essentially unregulated in this sense.[27]

The main regulated activities are conveyancing, probate, immigration advice, the right to conduct litigation, and the right of audience, where any of these are to be undertaken for a fee. The notion of regulated or unregulated activity however requires unpacking. A number of the regulated activities constitute reserved areas of practice, which may only be conducted by a qualified professional. Who counts as a qualified professional may vary between areas. Thus conveyancing is an activity reserved, essentially, to solicitors and licensed conveyancers. Immigration advice is unusual, as it is regulated but not 'reserved' in the classical sense, since a wide range of persons can provide the service, including those trained specifically as non-admitted immigration advisers. Moreover, the extent of professional jurisdiction in these areas can vary between professional groups, as with rights of audience, where, for example, barristers automatically have full rights of audience before all courts; solicitors have limited rights of audience, unless they are solicitor-advocates who have obtained a higher court qualification, and patent agents/trade mark attorneys have a limited jurisdiction, reflecting their specialist competence. These variations obviously have potentially different effects on consumer access and competition, and may create significant coordination problems for the regulators.

As we have seen there are also areas of practice, like will writing, which are entirely unregulated in the sense that anyone can draft a will for another, even for a fee, regardless of their training to do so. However, in a broader sense, the idea of an unregulated activity is a misnomer, since solicitors, barristers, and legal executives are all regulated as regards standards of work and conduct by their professional bodies in respect of *any* work they undertake in that capacity. Consequently 'unregulated' work is best understood as work that is not regulated *except* where the service is provided by a regulated professional. One of the regulatory issues in the context of the legal services market is thus where one draws the line. For example, the will writing market has seen a growing number of non-lawyer practitioners entering the market, who are not subject to

26 For example, the Financial Services Authority which authorises the Law Society to regulate solicitors' firms in the conduct of investment business.

27 Though such service providers do owe the same duty of care at common law as a solicitor would in respect of the quality of work: *Esterhuizen v Allied Dunbar Assurance plc* [1998] 2 FLR 668.

the training, conduct standards and indemnity insurance requirements required of, say, solicitors. This may not just raise issues of consumer protection, it can also be seen as a competition issue, since, regulated providers, such as solicitors, may be placed at a competitive disadvantage by their regulatory burden, and may ultimately either be priced out of the market, unless they can either persuade consumers that they provide sufficient added value to warrant a premium price, or, if they want to stay in the market, are prepared to join an unregulated race to the bottom.

Thirdly, the continued failure of the solicitors' profession in particular to address the problem of consumer complaints had left it a sitting target for reform. The complaints problem is of long standing. As long ago as 1995, solicitors were warned that they were 'drinking in the last chance saloon'.[28] The profession responded, at first, by blaming everyone but themselves.[29] The government fired a significant warning shot in the Access to Justice Act 1999, ss 51 and 52, which introduced reserved powers to directly supervise complaints handling from a 'failing' legal professional body. This forced the Law Society, finally, to throw large amounts of money at its historically underfunded and, by now, dysfunctional complaints arm, the Office for the Supervision of Solicitors. It was, however, still too little, too late. In the face of continuing coruscating criticism of solicitors' complaints handling by the Legal Services Ombudsman, the government finally moved into action.

In July 2003, the then Department for Constitutional Affairs (now the Ministry of Justice) announced a major review of the regulatory regime governing the legal services market, to be led by Sir David Clementi, a former deputy governor of the Bank of England and current chairman of Prudential, on of the UK's largest insurance companies. In the interim, the Lord Chancellor also exercised his reserve powers to supervise the Law Society's complaints handling, and in February 2004, appointed the Legal Services Ombudsman, Zahida Manzoor, also to the role of Legal Services Complaints Commissioner, a supervisory responsibility that is still in place.

The Clementi Review itself moved with some pace. A Consultation Paper was published in March 2004 and, following opportunities for consultation, a final Report appeared in December of the same year.[30] The Clementi terms of reference were broad, and clearly reflected the new competition-based and consumer-focused ideology;[31]

> To consider what regulatory framework would *best promote competition,* innovation and the public and consumer interest in an *efficient,* effective and independent legal sector….
>
> To recommend a framework which will be *independent in representing the public and consumer interests*, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified. (Emphasis added)

Turning to the details, the Clementi Review made a range of key recommendations. First and foremost the report called for the separation of the professional bodies' regulatory and representative functions and for the establishment of a single regulatory body, the 'Legal Services Board' (LSB) to licence and oversee those professional regulatory bodies. This option was favoured by the ma-

28 Stephen Ward, 'Solicitors drinking in the last chance saloon over client bills', *The Independent (London)* 21 May 1995, http://findarticles.com/p/articles/mi_qn4158/is_19950621/ai_n13989905 at 15 August 2008 (reporting criticisms of the profession by Michael Barnes, the then Legal Services Ombudsman in his fourth Annual Report).

29 See Abel, above n 12, 398-400; the potential scale of the problem was illustrated in a study commissioned by the Law Society in 1999 from Ernst & Young indicating that 50% of law firms generated 80% of complaints, *id*. at 400.

30 Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales: Final Report,* December 2004, <www.legal-services-review.org.uk> at 14 August 2008.

31 Ibid, 1.

jority of respondents, and ultimately by Clementi himself, over the creation of a single regulatory body ('model A' in Clementi's terms) that would take over the direct regulatory functions of the legal professional bodies.

Secondly, the report also called for the creation of a single complaints body, to be known as the Office for Legal Complaints (OLC), and overseen by the LSB. This was intended to replace the existing in-house complaints systems of the professional bodies, and to extend the range of matters for which consumers could complain (including potential negligence). The OLC was not mooted to take over the disciplinary functions of the professional disciplinary tribunals.

Thirdly, Clementi also addressed a number of governance and accountability issues that flow from these other proposals. It concluded that the LSB should be governed by a Board with a lay majority and lay Chair and Chief Executive. It created a set of regulatory objectives and stressed the importance of creating consultation and accountability mechanisms which would ensure the responsiveness of the LSB to government, consumers and representatives of the legal services sector. The details of this it left largely to be determined at a later stage. It also proposed that the regulator should have a role to play in determining what services should fall within the 'regulatory net', but that it would ultimately be for the government to determine changes to that net.

Lastly, the report also made important recommendations as regards 'alternative business structures' (now widely referred to as ABSs). In particular it called for a relaxation of present constraints over joint partnerships between solicitors, barristers and other regulated legal professionals – so-called 'Legal Disciplinary Practices' (LDPs) - and also anticipated a potential relaxation of rules governing non-lawyer ownership of and investment in law firms. Interestingly, post-Enron, the report stopped short of a wholesale endorsement of multi-disciplinary practices (MDPs), seeing these proposals as perhaps a good way to 'test the water' first, and assess the issues involved in licensing such businesses.

Most of the Clementi proposals have found their way largely unaltered into the Legal Services Act (LSA) 2007.[32] This is a very substantial and complex piece of legislation, containing 214 sections and 24 schedules. It is also primarily framework legislation. Much of the regulatory detail will need to be put in place by the LSB, and also by the frontline regulators and licensing authorities. Inevitably quite a lot of the devil will lie in that detail.

The Act implements the Clementi recommendations for a lay-dominated Legal Services Board, and an independent, unified, Office for Legal Complaints. These new institutions will take some time to put into place. The first members of the Legal Services Board have recently been appointed, but it still has to construct its operational teams and internal processes from scratch, and will have to go through a detailed drafting and consultation phase before it can come up with a new set of rules and monitoring procedures in respect of its oversight and licensing functions. It is anticipated that it will be spring 2010 before the Board is actually operating as a regulator. In developing and exercising its powers it must keep in mind a set of regulatory objectives laid down by the Act. These are broad and for the most part reflect a consensus of views derived from the

32 <http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_1> at 14 August 2008.

Clementi Review process.[33] The Board also has duties to consult and seek advice from a number of bodies, eg, in respect of decisions to authorise new regulatory bodies, or to allow regulatory bodies to license ABSs. The LSB is statutorily required to take account of consumer and competition interests in these processes, which are represented in the Act by the LSB's own specially constituted 'Consumer Panel' and by the OFT.

The Office for Legal Complaints will, in manpower terms, be much the larger operation of the two. The chair and Board members for the OLC are due to be appointed early in 2009, with the intention that it will become operational in late 2010. The costs of this whole process are not insubstantial. In June 2007 the forecast for implementation costs was revised upwards to £32.1 million (at then current prices) of which £19.9 million would be recovered through a direct levy of the frontline regulators, a further £9.8 million falling directly on the Law Society, and £2.4 million borne by the Ministry of Justice. Annual Running costs were also reviewed to £4.0 million for the LSB and £19.9 million for the OLC.[34]

Although individual regulation and disciplinary arrangements are to be retained, the Act moves professional regulation substantially towards a firm- and market-based system. In order to do this the Act, first, defines what constitutes a reserved legal activity,[35] and then, by s 13, requires both individuals and firms who wish to undertake reserved legal work to be authorized to do so by either an approved regulator or, in the case of an ABS, a licensing authority.[36] Eight existing regulators are recognised in the Act as approved bodies, including the Law Society and Bar Council. The LSB will have powers to authorise new regulators of a reserved legal activity under procedures laid down in Schedule 4 of the Act, and its own rules, and this of course reflects part of the Act's market liberalisation strategy.

It is worth noting that there is nothing in the Act which expressly obliges an approved regulator to physically separate its regulatory from its representative arm, though it is clear from s 29(2), that the Board must ensure that the regulatory and representative functions are organised in a way that is not prejudicial to the former, and that there is sufficient independence in regulatory decision-making. Nevertheless, both the Law Society and Bar have wholly delegated their regulatory functions to operationally independent bodies, known respectively as the Solicitors Regulation

33 Under s 1(1) LSA, the objectives are: (a) protecting and promoting the public interest; (b) supporting the principle of the rule of law; (c) improving access to justice; (d) protecting and promoting the interests of consumers; (e) promoting competition in the provision of services; (f) encouraging an independent, strong, diverse and effective legal profession; (g) increasing public understanding of the citizen's legal rights and duties; (h) promoting and maintaining adherence to the professional principles'. The 'professional principles' are a set of broadly ethical principles defined in s 1(3), which require authorised persons to act with independence and integrity; to maintain a proper standard of work; to act in the best interests of their clients; in the conduct of litigation or advocacy to comply with their duty to the court to act with independence in the interests of justice, and to maintain client confidentiality.

34 Ministry of Justice, *Supplement to the regulatory impact assessment: June 2007* <http://www.justice.gov.uk/docs/RIA-Supplement-v021.pdf> at 14 August 2008.

35 Section 12(1) LSA identifies these as (a) the exercise of a right of audience; (b) the conduct of litigation; (c) reserved instrument activities; (d) probate activities; (e) notarial activities, and (f) the administration of oaths. The scope of these terms is explained more fully in Schedule 2, though the Act does not change the range of reserved activities from that which existed before the Act. Under s 24, the Lord Chancellor may, by order, amend s 12 and Schedule 2 so as to add any legal activity to the list of reserved legal activities.

36 Companies and firms that have in-house legal departments that are not providing legal services to the public do not need to be authorised, though in-house counsel who undertake reserved legal activities for their employer are required to have individual authorisation – ss 15(4) and (5) LSA.

Authority (SRA)[37] and the Bar Standards Board (BSB).[38] These have taken over full responsibility for regulation, discipline and, until the OLC is operational, consumer complaints. Under proposed SRA rules,[39] all solicitors' firms will be required, from March 2009, to become 'recognised bodies' (in case of partnerships or incorporated practices) or, from July 2009, 'recognised sole practitioners'. It is intended that this will be achieved by a relatively simple 'passporting' process for existing firms, provided that the structure of the practice complies with the rules in force. New firms created after March 2009 will have to apply for recognition, and, once the new regulatory structure is in place, there will be an annual renewal process for all recognised bodies.

The most innovative parts of the Act, and those most likely to have significant market effects relate to the implementation of new business structures. The most radical of these provisions, concerning alternative business structures under Part 5 of the Act will not come into operation until the LSB itself is operational. Consequently the liberalisation of the legal services sector is taking place in a number of stages.

Firstly, some liberalisation of the formerly highly restrictive rules on fee-sharing with non-lawyers was introduced in 2004. This permits fee-sharing as a means of facilitating, subject to public interest constraints, the introduction of capital or the provision of services to the law firm involved. This means that law firms can already attract external investment by offering a form of profit-sharing to investors, based on fee income; rather than being restricted to raising capital through loans or from their own resources.[40]

Secondly the LSA permits[41] the creation of what Clementi called 'legal disciplinary practices' (LDPs - though note that the term is not used anywhere in the Act itself). These are practices in which different types of lawyer are appointed as 'managers' (ie partners, or directors of the business), but where there is no external (ie non-lawyer) ownership. The SRA anticipates bringing in new regulations in March 2009 to permit LDPs in which at least 75 per cent of managers are solicitors, European lawyers or registered foreign lawyers, and thereby allowing up to 25 per cent of the management to be drawn from other approved occupations, ie, barristers, licensed conveyancers, notaries public, legal executives, patent and trademark agents, and law costs draftsmen.

Thirdly, the Act will permit the LSB, through designated licensing authorities (which are likely to include some of the frontline professional regulators), to authorise practice through ABSs. Here the Act potentially goes further than Clementi in permitting lawyers to form multi-disciplinary practices offering both legal and non-legal services under one roof, as well as permitting individual non-lawyers and corporations to own law firms. The ABS regime may not be in place until 2012, but it is already being heralded as a very significant development in the legal services market, that could herald in new investment, as banks, insurance houses, private equity firms, and perhaps even supermarket chains (the so-called 'Tesco Law' model) start to take minority and majority stakes in law firms. If – or rather when – this happens it is also likely to see the introduction of some very different business models from those that dominate at present, especially around

37 <www.sra.org.uk>.

38 <www.barstandardsboard.org.uk>.

39 See Solicitors Regulation Authority, 'Legal Services Act FAQs' <www.sra.org.uk/legal-services-act/lsa-questions-faqs.page> at 15 August 2008.

40 See now Rule 8.02 of the Solicitors' Code of Conduct 2007, <www.sra.org.uk/documents/code/rule-8-fee-sharing.pdf> at 15 August 2008.

41 In effect by excluding them, by virtue of ss 71 and 111(2), from the definition of businesses subject to the ABS licensing regime.

mid-market, which is the sector most likely to be most receptive to external investment. But what will all this mean at the interface of the moral economy?

III. The New (Moral) Economy and English Legal Practice post-Clementi

The Clementi-inspired reforms cannot be considered in isolation. They are, after all, coming into play in an environment that is already being substantially re-shaped by the new economy. In order to understand the potential impact of the LSA, we need to look at what is already happening in legal practice. I will do so here by focusing on three related trends: changes to the market for legal services, and with that, changes to the way law firms operate – what we will refer to as the labour process - and, finally, changes to regulation.

A. *The market and labour processes*

The LSA is likely to hasten a number of market processes that are already clearly developing, and in this context it constitutes both an opportunity and a threat to law firms. The idea that there is not so much a single legal services market as a multiplicity of differentiated markets is hardly new, but it does mean that the effects of market liberalization are also likely to be complex and differentiated according to different sectors.[42]

Globalisation has particularly supported the largest firms to grow larger – those doing the big capital markets work, international trade, mergers and acquisitions, commercial property, trade and tax. The growing dominance of the large commercial law firms in Anglo-American practice has been a theme of the professional literature for much of the last twenty years. These play a very significant role in globalization itself – legitimating (indeed in John Flood's terms 'sanctifying'[43]) major international transactions with the imprimatur of Anglo-American law, managing uncertainty and stabilizing not just the parties' but the global markets' expectations. The largest law firms have grown very rich in the process. The UK big four – Allen & Overy, Clifford Chance, Freshfields, and Linklaters – have seen their collective revenue increase by 198 per cent since 2000, from £1.68bn to £4.82bn, with most of that growth coming from international and emerging, rather than domestic, markets.[44] The signs are that the biggest firms – the so-called 'magic circle' giants and their US counterparts – are pulling even further away not just from the domestic but the international competition.[45] Certainly the LSA is unlikely to have much impact at this very sharp end of the market, at least in the short term. Particularly in the US, but in the UK too, these high profile lawyers play, and will continue to play an important intermediary role in the political economy. They communicate business needs to government, they lobby, they move through

42 I have suggested elsewhere that market differentiation and fragmentation is in fact more fundamental to understanding the operation of the legal services market than competition per se – see Julian Webb, 'Turf Wars and Market Control: Competition and Complexity in the Market for Legal Services' (2004) 11 *International Journal of the Legal Profession* 81.

43 John Flood, 'Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions' (2007) 14 *Indiana Journal of Global Legal Studies* 35.

44 Data derived from 'The Transatlantic Elite' *The Lawyer,* 10 May 2008, <www.thelawyer.com/cgi-bin/item.cgi?id=132912> at 14 August 2008.

45 Ibid. See also, in the US context, Peter D Sherer, 'The Sky's the Limit', *American Lawyer,* May 2008, 155 (showing how compounding profits will widen the gap even among the ultra-elite firms).

the revolving door between the law firms and government or regulatory agencies, and sometimes cross the floor into the corporate environment. But more than that, in the new economy they are the key facilitators and 'moral entrepreneurs'[46] behind the emergence of new forms of private ordering and 'global law'.[47] Without them, the globalization process itself would not succeed.[48] This role is unlikely simply to disappear.

Below this level, many law firms in middle tiers have already done quite well from the new economy. A number of these have internationalised their offerings, or benefitted from the creation of new markets, eg, where governments have contracted out or privatised legal services. There is a strong feeling among commentators that the inward investment, and listing opportunities afforded by the LSA may well be exploited, particularly by larger mid-size and volume market firms.[49] And it is perhaps the volume market that remains most open to serious transformation. The potential to commoditise volume legal services remains enormous and is still relatively untapped. If external investment is permitted on an international scale, as seems consistent with the GATS ideology, then this will have significant consequences for domestic markets. Commoditisation is likely to involve two related processes: the delivery of relatively standard legal products through technologically rich environments, and the outsourcing of much routine transactional work to legal process outsourcing (LPO) businesses. The potential for such processes is already being explored in a relatively fragmented fashion. A number of English firms are already using technology to deliver services to the volume market. Examples include firms such as Lovetts plc, a five solicitor firm which incorporated in 1994, and has since become a recognised market leader[50] in delivering highly automated, low cost, pre-legal debt recovery, and successful volume conveyancers like Barnetts.[51] A number of law firms in the UK – and more in the US - are experimenting with different approaches to outsourcing, as are a growing number of in-house legal departments, using offshore entities to deliver both legal process outsourcing, and back-office functions like IT and accounts support. LPOs are growing rapidly in size and sophistication, delivering a wide range of services. The Indian LPO market is predicted to grow massively from US$146m in 2006 to US$640m by the end of 2010.[52] While most vendors have built business by concentrating on low value-high volume services, such as document review, e-discovery and legal publishing, the key players have consolidated by moving up the value chain into more high-end services, or specialist niches, such as contract services and intellectual property. It cannot be too long before someone starts to pull it all together, and when they do, the impact could be dramatic. Combine the two and we can begin to see an opening for high volume multi-national products to be serviced entirely offshore. In

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46 Yves Dezalay and Bryant Garth, 'Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes' (1995) 29 *Law and Society Review* 27.

47 Arthurs and Kreklewich, above n 13, 22.

48 Flood, above n 43, 41.

49 See for example, Tony Williams, 'Ten Trends That Will Shape the Legal Market' *The Times* (London), 22 October 2007, <http://business.timesonline.co.uk/tol/business/law/article2718339.ece> at 20 August 2008. Charlotte Edmond, 'Private Equity Firm First to Openly Target Legal Services in the UK' *Legal Week,* 6 March 2008; E Leigh Dance, 'The UK Legal Services Act: What Impacts Loom for Global Law Firm Competition?' *Law Practice,* July/August 2008, p 35.

50 Rated in the top band for debt recovery by the *Chambers UK Guide 2008* – see <http://www.chambersandpartners.co.uk/uk/rankings36.aspx?fid=1928&solbar=1>.

51 <http://www.barnetts-solicitors.co.uk> at 20 August 2008.

52 *Offshoring Legal Services to India – An Update* July 2007, <www.researchandmarkets.com/reports/c62163> at 20 August 2008

short, in twenty years time it may not be Clifford Chance and Baker and McKenzie vying for the title of the world's largest law firm, but 'Google Law International' and 'MSN Legal'.[53]

Even in the shorter term, the cold winds of marketisation will certainly add to the chill at what, in English terms, we call the 'high street' end of the market. The English legal profession has grown geometrically over the last twenty years,[54] and while much of that growth has been absorbed by the large commercial firms, the pressures on the lower end have increased. This is not just a consequence of a more crowded marketplace, but of long term structural changes to the market itself, affected by factors such as the opening up of the conveyancing monopoly, the introduction of conditional fees, and the consistent downward pressure on legal aid fees.[55]

The loss of the conveyancing monopoly and the introduction of conditional fees are both instructive in what they tell us about how the legal services market may behave in a deregulated market. The Administration of Justice Act 1985 permitted a new para-professional group of licensed conveyancers to enter the market. But this was not, on the whole, the 'big bang' the profession feared, though this may in part be because the effects of price competition were initially cushioned by the property boom of the mid-1980s. The reforms did undoubtedly increase competition among solicitors, though some research indicates that the effects on price were in fact locally very varied.[56] Fixed price conveyancing became commonplace, and it has generated greater transparency over costs. However, the introduction of licensed conveyancers did not of itself add a substantial element of inter-professional competition; rather licensed conveyancers were as likely to become collaborators as much as competitors, with many licensed conveyancers being employed by law firms.

The early history of conditional fees agreements (CFAs) is also instructive. The fundamental problem was that the initial system was under-regulated. It created a kind of market system that was largely costless to the consumer at the point of access, but one that was controlled and, to some degree, manipulated by the commercial interests of the insurance companies who underwrote the litigation, and law firms and claims managers who now had a direct financial interest in the outcomes of the litigation they took on. Claims management companies sprang up, scenting an opportunity for profit by tapping into what appeared to be a deep pool of minor personal injury litigation. There was a real lack of regulation over the setting of fee uplifts and insurance premiums, fees which consumers themselves had no real incentive to control. The insurance companies saw that they were potentially exposed to a far greater risk than they had anticipated and generated a high volume of satellite litigation about costs, which then created significant cash flow problems for claimant solicitors. The mess was finally sorted out by a mix of guidelines from the courts

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53 I am particularly grateful to John Flood for pointing out the potential for a major online information provider like Google to diversify into legal services.

54 In the past ten years the number of solicitors on the Law Society's Roll has increased by 46%, from 91,000 to 134,000 – Derek Bedlow, 'Brave New World' *Legal Week Student,* Spring 2008, pp 24-28 at 24.

55 Richard Moorhead. 'Legal Aid and the Decline of Private Practice: Blue Murder or Toxic Job?' (2004) 11 *International Journal of the Legal Profession* 159-190. See also Lord Carter's Review of Legal Aid Procurement, 'Procurement of Criminal Defence Services: Market-based Reform', February 2006, p 4-5. It argues that '[t]o be sustainable in the long term the supply of independent quality legal services must come from an efficient market structure that provides the right quality of service at minimum cost' and sees criminal legal aid contracts becoming concentrated in 'fewer, larger, more efficient firms'. <www.legalaidprocurementreview.gov.uk/docs/carter_review.pdf> at 20 August 2008.

56 See Frank H Stephen, James H Love and Alan A Patterson, 'Deregulation of Conveyancing Markets in England and Wales' (1994) 15 *Fiscal Studies* 102.

and new regulations, but not before two of the largest players in the market had collapsed, and a number of finance houses had withdrawn from CFA schemes. For our purposes, the point is that the CFA *debacle* demonstrates not just the risks of deregulation, but the fact that here the lack of proper regulation actually contributed to creating a system that clients could not understand (ie it actually created problems of information asymmetry[57]), and which actually disincentivised solicitors from acting in the public interest.[58]

Overall these various changes have now bedded-in, and successful firms at this end of the market have responded by adapting to the new economy; they have merged to generate economies of scale, routinised their work, and made use of information technology to deliver high volume, low cost services, often to a particular niche market. The growing interest of the new 'infomediaries', like price comparison website Moneysupermarket.com, in the most commoditised areas of legal work (conveyancing, personal injury and wills) is likely also to increase price competition in the future.[59] In this market, the LSA will almost certainly boost these trends, opening up new investment strands to the larger players, enabling further mergers and acquisitions, and potentially greater investment in new technology. Assuming that the world has started to move out of the current downturn by 2012, the new rules on ABSs could be introduced in time to ride the crest of a new investment wave, with the capacity to transform this end of the market, and leading, one suspects, to the domination of the marketplace by a smaller number of leading 'brands'.

To exploit these market trends law firms will need to develop business models and labour processes that will fit with the new economy.[60] The 'problem' (from a commercial perspective) is that many law firms are wedded both to ways of working, and to ideals and values which, though they still form an important feature of professional identity, may no longer sustain them economically. This is not to deny that firms have already changed significantly over the last twenty years or so. For many solicitors work has become increasingly specialized; outside of the smallest firms, the old image of solicitor as general practitioner is virtually dead. The 'Lone Ranger' image of the lawyer has also been replaced in larger firms by a conception of the lawyer as team player. These sorts of changes are significant, but do not necessarily tell the whole story. Despite such changes, firms may still be constitutionally inclined to a predominantly old economy worldview, which Muzio and Ackroyd term 'defensive professionalism'.[61] This, I suggest, is not so much old-fashioned professionalism, as a shift towards a managerialist ethos that still does not wholly fit with the logic of the new economy. What follows of course is a generalization, though one supported by quite a lot of empirical data, and industry comment.

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57 The problem of information asymmetry is seen as a cause of market failure, particularly in professional service markets where the consumers may have little information on which to judge the quality of service offered. This problem is more acute where the client is a relatively unsophisticated 'one shot' or very occasional 'repeat' player. In an unregulated market, therefore, information asymmetry increases the risk of 'adverse selection' – that without sufficient information, consumers will select poor quality services, often on the basis of price alone.

58 See generally Stella Yarrow and Pamela Abrams, 'Conditional Fees: The Challenge to Ethics' (1999) 2 *Legal Ethics* 192.

59 Rupert White, 'Retail Shift in Legal Services' *The Law Gazette,* 9 March 2008, <www.lawgazette.co.uk/in-business/retail-shift-legal-services> at 20 August 2008.

60 See for example, Williams, above n 49; Richard Susskind, Transforming the Law: Essays on Technology, Justice and the Legal Marketplace (2000), chapter 2.

61 Daniel Muzio and Stephen Ackroyd, 'On the Consequences of Defensive Professionalism: Recent Changes in the Legal Labour Process' (2005) 32 *Journal of Law and Society,* 615.

The key feature of defensive professionalism is that it is a strategy that seeks first and foremost to protect the status and profits of equity partners.[62] It is characterised by an industrial model of growth in which big is beautiful. The long term focus is thus on growing both the overall size of the firm, and the ratio of salaried fee earners to partners (referred to as 'leveraging'), as a route to increased profitability for the latter.[63] As clients become more price conscious, increased profitability is also generated by higher productivity demands. There is ample evidence of the long hours' culture and increasing workloads borne by associates and even trainees.[64] Associates in English magic circle firms are now expected to bill in the region of 1,700 to 1,800 hours per year. In mid-tier firms, the expectation is closer to 1,400-1,500 chargeable hours. These figures equate to somewhere between 6.4 and 7.6 billable hours per working day.[65] Buy-in to deteriorating working conditions is achieved by the 'tournament' for partnership, fuelling both a culture of compliance and processes of internal competition and (gender and ethnic) stratification.[66]

The logic of defensive professionalism is fundamentally conservative. It offers little incentive to change the business model, other than responsively to overt market threats. It involves a mindset that is often risk-averse and intolerant of failure; anything that is not fee earning may be 'rejected and discouraged as fee spending'.[67] Firms may be unwilling to invest in (risky) research and development. So far, many have struggled to find effective ways of addressing retention problems at associate level, despite the fact that high attrition rates involve not just a significant loss of investment in staff, but, research suggests, in a highly leveraged firm, can result in lower profitability.[68] Support functions, and their associated staff, may be under-resourced and under-valued: the first to go when profitability is threatened.[69] Where it does engage with the post-Fordist ethos of the new economy, defensive professionalism does so primarily because of the bottom line. It seeks competitiveness through managerial efficiency, a strong customer focus, routinisation of work where possible, and commoditisation of low value work, whether through technology or outsourcing.

In terms of moral economy, many of these developments are worrying, and not least because they remind us that professionalism has always been Janus-faced about its values. Capitalisms old and new have always used labour in pursuit of the accumulation of capital, and to that extent both use people primarily as a means to an end. However, there are qualitative changes that we probably should not ignore, and which represent a significant degrading of the old moral economy in a number of ways.

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62 Cf Susskind's observation that 'with very few exceptions… the top hundred law firms in the world are committed to squeezing as much profit as possible out of traditional legal service…. [T]hey will cling dearly to the old economy until there are overwhelming reasons to do otherwise'. above n 60, 55.

63 Muzio and Ackroyd, above n 61.

64 Ibid, 638.

65 Bedlow, above n 54, 26.

66 See Robert G. Lee ''Up or Out' – Means or Ends? Retention in Large Law Firms' in Philip Thomas (ed) *Discriminating Lawyers* (2000); Hilary Sommerlad and Peter J. Sanderson, Gender Choice and Commitment: Women Solicitors in England and Wales (1998).

67 Susskind, above n 60, 64-65.

68 Yasemin Y Kor and Huseyin Leblebici, 'How Do Interdependencies Among Human-Capital Deployment, Development and Diversification Strategies Affect Firms' Financial Performance?' (2005) 26 *Strategic Management Journal* 967.

69 Muzio and Ackroyd, above n 61, 636-7; See also 'Employee survey reveals support staff dissatisfied' *The Lawyer,* 1 September 2008.

First, growth and internationalisation within a firm may weaken the social and collegial ties within that firm, creating a vicious circle whereby still greater emphasis is placed on bureaucratic and managerialist structures in an attempt to replace the lost sense of identity and cohesion.[70] Secondly, the increasing segmentation and fragmentation of the profession as a whole is also of considerable significance. Fragmentation significantly undermines the unity of the profession.[71] As a matter of regulation, it raises questions about the capacity of a single regulatory body (such as the SRA) to maintain both its legitimacy, and its capacity to regulate through what is fundamentally a single professional code. Fragmentation may equally reduce the sense of collegiality within the wider profession; making the representation of the profession *qua* profession more difficult, and potentially weakening the influence of the collective profession in the political economy. Thirdly, the industrialisation of much transactional work, so that tasks are distributed between teams of workers, may create greater functional dependence between workers, but it also generates new ethical problems of its own,[72] and its routinisation and commoditisation may also contribute to a loss of the experience of law as 'meaningful work'[73] or 'craftsmanship'. For some, the growing emphasis on business imperatives threatens to undermine the ethos of universal service,[74] or perhaps, the outright rejection of traditional notions of professionalism as so much 'sherry talk'.[75]

B. Regulation

As the first independent review of the legal services market since Sir Henry Benson's Royal Commission reported in 1979, and the first ever, to my knowledge, to focus specifically on the issue of regulation, Clementi represented a highly significant development in the UK regulatory debate, and a victory for the new moral economy.

It was also a clear reflection of changing perceptions about the function of the regulatory state. Although influenced by the deregulation debate of the 1980s and the move to models of 'New

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70 Cf. Anthony Ferner, Paul Edwards and Keith Sisson, 'Coming Unstuck? In Search of the 'Corporate Glue' in an International Professional Service Firm' (2006) 34 *Human Resource Management* 343.

71 These arguments are developed more fully by Andrew Francis, 'Legal Ethics, the Marketplace and the Fragmentation of Legal Professionalism' (2005) 12 *International Journal of the Legal Profession* 173, 183-9.

72 The need to operate increasingly complex systems for checking conflicts of interest is one obvious consequence, but, more generally, in the move to team working, decisions traditionally made by a single professional must now either be negotiated among a team of people, or delegated to a team leader with responsibility for such decisions. Neither scenario sits entirely comfortably within an ethical model of decision-making that assumes individual professional autonomy. See Mary Twitchell, 'The Ethical Dilemmas of Lawyers in Teams' (1988) 72 *Minnesota Law Review* 697, 716, 726; Edwin H Greenebaum 'Law Firms and Clients as Groups: Loyalty, Rationality and Representation' (1988) 13 *Journal of the Legal Profession* 205.

73 Bill Simon defines 'meaningful work' as work that is a means both of self-expression and of connection with others – see William H Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (1998), 112.

74 See, for example, Anthony Kronman's *The Lost Lawyer* (1993). These concerns, however, are hardly new, and many of them were already being expressed in the early twentieth century – when the large law firm first started to emerge as an entity in the United States: see Champ S Andrews, 'The Law. A Business or a Profession?' (1908) 17 *Yale Law Journal* 602; Julius Henry Cohen, The Law: Business or Profession? (1924).

75 A phrase used by a solicitor quoted by Christa Christensen, Suzanne Day and Jane Worthington, ''Learned Profession? – the Stuff of Sherry Talk'. The Response to Practice Rule 15' (1999) 6 *International Journal of the Legal Profession* 27.

Public Management',[76] the debate has moved beyond a crude deregulation agenda, to stress the need for systems of regulation that are themselves fit for the new moral and political economy: efficient, systematic, transparent and accountable, whilst remaining – or perhaps becoming even more – skeptical of the (conventional) role of the state in regulation.[77]

It is tempting to suggest that the imprint of the new moral economy ran through the Clementi Review rather like the lettering through a stick of rock. The Review was shaped by a very different perception of professional services from that which had informed most debate until the 1980s. Now the language of competition had largely overridden the traditional discourses of professional service and autonomy. An instructive comparison can be drawn with the Benson Commission. Benson was very much the final act of a gentler age. It was dominated by the traditional values of professionalism, and to an extent that was surprising even then, gave the professions a clean bill of health. While ten years later, in 1989, Lord Benson (as he had become) could round on the Lord Chancellor Lord Mackay's Green Papers on legal services for their attachment to 'the political dogma of competition',[78] the rules of the game had changed sufficiently by 2004 for Sir David Clementi's review to be framed precisely by that same 'dogma', as his terms of reference proclaimed.

Clementi's objective was also to create a regulatory framework that was sufficiently independent *from* lawyers. Again, this constitutes an obvious but nonetheless significant shift in the balance of the moral and political economy. Lawyers' themselves have traditionally sought regulatory regimes which guarantee *their* independence, both from the state and, in some respects, from client interests. Whilst that traditional sense of independence was certainly acknowledged as important in the review, this framing of the issues reinforces a key assumption of the first term of reference: that consumers need protection from the legal profession; that left to their own devices, the majority of lawyers will resist competition. It assumes that the interests of lawyers and clients are generally not aligned, and that, given the opportunity, lawyers will use their power and knowledge, and, indeed, their moral claims to independence and self-regulation, to create monopoly rents for themselves.[79]

In this context, it is tempting to see the Legal Services Act, at the level of political economy, as the state's strategic response to a process of transition whereby, in Abel's pithy phrase, 'the traditional profession mobilized state power to resist the market, [and] the modern profession mobilizes market forces to resist the state',[80] and as indicative of the profession's failure to capture the moral high ground.

This is not to say that there are no potential benefits to be had for the profession, as well as consumers, out of this process. The proposal of a broadly co-regulatory model has been generally favourably received – and rightly so. If the LSB can position itself effectively as an intermediary

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76 Christopher Hood, 'A Public Management for All Seasons' (1991) 69 *Public Administration* 3-19; Hilary Sommerlad, 'The Implementation of Quality Initiatives and the New Public Management in the Legal Aid Sector in England and Wales: Bureaucratisation, Stratification and Surveillance' (1999) 6 *International Journal of the Legal Profession* 311.

77 Julia Black, 'Proceduralizing Regulation: Part 1' (2000) 20 *Oxford Journal of Legal Studies* 597, 600-601.

78 Hansard (HL) vol. 505, col.1317, 7 April 1989.

79 See Gillian K Hadfield, 'The Price of Law: How the Market for Lawyers Distorts the Justice System' (2000) 98 *Michigan Law Review* 953; Anthony Ogus, 'The Economic Basis of Legal Culture: Networks and Monopolization' (2002) 22 *Oxford Journal of Legal Studies* 419.

80 Above n 12, 484.

between lawyers, the state and consumers, it may help to depoliticise some of the debates about the provision and quality of legal services. Moreover, if the OLC can also make a real difference to the efficiency of complaints handling, then these processes together could provide an important foundation for (re)constructing institutional trust in the profession.

But, on the other hand, there are genuine concerns that the broadly deregulatory thrust of the Act could have unintended consequences for access to justice. Clearly a 'Tesco law' approach does create opportunities to increase access to legal services, but there are threats too. The greatest risks to access may arise if 'Tesco Law' cherry-picks the most profitable services, to the detriment of established local providers. A particular risk here is of increasing geographical inequalities in meeting legal need, particularly in rural areas. We need to look very carefully at whether hastening the disappearance of the high street solicitor, in the wake of the independent butcher and baker, is really increasing consumer choice. This may be particularly critical if cherry-picking knocks out full service legal practices, without providing available alternatives, especially given the growing evidence of the extent to which people often experience clusters of 'multiple justiciable problems'[81] which may require a range of expert support.

Clementi rejected these as arguments against opening up the market on three grounds:[82] (i) that access problems are more about cost than proximity (and here Clementi rightly encouraged providers to be more inventive in finding ways of meeting legal need other than face-to-face); (ii) that costs of 'uneconomic' services such as legal aid should be transparent; 'there is no reason why they should be subsidised by the users of other services',[83] and (iii) that if there is a particular issue about rural access this should be addressed as a separate policy/regulatory issue aside from the question of who provides the capital. Most of these arguments have some merit, but do not necessarily address the underlying risks. Baldwin *et al* have rightly raised the question whether the market should be managed in some respects to ensure a minimum geographical distribution of suppliers.[84] This has never been properly answered. There are also grounds for concern that transparency of cost and cross-subsidisation might become significant regulatory issues. Clearly, there are good reasons for increasing the transparency of *pricing*, but I am not sure it follows that providers of legal services should have to stop or somehow be more transparent about cross-subsidisation. I do not think the critique of cross-subsidisation is particularly well thought-out. There are counter arguments, notably in relation to the moral economy of lawyering, and the view of law as a social as much as an economic good, which militate against a narrowly economic view of cross-subsidisation, and which Clementi seemed to ignore. For example, if we reject the legitimacy of cross-subsidisation then we would surely risk precluding on purely economic grounds any ethical commitment by lawyers to provide *pro bono* services.

This brings me to my second point: the relationship between competition and quality. This is an issue that needs to be considered in respect of both regulated and unregulated services. As we saw in England in the early 1990s, with a number of scandals around immigration advice,[85]

81 Pascoe Pleasence, et al, 'Multiple Justiciable Problems: Common Clusters and Their Social and Demographic Indicators' (2004) 1 *Journal of Empirical Legal Studies* 301.

82 Above n 30, 119-21.

83 Ibid, 120.

84 Robert Baldwin, Martin Cave and Kate Malleson, 'Regulating Legal Services: Time for the Big Bang?' (2004) 67 *Modern Law Review* 787, 791.

85 See, Lord Chancellor's Advisory Committee on Legal Education and Conduct, Standards and Regulation of Immigration Advice (1997).

the risks to consumers may be particularly high in respect of unregulated legal services. I am not assuming here that regulation necessarily provides a strong guarantee of quality, but at the same time the degree and transparency of the risks in using a less-regulated entrant need to be carefully factored into the regulatory mix, and that information made available to consumers. The LSB could require service providers to be more explicit not just on price, but also quality measures and risk. This is not simply a matter of reducing informational asymmetry. Regulation of both risk *and* quality, it is submitted, are important. Risk assessment (and ultimately risk-based regulation) provides a potentially useful mechanism for encouraging best practice and higher levels of compliance by dangling the carrot of a reduced regulatory burden in front of lower-risk providers. Quality regulation is important in preventing adverse selection, and the problems of market capture and an unregulated 'race to the bottom', which might not just reduce choice, but also create potential externalities in the market (such as higher insurance or regulatory costs). Effective quality regulation, not just consumer access to information, I suggest is, paradoxical though it may seem, an important guarantor not just of quality, but also of competition.

IV. Conclusions – and some lessons for New Zealand?

Without doubt the English professional project is entering a new phase; one in which the status and rewards of traditional professionalism are increasingly for the few, rather than the many, and in which many of the old certainties about what it means to be a 'professional' are a lot less certain. But in reality this is, I suggest, part of the logic of classical professionalism, which, as a last resort, seeks always to defend its own privileges, if not now from the state, then from the inexorable pull of the market. If it has to adapt radically to do so, it almost certainly will.

Whether the opportunities created by market-based developments such as the LSA are likely to add to rather than reduce the tensions within professionalism is a moot point. Developments in England and Wales over the past decade do not suggest that the professional associations can necessarily be relied on to provide political leadership or to be a driver for radical change. In the words of the legendary Frank Zappa, 'It isn't necessary to imagine the world ending in fire or ice – there are two other possibilities: one is paperwork, and the other is nostalgia'.[86] The professional associations' nostalgic turn to their claims of independence and professional disinterest as a means of defending their turf through the 1990s, did little other than to expose such claims as at best morally ambiguous, and at worst 'as a dying bourgeois ideal'.[87] The profession doubtless hopes that the LSA does not presage a future that threatens to kill it by weight of regulation. As the past decade shows, however, whatever way the future goes will depend in part on the profession itself. The LSA in this context offers some opportunity to draw a line under the past. The separation of regulatory and representative functions, and in particular, the transfer of complaints to the independent OLC finally removes from the profession the debilitating task of defending the indefensible, of being judge in its own cause. The possibility of a positive co-regulatory regime developing between the LSB, the professional regulators and representative bodies holds out the possibility that value compromises can be produced that will be capable of maintaining public trust in the profession. But, if professionalism is to have a meaningful future, I suggest, it needs to be embedded first and foremost within the ideology and practices of law firms.

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86 See <http://en.wikiquote.org/wiki/Frank_Zappa> at 3 September 2008.

87 Abel, above n 12, 497.

The move to more firm-based regulation could play an important part in this. It will mean that law firms, not just individual lawyers, have to take greater responsibility for regulatory and ethical compliance. This creates important opportunities to develop and enhance internal compliance systems and cultures.[88] While these can be used in a way that is narrowly managerialist, or as an exercise in creative compliance, research in large law firms has also highlighted the potential of such systems to sustain and reinforce professional values and practices, within a culture of professionals organising professionals.[89] Ethics partners and ethics committees exist in a growing number of law firms already in the UK, USA and Australia, though it is often questionable how much power they have – at least outside of technical calls on matters such as potential conflicts of interest. More could be done to support such persons, for example, by the SRA promoting ethics advisors as a form of good practice,[90] or even moving to a stronger, mandated, compliance culture, perhaps with the promise of light touch regulation for those who adopt high quality internal processes. These kinds of changes could give such persons greater authority within their organisations.

We should also not overlook the possibility that the move to more corporatised business models could support law firms to break out of the mode of defensive professionalism just described. External investors may not only be less risk-averse than inside managers, but will almost certainly require new business models to be developed as a condition of their investment. This is both an opportunity and a threat. While there are significant ethical risks,[91] the idea that, in this process, these corporate law firms could become the locus of a new moral economy of legal practice also should not be dismissed out of hand. The premise of the LSA, in requiring ABSs to appoint a Head of Legal Practice to oversee professional compliance,[92] appears to push such practices further down the path of compliance-based regulation than their unincorporated competitors. This could potentially enable such firms to try and create some market advantage in setting themselves up as ethical leaders of the profession. At the very least it limits the risk of 'floating responsibility' (that is ethical and regulatory responsibility that attaches to the organisation, but rests with no specific individual) that is often attributed to corporations and large bureaucracies.[93] The introduction of fully incorporated firms also holds out some interesting possibilities. Incorporation itself is an opportunity to create a public statement about the type of law firm you intend to be. While investors will be interested in the bottom line, in the current climate, increasing numbers are also likely to want to know about the business's sense of its place in the community, or its version of 'corporate

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88 See for example, Christine Parker, 'Lawyer Deregulation via Business Deregulation: Compliance Professionalism and Legal Professionalism' (1999) 6 *International Journal of the Legal Profession* 175; Julian Webb and Donald Nicolson, 'Institutionalising Trust: Ethics and the Responsive Regulation of the Legal Profession' (1999) 2 *Legal Ethics* 148.

89 James Faulconbridge and Daniel Muzio, 'Organizational Professionalism in Globalizing Law Firms' (2008) 22 *Work, Employment and Society* 7, 14.

90 Elizabeth Chambliss, 'MDPs: Toward an Institutional Strategy for Entity Regulation (2001) 4 *Legal Ethics* 45, 61.

91 For example, Christine Parker cites the risks of greater managerialism (though, as I have sought to show, this is happening without incorporation); over-commercialisation of legal practice, and increased conflicts of interest between lawyer and non-lawyer participants in the incorporated firm – 'Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible' (2004) 23 *University of Queensland Law Journal* 347, 355-6.

92 See s 91 LSA 2007.

93 David Luban, Alan Strudler and David Wasserman, 'Moral Responsibility in the Age of Bureaucracy' (1992) 90 *Michigan Law Review* 2348.

social responsibility' (CSR).[94] Just as many large firm clients now require firms to demonstrate a commitment to *pro bono* activity, or support for community initiatives, so it is entirely plausible that investors will expect the same. It is notable in this context that the listed Australian firm of Slater and Gordon Limited emphasised their values and ethical obligations in their prospectus, including their overriding obligations to the law and their clients, to an extent beyond that which would seem required on a purely compliance basis.[95]

So, what are the lessons and challenges for New Zealand in all this? New Zealand is in some respects a very different jurisdiction from England. Its largest firms are primarily national rather than global in reach, and in terms of size, would sit well in the mid-rank of English law firms.[96] In other regards, however, there appear to be some significant similarities, though accurate, detailed, comparison is hindered by a relative lack of published statistics and research on the New Zealand profession. In a very brief overview of the practice context it can be said that the profession in both jurisdictions has grown rapidly over the last twenty years. Work practices appear to be changing in New Zealand in ways that are not dissimilar to the UK. As in the UK, and most other Common Law jurisdictions, there is evidence of a wide earnings gap between corporate lawyers and the rest, and of a growing long hours' culture.[97] There is also evidence of continuing gender stratification.[98] Private client work has been impacted by even tighter budgetary control over legal aid than in the UK. Until this year remuneration rates had not been increased for 12 years, leading many firms to argue that legal aid had become wholly uneconomic.[99] Complaints against lawyers have been on the rise.[100]

In terms of regulatory reform, of course, the New Zealand profession is also facing changes under the Lawyers and Conveyancers Act 2006 (LCA). The changes will be largely familiar to a New Zealand readership. Like the English Administration of Justice Act 1985, the LCA creates a separate conveyancing profession,[101] permits conditional fees,[102] and allows law firms to incorporate, though like earlier legislation in England and Australia, it restricts ownership and control essentially to lawyers.[103] It puts the 'fundamental obligation' of independence and the duties owed by lawyers to the court and to their clients on a statutory footing.[104] It does the same with the obli-

94 A growing number of large UK law firms have already developed CSR policies and programmes, including Clyde & Co, CMS Cameron McKenna, Freshfields, S J Berwin, and Simmons and Simmons. See also Halina Ward, 'Corporate Responsibility and the Business of Law' (International Institute for Environment and Development, London, 2005) (on file with the author).

95 <www.slatergordon.com.au/pages/reports_presentations.aspx;> at 8 May 2008.

96 In fact, in terms of the size of firms, number of practitioners and population served it is probably much more comparable to the Scottish profession – see, eg, data from the Law Society of Scotland's Annual Report 2005, <http://www.lawscot.org.uk/AnnualReport2005/membership_society.htm>.

97 John H. Farrar, 'The Winds of Change Hit the Legal Profession' (2007) 15 *Waikato Law Review* 23.

98 Georgina Murray, 'New Zealand Women Lawyers at the End of the Twentieth Century' in Ulrike Schultz and Gisela Shaw (eds), *Women in the World's Legal Professions* (2003) 131-3.

99 See, eg, TV3 'Budget boost for legal aid lawyers not enough' 22 May 2008, <http://www.tv3.co.nz/News/Story/tabid/209/articleID/56810/cat/41/Default.aspx> at 15 August 2008.

100 Farrar, above n 97.

101 Section 3 LCA.

102 See Part 11, LCA.

103 Section 6. Curiously this definition section has been used as the mechanism for introducing two quite substantial changes to legal practice, the possibility of incorporation, and the definition of reserved activities.

104 Section 4. The duties are not enumerated in the Act and s 4 is best seen therefore as merely declaratory of existing Common Law obligations.

gation (imposed on the New Zealand Law Society – NZLS) to maintain rules of professional conduct and a code of conduct,[105] The Act also identifies a number of reserved areas of practice, but this does involve some erosion from the position under the Law Practitioners Act 1982, insofar as the giving of general legal advice is not a reserved activity. As in England and Wales will writing and tax advice are also not reserved.

The LCA introduces a number of other key regulatory changes to professional organisation and discipline. It leaves first-tier complaints-handling with the NZLS, but then creates both the post of Legal Complaints Review Officer[106] as an independent, but second tier complaints service, and an independent Lawyers and Conveyancers Disciplinary Tribunal[107] for more serious misconduct. Moreover, it has been anticipated that the New Zealand Law Society will take over the regulatory functions of the district law societies, and undertake representative functions for its members. Given that membership of the NZLS is voluntary, the extent of its representative role could be moot. The Society has sought to establish itself as the sole representative body for lawyers in New Zealand, though at the time of writing this is not yet a foregone conclusion.[108]

In sum, then, it is apparent that the general direction of travel is not dissimilar to the UK, though New Zealand has yet to progress as far down the path predicted by the new economy. The Lawyers and Conveyancers Act has relatively limited deregulatory effects. It looks, by comparison to the LSA, a relatively play safe measure for both state and profession. It is unsurprising that, in 2006, the President of the NZLS greeted its arrival with 'a sense of relief'.[109] The opening up of conveyancing may well increase price competition between solicitors, but does not necessarily presage substantial competition from conveyancing practitioners. The introduction of conditional fees to New Zealand, if the lessons from England are learned, may have significant economic benefits for law firms squeezed by cutbacks in civil legal aid, but both this and the opening up of the conveyancing market have increased the pressure to commoditise legal services in England, and could do the same in New Zealand. Commoditisation itself is not without ethical and moral risk (for example, it depersonalises the lawyer-client relationship, and can increase the risk of failure to distinguish those cases that require a more bespoke service). The English experience also suggests that conditional fees only enhance access to justice where the interests of lawyer, client and insurer are all aligned. Moreover the English experience suggests it is unlikely that the LCA will be the last word, even in the medium term. As we have seen in England, once the market genie is out of the bottle, it is very hard to put it back in and not least because, in an increasingly fragmented legal services market, it is not in the interests of the economically powerful to do so.

The LCA, then, may hasten the fragmentation of the profession, but in a number of respects it seeks also to reinforce the old moral economy and underpin it by a modicum of 'modernisation' as regards client care and complaints handling. The economic impact of the regulatory reforms on

105 Sections 94-95.

106 Sections 190-205.

107 Sections 226-235.

108 Section 65 LCA. At the time of writing it appears uncertain that the NZLS will establish the preferred 'One Society' model, as the Auckland District Law Society has rejected that approach following uncertainties whether it would be able to retain control over the representative functions in respect of its members, and is seeking incorporation in its own right – Sarah McDonald, 'Auckland lawyers shun One Society', *National Business Review,* 22 August 2008, <www.nbr.co.nz/article/auckland-lawyers-shun-one-society-34289> at 2 September 2008.

109 Letter from Chris Darlow to practitioners, 26 April 2006, <www.lawyers.org.nz/PDFs/LCA/letterweb.pdf> at 2 September 2008.

small firms will almost certainly not be as great as in the UK. The benefits of incorporation to mid-size and large firms are also likely to be less than if greater liberalisation of business structures had been allowed, though the risks may be less too. It will be interesting to see how the profession in England or Australia responds to the first attempt at a hostile takeover of a listed incorporated practice! On the other hand, the relative value of external investment, even in a smaller jurisdiction should not be overlooked. Large Australian law firms are working strategically to establish a strong, trans-national, competitive presence in markets in the Asia Pacific region,[110] and there is a possibility that the large New Zealand firms will be left further behind in terms of that market. Whether that leaves them more exposed to predatory actions from across the Tasman, or from further afield is a moot question. So far there are relatively few genuinely trans-Tasman law firms, and the only truly global firm with a presence in New Zealand – Minter Ellison[111] – is also the only major global player to have an Australasian 'home' jurisdiction. Whether significantly more, and larger, Australian firms will follow Slater and Gordon, and whether New Zealand firms will begin to press for a level playing field with their Australian counterparts also remains to be seen.

The failure of the LCA to formally separate representative and regulatory functions appears surprising, in the context of international comparisons with both England and Australia, and particularly as the LSA in England operationalises reforms similar to those actually proposed in New Zealand by the 1997 E-DEC Report, commissioned by the New Zealand Law Society itself.[112] This, it will be recalled, had proposed the establishment of a New Zealand Law Council with responsibility for regulating professional conduct and promoting client protection in the public interest, leaving the Law Society free to develop its representative functions. How and whom the NZLS will represent is presently unclear. The precedents are not entirely encouraging. The English Law Society has increasingly struggled with the contradictions of its representative and regulatory roles; it has been hobbled by periods of poor and fractious leadership. It has been caught up in the contradictory needs of a fragmenting profession. It has thus too often found itself between the rock of small firms seeking a level of economic protectionism that, in reality, they would never be granted by a skeptical state, and the hard place of corporate firms who, increasingly, see themselves as having little in common with the 'high street' solicitor, and with little to gain from Law Society representation.

The lawyer's 'fundamental obligation' of independence may itself prove to be a double edged sword. While I do not deny the importance of independence as an ethical principle, the collective professional claim to independence becomes in a number of respects incoherent. Clementi, as we have seen, called the English profession's bluff, and won. If lawyers prize independence so much, then why should they not be obliged to behave independently, and be accountable to an independent body as such? The English profession has struggled with the ways in which its claims to independence have often served to privilege the interests of the few, over the many: notably the interests of equity partners over the growing army of associates, trainees, and paralegals; client

110 See Ashley H Pinnington and John T Gray, 'The Global Restructuring of Legal Services Work? A Study of the Internationalisation of Australian Law Firms' (2007) 14 *International Journal of the Legal Profession* 147.

111 Trading in New Zealand as Minter Ellison Rudd Watts; another 'global' trans-Tasman firm, DLA Phillips Fox is part of the DLA Piper Group, that grew out of three UK and US legacy firms. However that operates as a close alliance of independent practices rather than a true global partnership.

112 E-DEC Ltd, 'Purposes, Functions and Structure of Law Societies in New Zealand: Final Report to the New Zealand Law Society' (1997).

interests over the rights of third parties, minority groups and the environment,[113] and the interests of lawyers collectively, in their exploitation of monopoly rents and restrictive practices, over consumers. The irony is, of course, that market liberalisation also threatens to kill as much as it cures, notably by increasing the gap between the class of what we might call 'complete professionals' (the traditional equity partners) and the rest of an increasingly de-professionalised service class. Whether New Zealand will be any more successful at negotiating these dynamics and contradictions of professionalism in the new moral and political economy is for you to decide.

Finally, we should also recognize that the new political and moral economy could also have significant implications for legal education and training. One very likely outcome of the changes in England and Wales is that the numbers of fully qualified lawyers required will decline, as paralegals and LPOs take over more work. This creates a challenge for universities, who are under their own pressures to maintain recruitment levels, and for whom law courses have been a strong source of student numbers since the expansion of the early 1990s. Growing numbers of graduates are already working as paralegals, and, outside of the research-led universities, bodies like ILEX and a new Institute of Paralegals are already engaged in developing linkages with universities to assist graduates in obtaining paralegal qualifications, in part through their degree studies. Changes proposed by the Law Society/SRA at the vocational stage of training are also beginning to mirror the trends of practice for more bespoke and specialized courses, reflecting the fragmentation of the field of practice.[114] These trends, although capable of binding the professional bodies more closely into the reproduction of the profession, in turn may add to upward pressures on the already weakening ideal of unified legal profession, and downward pressure on the generic law degree, large parts of which are arguably redundant from the perspective of their professional utility, and increasingly unpopular with students chasing highly competitive training contracts and pupillages.

The link to education also brings our discussion of professionalism closer to one of the other themes of this issue: the law in context. Another common feature of the English and New Zealand systems has been their relative failure to take the study of the legal profession seriously within the law school curriculum. If it is taught at all, it is likely to appear either as just one element of a generic 'legal system' course, or, perhaps, as part of the context in teaching lawyers' ethics,[115] or legal skills.[116] Whilst this is understandable in the context of an increasingly crowded curriculum, it does mean that we, in the academic profession, are missing important opportunities to turn a critical spotlight onto a world that most of our students still wish to inhabit, but in fact have little critical appreciation of. But more than that, like it or not, understanding what lawyers are and what they do is fundamental to a fuller appreciation of the relationship between law and society. Legal practice continues to play a significant role in state formation and reconstruction; it is deeply imbricated in the creation of global capital, and, on a good day, the profession still has the power and the privilege to act as a bulwark against oppression of many kinds. In short, as Rick Abel observes, 'lawyers are a pivotal institution of civil society'.[117] A proper study of the legal profession not only adds to our appreciation of the law in action, but serves to emphasise both the

113 Donald Nicolson and Julian Webb, Professional Legal Ethics: Critical Interrogations (1999), notably at 282.

114 Andrew Boon, John Flood and Julian Webb, 'Postmodern Professions? The Fragmentation of Legal Education and the Legal Profession' (2005) 32 *Journal of Law & Society* 473.

115 See, eg, Duncan Webb, Ethics: Professional Responsibility and the Lawyer (2000), chapter 1.

116 See, eg, Caroline Maughan and Julian Webb, Lawyering Skills and the Legal Process (2nd ed, 2005) chapter 6.

117 Above n 12, xiii.

changing, and deeply contested character of (legal) professionalism in the twenty-first century, and the moral ambiguity of law and legal institutions.