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Necessary but Insufficient?

Reforms to Legal Services Regulation, Technology, and the Role of the Courts in Increasing Access to Justice in England and Wales

Natalie Byrom

The introduction of the Legal Services Act 2007[1] (LSA 2007) was heralded as a "comprehensive and profound" shift in legal services regulation,[2] whose stated intention was to "put consumers first."[3] The LSA 2007 emerged in response to recommendations of successive reviews[4] confirming that the legal services market was not working for individual consumers – complaints were high, redress mechanisms were inadequate, and gaps in provision left people unable to access justice. The LSA 2007 aimed to remedy these issues through clarifying routes to redress, weakening the lawyers' monopoly on the delivery of legal services and thereby increasing access to justice. Taken together, these reforms resulted in the creation of a regulatory framework that has been described as among the least restrictive in the world.[5] However, the decision to retain as part of the LSA 2007 a regulatory regime structured around professional titles and the affirmation of six "reserved activities"[6] – which are arguably unrelated to "any conception of relative public,

[1] Legal Services Act 2007, https://www.legislation.gov.uk/ukpga/2007/29/part/1 (last accessed Feb. 4, 2025).

[2] Myles V. Lynk, *Implications of the UK Legal Services Act 2007 for US Law Practice and Legal Ethics*, 23 Pro Law. 26, 27 (2015).

[3] Dep't Const. Affs., *The Future of Legal Services: Putting Consumers First*, CM 6679 (2005), https://assets.publishing.service.gov.uk/media/5a7c000740f0b63f7572ab8b/6679.pdf (last accessed Feb. 4, 2025).

[4] John Flood, *Will There Be Fallout from Clementi? The Repercussions for the Legal Profession after the Legal Services Act 2007*, 2012 Mich. St. L. Rev. 537 (2012).

[5] Stephen Mayson, *Independent Review of Legal Services Regulation: Assessment of the Current Regulatory Framework* 4 (UCL Ctr. Ethics & L., Working Paper LSR-0, 2020), https://www.ucl.ac.uk/ethics-law/sites/ethics_law/files/irlsr_wp_lsr-0_assessment_final_0.pdf (last accessed Feb. 4, 2025).

[6] These activities are "exercising rights of audience and rights to conduct litigation; preparing documents that relate principally to the transfer or registration of land and applications for probate; carrying out notarial functions; and administering oaths." The provision of legal advice is not a reserved activity under the Legal Services Act 2007.

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market or consumer risks in the twenty-first century"[7] – has created complexity and uncertainty that have undermined innovation in the interests of access to justice. Crucially, the reforms have failed to reorient the market toward the delivery of legal services to individuals on low incomes, a position exacerbated by the subsequent withdrawal of public funding for civil, family, and criminal legal aid in 2013. This combination of factors has led to a dramatic increase in the number of people representing themselves in legal proceedings, which in turn, has placed significant pressure on the courts and tribunals.

In the face of growing delays and a government unwilling to invest in the court system in the absence of extensive reform, in 2014, the Ministry of Justice and Senior Judiciary set in motion plans to harness technology to improve the efficiency of the courts by introducing new digital ways of working. By 2016, the scale and scope of these plans had been significantly expanded to include the adoption of in-court digital technology, online dispute resolution (ODR), online hearings, an expanded role for Case Officers,[8] and reductions in the workforce and physical court estate[9] – creating a £1.3 billion public sector technology program "unmatched anywhere in the world" in terms of breadth and aspiration. The reform program intended to produce a "single online system for starting and managing cases" that would "help people to understand their rights and what options are open to them"[10] and encourage earlier settlement of cases and uptake of alternative dispute resolution. Original proposals for this single online system included the intention to create automated processes to help litigants understand their rights and provide them with basic legal advice – making the justice system more navigable for self-represented litigants. Crucially, these new systems would not primarily be purchased "off the shelf" from the private sector but designed and built by HM Courts and Tribunals Service (HMCTS)[11] with input from the judiciary and other key stakeholders.[12]

[7] Stephen Mayson, *Independent Review of Legal Services Regulation: The Scope of Legal Services Regulation* 5 (Working Paper LSR-2, 2020), https://www.ucl.ac.uk/ethics-law/sites/ethics_law/files/irlsr_wp_lsr-2_scope_final.pdf (last accessed Feb. 4, 2025).

[8] These are administrative staff with delegated judicial powers to facilitate earlier settlement between parties.

[9] Bos. Consulting Grp., *HM Courts and Tribunals Service Reform Programme: Independent Review* 3 (2016), https://www.transformjustice.org.uk/wp-content/uploads/2023/11/BCG-Report-for-Release.pdf (last accessed Feb. 5, 2025).

[10] Ministry of Just. et al., *Transforming Our Justice System* 6 (2016), https://assets.publishing.service.gov.uk/media/5a803d9ae5274a2e8ab4f019/joint-vision-statement.pdf [hereinafter Ministry of Justice Report] (last accessed Feb. 4, 2025).

[11] An executive agency of the Ministry of Justice, jointly accountable to the Lord Chancellor and the Senior Judiciary for the administration of the courts. For a detailed examination of the adequacy of arrangements for the governance of HMCTS and their impact on the effective administration of the courts, please see Natalie Byrom, *Where Has My Justice Gone? Current Issues in Access to Justice in England and Wales*, Nuffield Found. (2024), https://www.nuffieldfoundation.org/wp-content/uploads/2024/Where-has-my-justice-gone.pdf (last accessed Feb. 4, 2025).

[12] Bos. Consulting Grp., *supra* note 9, at 4.

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The stated aim of these reforms was to produce a courts and tribunals system that is "just, and proportionate and accessible to everyone."[13]

Almost from its inception, the reform program was beset by delays and challenges.[14] Between 2017 and 2020 the program was repeatedly scaled back and the timetable for delivery extended.[15] By 2019, official communications from HMCTS seemed to indicate that they were quietly retreating from proposals for a publicly funded and designed pre-court automated process to help parties understand their rights – arguably the flagship initiative of the program in terms of improving access to justice.[16] The COVID-19 pandemic served to exacerbate existing issues, diverting key staff to focus on recovery plans and delaying the roll-out of existing projects,[17] while also intensifying significant case backlogs. By February 2023, the UK National Audit Office reported that even though HMCTS had only £120 million left of its total £1.3 billion budget, only twenty-four out of forty-four reform projects had been completed.[18]

In the face of a reform program that has failed to deliver on its original ambition and scope, and the absence of further public funding, the government and senior judiciary are now, once again, looking to the market to deliver solutions that will reduce pressure on the courts and increase access to justice. In November 2023, the Lord Chancellor[19] and senior judiciary announced a new vision for the future of civil and family courts and tribunals,[20] one that will harness technology and data standards to join up information, support, and dispute resolution services provided by the private sector. This future digital justice system has been described by the

[13] Ministry of Justice Report, *supra* note 10, at 4.

[14] Nat'l Audit Off., *Early Progress in Transforming Courts and Tribunals Session* 24 (2018), https://www.nao.org.uk/wp-content/uploads/2018/05/Early-progess-in-transforming-courts-and-tribunals.pdf (last accessed Feb. 4, 2025).

[15] Nat'l Audit Off., *Progress on the Courts and Tribunals Reform Programme Session* 17 (2023), https://www.nao.org.uk/wp-content/uploads/2023/02/progress-on-courts-and-tribunals-reform-programme-1.pdf [hereinafter Nat'l Audit 2023] (last accessed Feb. 4, 2025).

[16] Susan Acland-Hood, *How Do We Work out When to Stick, and When to Twist?*, Inside HMCTS (Feb. 28, 2019), https://insidehmcts.blog.gov.uk/2019/02/28/how-do-we-work-out-when-to-stick-and-when-to-twist/ (last accessed Feb. 4, 2025).

[17] Nat'l Audit 2023, *supra* note 15, at 15.

[18] *Id.* at 48.

[19] The Lord Chancellor and Secretary of State for Justice is appointed by the Monarch on the advice of the Prime Minister and is a senior member of cabinet. By law, the Lord Chancellor is the minister of the Crown responsible for the administration of the courts and legal aid in England and Wales. In their capacity as Secretary of State for Justice, the Lord Chancellor also administers the prison system and probation services in England and Wales. Prior to 2005, the Lord Chancellor was also head of the judiciary and a senior judge of the House of Lords in its judicial capacity. However, under the Constitutional Reform Act 2005, the Lord Chancellor was replaced as head of the judiciary by the Lord Chief Justice, and the Lord Chancellor may no longer sit as a judge.

[20] Ministry of Just. et al., *Vision for the Future of Civil and Family Courts and Tribunals*, U.K. Gov't (Nov. 20, 2023), https://www.gov.uk/government/news/vision-for-the-future-of-civil-and-family-courts-and-tribunals (last accessed Feb. 4, 2025).

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Senior Judiciary as a "public private partnership"[21] that moves "away from state controlled centralised systems"[22] – signaling a clear departure from the approach underpinning the court reform program.

As part of this vision, data standards specified and governed by a newly created committee – the Online Procedure Rule Committee (OPRC) – will be used to support the seamless transfer of client data between private sector digital information, advice, and dispute resolution providers, and eventually onto the courts, where necessary.[23] This new vision raises several fundamental questions relating to:

- the willingness of the market to deliver digital information, advice, and dispute resolution services aimed at individual consumers on low incomes – particularly those with legal problems in the areas of law formerly funded by legal aid;
- the incentives for private providers to transfer cases to the public justice system;
- the willingness of private companies to participate in a court-centric set of technical and data standards and the impact on fairness and access to justice should they choose to demur; and
- the capacity of the OPRC to oversee the delivery of proposals that appear, on the basis of existing information, to surpass in aspiration, scope, and difficulty of previous initiatives in financial services, specifically the UK Open Banking initiative[24] – which has itself been described as "ambitious, complex and world leading."[25]

Finally, the proposals, which rely on the existence and widespread public adoption of private sector digital information, advice, and dispute resolution services, call into question the adequacy of the scope of regulation established by LSA 2007.

[21] Lord Just. Colin Birss, *The 24th Competition Law Association Burrell Lecture: Is a Focus on Data the Way to Improve Access to Justice in Multifaceted World?*, U.K. Judiciary (Dec. 6, 2023), https://www.judiciary.uk/speech-by-lord-justice-colin-birss-is-a-focus-on-data-the-way-to-improve-access-to-justice-in-a-multifaceted-world/ (last accessed Feb. 4, 2025).

[22] *Id.*

[23] *Id.*

[24] The UK Open Banking initiative was developed to implement European-level legislation – the second Payment Services Directive – which was introduced with the aim of increasing competition in the payments sector through improving transparency, innovation, and supporting customer choice, while also improving consumer protection. Open banking allows customers to securely share data with trusted third parties so that a broad range of businesses can compete to provide bank customers with better financial services, more choice, and lower prices. This sharing has been made possible through mandating data standards and the creation of Application Programme Interfaces built to an open standard developed in partnership with industry.

[25] *See* Kirsten Baker, Competition & Mkts. Auth., Open Banking Lessons Learned Review 3 (2022).

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Research[26] increasingly suggests that the focus of the LSA 2007 on reserved activities and titles has created uncertainty, which has hindered the growth of new technology-based models of legal advice and support. Further, the structure of the LSA 2007 has placed many providers of technology-assisted legal information and advice services outside of the scope of legal services regulation. Successive research has highlighted the "credibility gap"[27] affecting unregulated businesses, particularly those that operate in the tech and data space, and the impact of this gap on public trust and adoption.[28] The imperative to successfully implement this latest set of reforms may therefore finally force a wholesale reconsideration of the regime established by the LSA 2007, specifically, the replacement of existing reserved activities and title-based regulation with a principled, risk-based approach capable of encompassing currently unregulated digital information, advice, and dispute resolution services.

This chapter is structured as follows. Section 12.1 briefly outlines the measures introduced as part of the LSA 2007, specifically focusing on those elements of the regulatory framework that were intended to increase access to justice. Section 12.2 presents a critical appraisal of these reforms and their impact. Section 12.3 describes the attempts made by government and the senior judiciary between 2015 and 2023 to harness public sector technology to address access-to-justice challenges in England and Wales, focusing principally on the digital court reform program. Section 12.4 describes some of the issues with delivery that have plagued the reform program, with a particular focus on one of the flagship initiatives intended to improve access to justice for individual consumers – the Online Solutions Court. Section 12.5 outlines what is currently known about new plans to leverage services designed and operated by the private sector to deliver digital pathways to and through the justice system, while Section 12.6 concludes the chapter by presenting some of the key questions that these nascent plans pose – questions with significant implications for the future of legal service regulation in England and Wales.

12.1 THE LEGAL SERVICES ACT 2007: REFORMING REGULATION TO INCREASE ACCESS TO JUSTICE?

The LSA 2007 was introduced to tackle systemic issues with the operation of the legal services market – particularly the parts of the sector that serve individual, rather than corporate clients. By 2004, complaints against legal service providers for

[26] Legal Servs. Bd., *Technology and Innovation in Legal Services: An Analysis of a 2022 Survey of Legal Service Providers* 10 (2023), https://legalservicesboard.org.uk/wp-content/uploads/2023/06/20230425-Tech-and-Innov-survey-2022-Designed.pdf (last accessed Feb. 4, 2025).

[27] Legal Servs. Bd., *The State of Legal Services 2020: Narrative Volume* 47–48 (2020), https://legalservicesboard.org.uk/wp-content/uploads/2020/11/The-State-of-Legal-Services-Narrative-Volume_Final.pdf (last accessed Feb. 4, 2025).

[28] Ctr. for Data, Ethics & Innovation, AI Barometer Report 4 (2020).

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issues including inadequate professional service, misconduct, and negligence[29] were high. In 2005, the Law Society, a consumer rights organization, reported that one-third of people considered that they had received poor service from the lawyer they had instructed.[30] Mechanisms for resolution and redress in relation to complaints, then operated by the bodies representing the profession, were "inefficient and inept,"[31] leading to extensive delays and rising backlogs. In parallel, successive independent reviews highlighted the complexity and incoherence of the regulatory regime for the legal services market, which was then overseen by twenty-two separate regulators whose remits were poorly aligned and who often failed to communicate with each other,[32] creating confusion and gaps in protection for consumers. Finally, an investigation by the Office of Fair Trading[33] raised concerns that the "lawyers monopoly" on the provision of legal services was distorting competition, negatively affecting quality and price,[34] and could no longer be justified as serving the public interest.[35]

A seminal review of the regulation of legal services, commissioned by government and led by Sir David Clementi, found that the framework that existed in 2004 had no clear objectives or principles and was inflexible, overly complex, and lacking in transparency and accountability.[36] Existing complaints mechanisms run by lawyers themselves were, at a level of principle, inadequate to secure consumer confidence.[37] In relation to competition, Clementi found that there was real and growing pressure from consumers and others as to whether the restrictive practices of the main professional bodies could still be justified. Overall, Clementi concluded, existing arrangements had "insufficient regard for the interests of consumers"[38] and should therefore be urgently reformed.

The measures introduced by the LSA 2007 were intended to address these issues by putting "the consumer first" and delivering a "simpler, more consistent regulatory framework."[39] Objectives for regulation, including the duty to improve access to justice and increase citizens understanding of their rights and duties, were introduced.[40] A new overarching regulator, the Legal Services Board, was created to

[29] Flood, *supra* note 4, at 540.
[30] *Id.* at 541.
[31] *Id.*
[32] *Id.* at 543.
[33] This is a non-ministerial government department responsible for protecting consumer interests across the UK between 1973 and April 1, 2014. *See Office of Fair Trading*, U.K. Gov't, https://www.gov.uk/government/organisations/office-of-fair-trading (last accessed Apr. 25, 2024).
[34] Dep't Const. Affs., *supra* note 3, at 15.
[35] Flood, *supra* note 4, at 539.
[36] Dep't Const. Affs., *supra* note 34, at 17.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 8.
[40] Mayson, *supra* note 5, at 3.

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oversee ten frontline regulators[41] and the principle that the regulation of professionals should be independent from the representation of them was enshrined in statute[42] – addressing concerns about regulatory capture. New, clearer routes for dealing with complaint resolution and redress were introduced through the creation of the Office for Legal Complaints and the Legal Ombudsman, and a Legal Services Consumer Panel was created to ensure that the perspectives of consumers of legal services were heard and considered by regulators.

The LSA 2007 also instituted reforms to existing rules that stated that law firms had to be wholly owned by qualified lawyers through the introduction of Alternative Business Structures (ABSs). The ABSs permitted the participation in law firms of those who are not legally qualified – whether are owners, managers, or investors. In doing so, the LSA 2007 supported the ownership of legal practices by a supermarket or investment bank.[43] The creation of ABSs aimed to reduce the fragmentation[44] of the part of the profession that served individual consumers through supporting the creation of larger, multidisciplinary organizations offering both legal and nonlegal services, for example, car insurance and legal services for accident claims.[45] Through improving access to both capital and economies of scale, it was hoped that ABSs would improve access to justice – making services cheaper and closing gaps in coverage that impacted negatively on those in rural areas and less mobile consumers.[46] Improved access to capital would also, it was hoped, support innovative service delivery models through enabling firms to invest in technology, tools, and infrastructure – supporting organizations to meet legal need at scale.[47]

While the introduction of the LSA 2007 was heralded as a "comprehensive and profound shift" in legal services regulation,[48] it left one aspect of the former regime largely untouched: the set of "reserved activities"[49] that can only be undertaken by those who are appropriately qualified and expressly authorized to do so – whether

[41] These were the Solicitors Regulation Authority, the Bar Standards Board, CILEx Regulation, the Master of the Faculties, the Council for Licensed Conveyancers, the Intellectual Property Regulation Board, the Costs Lawyers Standards Board, the Institute of Chartered Accountants in England & Wales, the Institute of Chartered Accountants in Scotland, and the Association of Chartered Certified Accountants.

[42] This led to the creation of new, separate regulatory arms for the Law Society and the Bar Council – the Solicitors Regulation Authority and the Bar Standards Board.

[43] One of the first licensed ABSs was Cooperative Legal Services, owned and run by the supermarket chain, Cooperative. Flood, *supra* note 4, at 549.

[44] At the time the LSA 2007 was introduced, the English legal profession consisted of 169,002 lawyers comprising 150,128 solicitors and 15,387 barristers. There were approximately 10,400 solicitors firms, most of which (84.8 percent) had four partners or fewer – to serve a population of 62 million people. Flood, *supra* note 4, at 539.

[45] *Id.* at 548.

[46] *Id.*

[47] Dep't Const. Affs., *supra* note 34, at 21.

[48] Lynk, *supra* note 2, at 27.

[49] These activities are "exercising rights of audience and rights to conduct litigation; preparing documents that relate principally to the transfer or registration of land and applications for

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individuals or entities.[50] The legal profession's monopoly is created and sustained through these six reserved legal activities, which vary significantly in content and scope.

The rationale for the decision to affirm rather than review these activities is unclear, especially since, it has been argued, the reserved activities are "not derived from any systematic or principled approach to regulation" but rather stem from "a collection of historical practices, political expediencies and anachronisms."[51] Legal activities outside the scope of the reserved activities, including the provision of legal advice, are not regulated under the LSA 2007 unless they are delivered by a legally qualified professional. This creates a curious disparity whereby legal professionals providing legal advice[52] are regulated for the delivery of that advice by the regulator for their profession, while those who are not legally qualified are not regulated for providing the same service.[53] Where non-reserved activities, for example, the provision of legal information and advice, are provided by those who are *not* legally qualified, these activities cannot be regulated by a legal services regulator, leaving consumers who rely on these services unable to access redress, other than that provided by general consumer law or under voluntary codes of practice.[54] The idiosyncratic nature of these arrangements has led to a framework that is still confusing, disproportionate, and inadequate to protect consumers from risk,[55] particularly in the context of the rise of legal technology designed to substitute for, rather than augment, services provided by legal professionals.

12.2 THE IMPACT OF THE LEGAL SERVICES ACT 2007 ON ACCESS TO JUSTICE IN ENGLAND AND WALES

Despite the stated objectives of the LSA 2007, including explicit commitments to protect consumers and improve access to justice, a growing body of evidence suggests that the revised regulatory requirements have failed to adequately address either the transactional or systemic harms that undermine access to justice in England and Wales. The following section explores what is known about the nature and impact of these harms in greater detail.

probate; carrying out notarial functions; and administering oaths." The provision of legal advice is not a reserved activity under the LSA 2007.

[50] Inst. of Chartered Accts. in Eng. & Wales, *An Overview of the Legal Services Act 2007* (2017), https://www.icaew.com/-/media/corporate/files/regulations/probate-and-abs/an-overview-of-the-legal-services-act-2007.ashx (last accessed Feb. 4, 2025).

[51] Mayson, *supra* note 7, at 5.

[52] For example, a solicitor, barrister, or licenced conveyancer.

[53] Mayson, *supra* note 7, at 5.

[54] *Id.*

[55] Stephen Mayson, *Independent Review of Legal Services Regulation: The Focus of Legal Services Regulation* 30 (Working Paper LSR-3, 2020), https://www.ucl.ac.uk/ethics-law/sites/ethics_law/files/irlsr_wp_lsr-3_focus_final.pdf (last accessed Feb. 4, 2025).

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12.2.1 *Transactional Harms*

Transactional harms are harms that accrue from the "unsatisfactory engagement of legal services,"[56] such as receiving inaccurate or inappropriate legal results, failing to exercise legal rights, or purchasing unnecessary or inappropriate legal services,[57] which can lead to both economic and wider forms of detriment. The scope of the LSA 2007 resulted in the creation of a large unregulated sector of legal service providers. Research published by the Legal Services Board in 2022 suggests that unregulated businesses have up to a 9 percent share of the overall legal services market serving individual consumers.[58] The same research found that while most people were satisfied with the service provided by all types of providers, those using unregulated providers were most likely to report dissatisfaction with the service they received. Limited data gathered from consumer rights charities and ombudsmen schemes suggests that issues with unregulated providers (such as receiving poor advice) have negative impacts on consumers including lost time, lost money, and worse health or well-being.[59] The true scale of transactional harms experienced by users of the unregulated legal sector is arguably obscured by the fact that the limited data that does exist is derived from consumer complaints. The exclusion of consumers of unregulated legal services from access to the accessible, centralized redress schemes created by the LSA 2007 has created significant barriers to reporting harms in the very parts of the legal services market that are subject to the least *ex ante* quality assurance and regulatory oversight. In the absence of access to bodies like the Office for Legal Complaints and Legal Ombudsmen, individuals who purchase services from unregulated legal service providers must rely on remedies under consumer law or voluntary codes of practice, which are difficult to access. Excluding consumers of unregulated legal services from centralized complaint and redress mechanisms also undermines the ability of regulators and policymakers to gather data on the prevalence of harm. While the Office for Legal Complaints and the Legal Ombudsman are required to collect and publish data on the scale and nature of the complaints they receive, no such requirements exist in relation to consumer law or codes of practice.

The decision to affirm rather than review or replace the preexisting reserved activities has created gaps in oversight and redress that expose individual consumers to transactional harms. In particular, the failure to bring the provision of initial legal

[56] Stephen Mayson, UCL Ctr. for Ethics & L., *Consumer Harm and Legal Services: From Fig Leaf to Legal Well-being*, Supplementary Report of the Independent Review of Legal Services Regulation, at v (2022), https://www.ucl.ac.uk/ethics-law/sites/ethics_law/files/irlsr_supplementary_report_2022_final_220413.pdf (last accessed Feb. 4, 2025).

[57] *Id.*

[58] Legal Servs. Bd., *Mapping Unregulated Legal Services: Research Report* 5 (2022), https://legalservicesboard.org.uk/wp-content/uploads/2022/06/20220616-Mapping-unregulated-legal-services-FINAL-1.pdf (last accessed Feb. 4, 2025).

[59] *Id.* at 6.

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information and advice within the scope of the LSA 2007 exposes consumers to the risk that they may fail to exercise their legal rights or receive inappropriate legal services. Successive research studies have found that legal problem-resolution strategy is strongly correlated with accurate understanding of rights, awareness of legal services, and correct problem characterization.[60] As such, access to accurate and appropriate initial information and advice is a fundamental prerequisite for securing effective legal services and outcomes. The fact that the provision of initial legal information and advice currently falls outside the scope of legal services regulation (unless provided by a legal professional) exposes consumers to risk particularly in the context of the shift to technology-assisted and online models of legal information and advice, which has been led by organizations and individuals not regulated under the LSA 2007. Research published by the Legal Services Board in 2022 found that unregulated firms are more likely than firms overall to use technology (e.g., apps, chatbots, and interactive websites) to deliver services to consumers.[61] As researchers have observed, the kinds of "one-to-many" models of legal information and advice facilitated by technology have the potential to damage more people, more quickly, than a single rogue human can.[62] This risk has been recognized by both the Legal Services Board and the Competition and Markets Authority (CMA), with the latter advocating for a wholesale review of the LSA 2007 as early as 2016.

12.2.2 *Systemic Harms*

In addition to exposing consumers to transactional harms, the LSA 2007 has failed to address the systemic harm created by the fact that the market is unable to supply: "[A]ny or enough providers of legal services who are competent, local, accessible, and affordable for the legal needs in question."[63] The LSA 2007 was introduced one year prior to the global financial crisis and three years before a change of government that ushered in a series of policies aimed at significantly reducing public spending on legal services for those on low incomes. In 2010 the incoming center-right government required the Ministry of Justice to find "budget cuts of around £2 billion from an overall budget of £9.8 billion."[64] In response, the then Lord

[60] This is true in addition to other factors, including legal confidence and social norms. *See, for example*, Pascoe Pleasence et al., How People Understand and Interact with the Law ii (2015); OECD & Open Soc'y Founds., Legal Needs Surveys and Access to Justice (2019).

[61] Legal Servs. Bd., *supra* note 26, at 9.

[62] Alison Hook, *The Use and Regulation of Technology in the Legal Sector beyond England and Wales*, Rsch. Paper for the Legal Servs. Bd. 52 (2019), https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf (last accessed Feb. 4, 2025).

[63] Mayson, *supra* note 56, at 4.

[64] House of Commons Just. Comm., *Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, at 5 (2015), https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf (last accessed Feb. 4, 2025).

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Chancellor introduced legislation – the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) – with the intention of drastically reducing the amount of public funding available to support the provision of legal information, advice, and representation in relation to both civil and criminal law matters. Official figures demonstrate that following the enactment of LASPO, central government funding for civil legal advice and representation has fallen by one-third.[65]

In the face of this new funding landscape, measures introduced as part of the LSA 2007 intended to increase the number of consumer-focused legal service providers have proved inadequate. In the absence of public funding, the market has failed to respond effectively to the growing numbers of people experiencing unmet legal need. Research published by the Legal Services Board in 2020 demonstrates that every year, 3.6 million people across England and Wales have an unmet legal need involving a dispute.[66] Far from encouraging more provision in areas of consumer law, "the 'centre of gravity' in private practice has shifted further toward the generally more lucrative areas of business, commercial and institutional law and away from the needs of individual consumers and their everyday legal problems."[67] The lack of accessible legal advice and representation has also increased pressure on the courts as more people attempt to represent themselves in legal proceedings.[68] As one expert remarked, the reforms to regulation do "not appear to have revolutionized access to justice in the U.K."[69]

12.3 COMPENSATING FOR MARKET FAILURE: DIGITAL COURT REFORM TO THE RESCUE?

As early as 2014, it was becoming clear that the courts and tribunals in England and Wales were unable to cope with the substantial increase in self-represented litigants, many of which experienced difficulties in effectively presenting their case.[70] A cross-party committee of parliamentarians concluded that the court system would require "more funding to cope."[71] However, an increase in funding, without significant reform attached, was not to prove forthcoming. Speeches published by members of the Senior Judiciary confirmed that they too were confronted with "the need to

[65] In 2010–11 the civil legal aid budget was £1.346 billion, compared with £873 million in 2022–23. The criminal legal aid budget was £1.542 billion in 2010–11, declining to £926 million in 2022–23. *See* D. Clark, *Resource Department Expenditure Limit (RDEL) of Criminal and Civil Legal Aid in England and Wales from 2005/06 to 2021/22*, Statista (Dec. 6, 2023), https://www.statista.com/statistics/1098628/legal-aid-spending-in-england-and-wales/ (last accessed Feb. 4, 2025).

[66] Legal Servs. Bd., *supra* note 27, at 21.

[67] Mayson, *supra* note 56, at 5.

[68] House of Commons Just. Comm., *supra* note 64 at 4.

[69] David Freeman Engstrom & R. J. Vogt, *The New Judicial Governance: Courts, Data, and the Future of Civil Justice*, 72 Depaul L. Rev. 171, 225 (2022).

[70] House of Commons Just. Comm., *supra* note 64 at 4.

[71] *Id.*

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reform which is necessitated by the retrenchment of the State."[72] In this context, it was argued that the courts would have to think boldly and consider a combination of reforms in parallel, including shifting to more inquisitorial processes, simplifying court procedures, modernizing court technology, and adopting new "virtual" approaches for preliminary hearings.[73] The then-master of the rolls (the head of civil justice) went further still, stating that without radical change England and Wales would face nothing less than the "managed decline" of its justice system.[74]

In March 2014, a memo to judges and court staff announced the approval of a reform program with a budget of £375 million over five years, to commence in 2015–16. The aim of the program was to create a "sustainable and affordable system" that would also "enable the legal profession and other justice agencies to adopt more efficient and cost saving working practices by using digital technology in their dealings with the courts and tribunals."[75] From 2015 onward, several reviews exploring options for reform took place. One group, led by Professor Richard Susskind, drew inspiration from projects in the Netherlands and Canada and recommended the creation of "a new online court utilising online dispute resolution (ODR) techniques to secure efficient and effective access to justice for individuals who did not have access to a lawyer."[76] A subsequent review of the structure of the civil courts, led by Lord Justice Briggs, broadly adopted the recommendations of Professor Susskind's working group as part of plans to create a "wholly new, standalone Online Court – the Online Solutions Court."[77]

The Online Solutions Court designed by Lord Justice Briggs was structured around a three-stage process, designed to support self-represented litigants to resolve low-value claims. Stage 1 of the Online Court used decision trees to help litigants understand the nature of their legal problem and assist them in finding appropriate sources of advice, help, and support.[78] If having progressed through Stage 1, litigants were unable to resolve their issue via alternative means, they would then be supported through an automated online process to complete an application form and submit relevant documents, before progressing to Stage 2. The second stage of the Online

[72] Roger John Laugharne Thomas, Baron Thomas of Cwmgiedd, Lord C.J. of Eng. & Wales, *Reshaping Justice*, Address to JUSTICE 3 (2014); *see also* Letter from Chris Graylin, Lord Chancellor & Sec'y St. Just. et al. (n.d.), https://www.judiciary.uk/wp-content/uploads/JCO/Documents/News+Release/REFORMING-HM-COURTS-AND-TRIBUNALS_2_.pdf (last accessed Feb. 4, 2025).

[73] Roger John Laugharne Thomas, *supra* note 72, at 4.

[74] Terence Etherton, Master of the Rolls, *The Civil Court of the Future*, Lord Slynn Memorial Lecture (June 14, 2017), https://www.judiciary.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf (last accessed Feb. 4, 2025).

[75] Letter from Lord Thomas of Cwmgiedd, Lord C.J. of Eng. & Wales et al. 1 (Mar. 28, 2014), https://www.judiciary.uk/wp-content/uploads/2014/03/joint-letter-to-judges-and-staff-hmcts-reform.pdf (last accessed Feb. 4, 2025).

[76] Etherton, *supra* note 74, at 6.

[77] *Id.* at 6.

[78] *Id.* at 9.

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Court would enlist case officers – court administrators supervised by judges – to manage claims and facilitate settlement via a range of methods including mediation, online alternative dispute resolution, and early neutral evaluation.[79] If resolution was not reached via Stage 2, litigants would then proceed to Stage 3, where their claim would be adjudicated by a judge, either online, via telephone, or on the papers. Of the three stages articulated as part of his vision for the Online Solutions Court, Lord Justice Briggs considered Stage 1 to be the most important. He even went so far as to describe "interactive triage" as the "main feature of his reforms" stating that without it the court would be "as unnavigable as before."[80]

Initially, prospects for the full implementation of the Online Solutions Court looked promising. In December 2015 Lord Justice Briggs reported that his proposals were being "actively developed by the HM Courts and Tribunals Service" and that "funding is now in place for design, testing and implementation."[81] Since then, the ambition, scope, and budget, if not the timeframe for completion, had been repeatedly increased. By the autumn of 2016, the overall budget for court reform had nearly doubled.[82] Consultants brought in to advise HMCTS on their plans described the overall breadth and aspiration of the reform program as "unmatched anywhere in the world,"[83] stating that "no other system has attempted a reform programme that is so broad in terms of widespread adoption of digitalization, introduction of structural changes in court personnel and rationalisation of estate and workforce."[84] What is more, the new digital services contemplated as part of the reform program would not primarily be purchased "off the shelf" but designed and built by HMCTS with input from the judiciary and other key stakeholders, albeit with extensive support from teams of external consultants and staff on fixed term and temporary contracts.[85] Beyond improving the efficiency of the courts, successful delivery of the reform program was positioned as critical to the delivery of a range of wider access-to-justice policies: specifically, those intended to pump-prime the nascent LawTech sector[86] by encouraging innovation and improving access to court data.

[79] *Id.*

[80] Frederick Wilmot-Smith, *Justice eBay Style*, London Rev. Books (Sept. 26, 2019), https://www.lrb.co.uk/the-paper/v41/n18/frederick-wilmot-smith/justice-ebay-style (last accessed Feb. 4, 2025).

[81] Lord Justice Briggs, Judiciary of Eng. & Wales, *Civil Courts Structure Review: Interim Report* 75–76 (2015), https://www.judiciary.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf (last accessed Feb. 4, 2025).

[82] Joshua Rozenberg, *The Online Court: Will IT Work?*, Legal Educ. Found. (July 2020), https://long-reads.thelegaleducationfoundation.org/hmcts-reform/ (last accessed Feb. 4, 2025).

[83] Bos. Consulting Grp., *supra* note 9, at 4.

[84] *Id.*

[85] *Id.*

[86] Ministry of Just., *Legal Support: The Way Ahead*, OGL (2019), https://assets.publishing.service.gov.uk/media/5c5b3a084ofob676e6ddc6dc/legal-support-the-way-ahead.pdf (last accessed Feb. 4, 2025).

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12.4 FAILURE TO DELIVER: THE CURIOUS CASE OF THE ONLINE SOLUTIONS COURT

The recommendations made by Lord Justice Briggs, including the proposal for the creation of an Online Solutions Court, were accepted and formally endorsed by the Senior Judiciary in a joint statement published in January 2017.[87] A speech published in June 2017 by the newly appointed Master of the Rolls seemed to confirm that plans to introduce an Online Solutions Court – including the Stage 1 "interactive triage" that Lord Justice Briggs considered to be the "main feature" of his proposals – were still a crucial element of the overall program.

However, by January 2019, any mention of Stage 1 with its "automated, interactive triage" had been dropped altogether from official communications published by HMCTS. At this point, HMCTS published a document articulating their revised vision for the reform program.[88] All mention of Stage 1 was omitted. Instead, and as had been the case prior to reform, the document stated that the journey for users would begin at the point at which they completed a claim form, which they could at that point already do online.

At the time of writing, new systems matching Lord Justice Brigg's vision have still not been launched, but neither has their abandonment been formally announced by government. In total and as described in the introduction above, only twenty-four of the planned forty-four reform projects have been marked as complete by HMCTS, and less than £120 million of the £1.3 billion budget allocated remains. The National Audit Office, reviewing the progress of the court reform program for the third time in 2023, found that:

> it remains difficult to understand whether HMCTS has delivered the full intended scope for projects that it classes as complete. This is because HMCTS classes a project as complete when it considers that the service provides sufficient functionality, even if HMCTS has not developed all the service's intended scope.[89]

Damningly, the National Audit Office reported that HMCTS may itself not know whether projects have delivered on their original promise – due to a failure to either

[87] Press Release, Cts. & Tribunals Judiciary, *Civil Courts Structure Review: Joint Statement from the Lord Chief Justice and the Master of the Rolls* (Jan. 6, 2017), https://www.judiciary.uk/guidance-and-resources/civil-courts-structure-review-joint-statement-from-the-lord-chief-justice-and-the-master-of-the-rolls/ (last accessed Feb. 4, 2025).

[88] H.M. Cts. & Tribunals Serv., *Putting People at the Heart of Reform: Response to PAC Recommendation 2* Just. Matters (Jan. 2019), https://assets.publishing.service.gov.uk/media/5c5405a0e5274a49487aef54/Public_Accounts_Committee_Recommendation_2_31_Jan_2019.pdf (last accessed Feb. 4, 2025).

[89] H.M. Cts. & Tribunals Serv., *Progress on the Courts and Tribunals Reform Programme* 21 (Feb. 2022–23), https://www.nao.org.uk/reports/progress-on-the-courts-and-tribunals-reform-programme/ (last accessed Feb. 4, 2025).

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adequately define and document the initial scope of projects or routinely monitor the outstanding work needed to deliver them.[90]

12.5 A NEW VISION FOR THE FUTURE? BACK TO THE MARKET TO DELIVER A DIGITAL JUSTICE SYSTEM

In the face of growing awareness that the digital reform program had failed to deliver its original ambition and scope, despite HMCTS having spent 90 percent of the agreed £1.3 billion budget, a different approach was urgently needed. The imperative to reform the courts and tribunals to reduce their ongoing cost had not disappeared – in fact, the context of significant case backlogs across the civil and family courts and tribunals,[91] exacerbated by the COVID-19 pandemic, strengthened the imperative to improve efficiency. However, a challenging fiscal environment precipitated by a range of global and domestic factors[92] rendered the prospect of further significant government investment in the courts and tribunals system unlikely.

In response to this environment, in November 2023, the Lord Chancellor and senior judiciary announced a new vision for the future of civil and family courts and tribunals.[93] Their short published statement sets out a bold ambition to harness AI and technology to create a joined-up process for people attempting to navigate third- and private-sector providers of information, advice, and dispute resolution, and facilitate seamless transfer to the courts where necessary.[94] The OPRC, established by the Judicial Review and Courts Act 2022, is intended to play a key role in delivering this vision, by using its powers to set rules and standards, including data standards, for both online court-based dispute resolution services and "digital pre-action portals and other processes."[95] The Master of the Rolls, Sir Geoffrey Vos, inaugural Chair of the OPRC, had previously stated that the creation of the OPRC signaled an end to the fixation on court-based systems, and the beginning of a process of creating a "truly holistic Digital Justice System."[96] The focus of the OPRC's rulemaking will be on "providing architectural coherence and integration"[97] between private and non-court providers of dispute resolution services and

[90] Nat'l Audit 2023, *supra* note 15, at 48.
[91] Byrom, *supra* note 11.
[92] Daniel Harari et al., *Rising Cost of Living in the UK* 20, House of Commons Libr. (2024), https://researchbriefings.files.parliament.uk/documents/CBP-9428/CBP-9428.pdf (last accessed Feb. 4, 2025).
[93] Ministry of Just. et al., *supra* note 20.
[94] *Id.*
[95] Sir Geoffrey Vos, Master of the Rolls, Keynote Address to the Ombudsman Ass'n, *Driving System Change and Addressing Injustice* (June 21, 2023), https://www.judiciary.uk/speech-by-the-master-of-the-rolls-driving-system-change-and-addressing-injustice/ (last accessed Feb. 4, 2025).
[96] *Id.*
[97] *Id.*

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the formal justice system. This would be achieved, Vos argued, through the process of both (1) dictating high-level standards for the dispute resolution processes within the OPRC's remit and (2) setting common technical standards for digital dispute resolution platforms, including specifying the design of application programming interfaces (APIs) to support the seamless transfer of data from dispute resolution services to the courts.[98]

Lord Justice Birss, the Deputy Head of Civil Justice, elaborated on this vision in late 2023[99] and early 2024.[100] He explained that a "holistic Digital Justice System" would have four key elements. First, the aim is no longer to create a single digital "front door" to the courts, supported by a state-run "interactive triage" system for the different legal issues.[101] Instead of the public sector taking responsibility for building a "single . . . monolithic IT programme at huge cost and with huge complexity,"[102] routes into the court system will be designed by the private and not-for-profit sectors.[103] Providing these dispute resolution providers adhere to the data standard specified by the OPRC, they will be able to access APIs to support them in transferring cases seamlessly from their platforms to the courts. Second, the cost of building and updating digital information, advice, and dispute resolution services will be borne by the private and not-for-profit providers who develop them.[104] Accordingly, both the cost of developing digital pre-action entry-routes and the "prohibitive burden of maintenance"[105] will not be borne by government, cementing the delivery of the digital justice system as a "public private partnership."[106] Third, the data standards specified by the OPRC will be based on fields in the common database created to manage cases across the civil and family courts and tribunals.[107] This will facilitate the easy transfer of cases from private dispute resolution providers to the courts, reducing the need for users to re-enter

[98] *Id.*

[99] Birss, *supra* note 21.

[100] Colin Birss, Lord J., Deputy Head of Just., Speech to King's College London L. Sch., *Future Visions of Justice* (Mar. 18, 2024), https://www.judiciary.uk/speech-by-the-deputy-head-of-civil-justice-future-visions-of-justice/ (last accessed Feb. 4, 2025).

[101] See Birss, supra note 21. Now you might think that part of the solution to many of these problems is what has been called in the past 'a single point of entry'. If only there was a single place – a single website let's say – maybe run by the Government – to which everyone could go and it would ask them what their problem was and tell them authoritatively where they needed to go and what to do. And at one stage our thinking was centred around a set up like this. And something like that looks like that may still have a role to play. However, it does raise some difficulties and the point of this address is to explain why a data standards approach offers advantages. (Birss, *supra* note 21.)

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

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information or upload the same documents to multiple systems.[108] Fourth, over time this data standard could be adopted by a wider range of providers, including early legal advice and assistance services, enabling seamless transfer of data from the start of individuals' advice-seeking journey and helping an individual litigant "navigate through the whole of the digital justice system before they ever get to court."[109]

12.6 DELIVERING THE NEW VISION: QUESTIONS AND CONSIDERATIONS

The goals of the new vision for the digital justice system, especially those that relate to simplifying the experience of navigating both legal services and the courts for individual consumers, are laudable. However, for the proposals as currently expressed to be implemented successfully, a series of issues and questions must be addressed. These are outlined in the concluding section of the chapter (Section 12.7).

12.6.1 *Is the Market Capable of Delivering Digital Legal Information, Advice, and Dispute Resolution Services in the Areas of Law Where There Is the Most Significant Unmet Legal Need?*

As noted above, reforms to the regulation of legal services introduced by the LSA 2007 have failed to encourage the development of new business models[110] that deliver effective services to low-income, high-need clients. As a consequence, the state has been forced to step in to fund the creation of high-quality, free, or low-cost online legal information – either by designing services themselves or by providing grants to charities to deliver and maintain these services. The fragility of existing providers was highlighted last year when the cessation of a government grant to a charitable provider of legal information threatened the continuing existence of the service.[111] There are multiple recent examples of government being forced to step in to design, commission, or fund online legal information and signposting services

[108] Lord Justice Birss provides the following explanation:

> The vision is that the provider's system will – because it rests on the same building blocks – then be able to refer them on, this next stage may then involve further advice and/or bringing a civil, family or tribunal claim into the courts and tribunals system. The person selects the option to start a court action. The system has the information to do this for them, and they can then immediately see their claim on the court's system. . . . The data flows to where it is needed when it needs to do so. The data standards will in time mean that all this happens smoothly, without the person having to repeatedly tell their story or repeatedly upload documents. (*Id.*)

[109] *Id.*

[110] Legal Servs. Bd., *supra* note 27, at 12.

[111] Mondipa Fouzder, *Legal Help Website Faces Uncertain Future after Funding Ends*, L. Soc'y Gazette (July 3, 2023), https://www.lawgazette.co.uk/news/legal-help-website-faces-uncertain-future-after-funding-ends/5116516.article (last accessed Feb. 4, 2025).

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where the market has failed to provide them, including the housing disrepair tool,[112] the recently issued tender for an Online Support and Advice Grant to deliver a digital service capable of providing litigants in person with legal support and advice in relation to civil, family, and tribunal problems,[113] and the announcement in the spring budget of funding for a digital "one-stop shop" for people experiencing family law issues, described as "a new online information and guidance tool to support earlier resolution of family disputes and divert cases away from the family courts, where appropriate."[114]

Issues also exist with the willingness and capacity of the market to deliver online and digital dispute resolution services in the areas of law where unmet legal need is most persistent. While several ombudsmen schemes and providers of alternative dispute resolution do exist,[115] the extent to which their services are currently delivered online is unclear. Only 3 companies out of 365 listed on the government-funded LawTech UK ecosystem tracker are described as providing digital dispute resolution services to consumers.[116] These challenges are reflected in global studies exploring the development of private, as opposed to court-based ODR schemes. As researchers noted in 2021, "ODR has not been able to find a suitable business model to motivate ODR service providers to provide sustainable services."[117] Further work is needed to understand why there has been such limited activity to date, and what support from regulators and government may be needed to develop the market further.

12.6.2 *Are There Sufficient Incentives for Private Dispute Resolution Providers to Transfer Cases to the Courts?*

The OPRC has the power to make rules that provide "for the transfer by electronic means of information held for the purposes of an online dispute resolution service to a court or tribunal."[118] Widespread adoption of the data and technical standards set by the OPRC is critical to delivering a joined-up digital justice system and reducing barriers to access for individuals and businesses. However, under the existing

[112] Richa Sharma & Michael Hay, *Housing Disrepair Online Signposting Tool: Summary of Monitoring Data and Stakeholder Interviews*, Ministry of Just. (2023), https://assets.publishing.service.gov.uk/media/6555e142046ed4000d8b99ce/MOJ_HousingDisrepairOST.pdf (last accessed Feb. 4, 2025).

[113] Ministry of Just., *Online Support and Advice Grant (OSAG Legal Support)*, Bidstats (Jan. 16, 2024), https://bidstats.uk/tenders/2024/W03/814809135 (last accessed Feb. 4, 2025).

[114] HM Treas., Spring Budget 2024, at 69 (2024).

[115] *See infra* Section 6.3.

[116] *LawtechUK Ecosystem Tracker*, LawTech UK, https://lawtechuk.io/ecosystem/ (last accessed Apr. 25, 2024).

[117] Online Dispute Resolution: Theory and Practice – A Treatise on Technology and Dispute Resolution 591 (Mohamed S. Abdel Wahab et al. eds., 2d ed. 2021).

[118] Judicial Review and Courts Act 2022, c. 35 § (1)(a) (UK), https://www.legislation.gov.uk/ukpga/2022/35/section/24 (last accessed Feb. 4, 2025).

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framework, only those ODR services that wish to transfer cases to the courts will be required to abide by the data and technical standards specified by the OPRC. This may pose a challenge for the delivery of the new vision as it is unclear whether the existing business models adopted by private ODR and alternative dispute resolution (ADR) providers incentivize them to facilitate the "seamless transfer"[119] of cases to the courts.

To explain further, private ODR systems are "created by contract and rely on the agreement of the participants for their legitimacy."[120] Private ODR systems, particularly in the consumer or commercial space, are often funded by one of the parties, or one category party to a dispute (e.g., the Official Injury Claim portal, which is funded by the Motor Insurance Bureau). In many cases, businesses are able to choose which ADR or ODR provider they use; as a consequence, the marketing material produced by private ODR and ADR providers tends to emphasize their flexibility – in the sense that procedures need not always apply "strict rules of law" and their confidentiality – which enables firms to avoid the risk of "adverse publicity and reputational damage that could arise from a court case."[121] Accordingly, the business model adopted by private ODR and ADR providers creates an incentive *not* to make the transfer of cases to the courts easier, threatening the viability of new proposals.

12.6.3 *Will the Market Agree to Meet the Needs of the Public Justice System in Relation to Collecting Data to Monitor Fairness and Address Inequality of Access?*

Even where ODR providers wish to support seamless transfer of cases to the courts, it is unclear whether they will be willing to adapt their data collection practices to meet the needs of the public justice system. As noted by researchers:

> Private ODR systems are created by contract and rely on the agreement of the participants for their legitimacy. Public systems, on the other hand, are created by law and rely on the ability to protect the broad range of interests law serves – distributive justice, substantive equality, political freedom, and democratic participation – for their legitimacy. A private system is free to take the interests of only the parties to a dispute into account, but a public system must consider the interests of third parties, the legal system as a whole, and the background set of moral, social, political, and legal norms that make contract-based relationships possible. A public dispute resolution system must produce outcomes that are fair and just, not just convenient, efficient, and cheap.[122]

[119] Birss, *supra* note 21.
[120] Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 Cardozo J. Conflict Res. 717, 733 (2017).
[121] *Alternative Dispute Resolution*, BusinessCompanion (last updated May 2024), https://www.businesscompanion.info/en/quick-guides/consumer-contracts/alternative-dispute-resolution (last accessed Feb. 4, 2025).
[122] Condlin, *supra* note 120, at 733–34 (citations omitted).

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One way in which the courts in England and Wales have sought to demonstrate that reformed digital processes produce outcomes that are fair and just is by introducing new data collection practices to monitor the impact of digitized services on the experience of users with particular demographic and protected characteristics under the Equality Act 2010.[123] Users of digitized services are asked to complete a short questionnaire about their demographic and protected characteristics at the point at which they make an application to the courts or respond to an existing case.[124] This data is being used to undertake "access to justice impact assessments"[125] designed to identify, fix, and monitor barriers to access to justice for users from different demographic groups. To date, access-to-justice impact assessments have been completed for digital services dealing with divorce, probate, social security and child support, and online civil money claims. These impact assessments have revealed that in relation to probate and divorce service cases filed by users from ethnic minority groups were more likely to experience delays or be stopped than those filed by white applicants.[126] The findings of these impact assessments are now being used to improve services, demonstrating the importance and utility of the new data collection practices HMCTS have introduced. Private ODR providers are not required to collect or publish data on the fairness of their processes or monitor data on the demographic and protected characteristics of users. It is unclear whether they would be willing to amend their practices to support this data collection – particularly if doing so incurs additional costs. However, if they do not collect this data and are still permitted to "seamlessly transfer" cases to the courts, the opportunity to monitor fairness may be lost, undoing the significant recent progress that has been made to harness digital systems to improve the transparency, accountability, and fairness of the courts.

12.6.4 *Does the OPRC Have the Mandate and Resources Needed to Deliver the New Holistic Digital Justice System? Lessons from UK Financial Services*

Proposals to harness data and technical standards to deliver joined-up legal services and systems are unprecedented in the context of the justice system in England and

[123] Edafe Onerhime, *Monitoring Equality in Digital Public Services*, Open Data Inst. (2020), https://research.thelegaleducationfoundation.org/research-learning/funded-research/monitoring-equality-in-digital-public-services (last accessed Feb. 4, 2025).

[124] *HMCTS Protected Characteristics Questionnaire – Data on Users of Reformed Services*, U.K. Gov't (Nov. 16, 2023), https://www.gov.uk/government/publications/hmcts-protected-characteristics-questionnaire-2023/hmcts-protected-characteristics-questionnaire-data-on-users-of-reformed-services (last accessed Feb. 4, 2025).

[125] H.M. Cts. & Tribunals Serv., *Assessing Access to Justice in HMCTS Services – Summary Report*, U.K. Gov't (2023), https://www.gov.uk/government/publications/assessing-access-to-justice-in-hmcts-services/assessing-access-to-justice-in-hmcts-services-summary-report (last accessed Feb. 4, 2025).

[126] *Id.*

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Wales. However, initiatives of the kind described by the Master of the Rolls and Lord Justice Birss do exist and have been implemented in the context of the UK financial services industry as part of the UK Open Banking Initiative, which was created to make it easier for customers to compare and switch banks by supporting the secure sharing and transfer of personal data.

The UK Open Banking initiative was developed in response to concerns that there was too little competition in the banking sector and that this absence of competition was undermining innovation and harming consumers. An investigation led by the CMA found that across the United Kingdom, the "four largest banks account for over 70 percent of main Personal Current Accounts and collectively have lost less than 5% market share since 2005 – despite the fact that 90 percent of consumers would benefit from switching to a cheaper product."[127] To remedy this situation, in 2017 the CMA issued an order, the Retail Banking Market Investigation Order[128] (2017 Order) which compelled the UK's nine biggest banks to open their data to third parties. The proposals contemplated the sharing of two different kinds of data in two different standardized formats. First, under the new UK Open Banking regime, the nine largest UK banks would be required to release as open data reference information about the location of their branches and ATMs, the details of their different products, and data on service quality, to an agreed data standard.[129] Second, the UK Open Banking framework made it possible for customers to securely share limited transaction data with other banks and third parties through the use of APIs.

The aim of the CMA in passing the 2017 Order was to create the infrastructure to support the publication and sharing of a limited set of clearly defined data between organizations in a concentrated market.[130] To achieve this aim, the CMA mandated the creation of an independent organization (the Open Banking Implementation Entity ("OBIE")),[131] funded by industry, with an average FTE headcount of over 100

[127] Comp. & Mkts. Auth., *Retail Banking Market Investigation: Final Report*, at x–xi (2016), https://assets.publishing.service.gov.uk/media/57ac9667e5274a0f6c00007a/retail-banking-market-investigation-full-final-report.pdf (last accessed Feb. 4, 2025).

[128] Comp. & Mkts. Auth., *The Retail Banking Market Investigation Order 2017* (2017), https://assets.publishing.service.gov.uk/media/5a759cc7ed915d506ee80283/retail-banking-market-investigation-order-2017.pdf (last accessed Feb. 4, 2025).

[129] Rowland Manthorpe, *To Change How You Use Money, Open Banking Must Break Banks*, Wired (Oct. 16, 2017), https://www.wired.com/story/psd2-future-of-banking/ (last accessed Feb. 4, 2025).

[130] By 2022 it was reported that there were over 300 service providers enrolled in the OBIE service directory. *See* Baker, *supra* note 25, at 3.

[131] The (OBIE) was created to "agree, consult upon, implement, maintain and make widely available without charge open and common banking standards" for the reference and transaction data specified in the 2017 Order. *The Future Oversight of the CMA's Open Banking Remedies: Response to Consultation*, Comp. & Mkts. Auth. 2 (2022). The OBIE was established as an independent company, Open Banking Limited, funded by the nine largest UK banks and was originally overseen by the CMA. *Id.*

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staff, and annual operating costs ranging between £32.7 million and £47 million.[132] The Open Banking Implementation Entity was given the power to mandate adoption of the data and technical standards developed by the nine largest UK banks with a combined market share of over 90 percent of the UK's consumer and small business accounts.[133] Additional regulatory oversight of the use of application program interfaces to guard against fraud and misuse was provided by the Financial Conduct Authority, an extremely well-resourced regulator, with support from the Information Commissioners Office. Even so, by the end of the implementation period in 2023, only six out of nine of the UK's largest banks had adopted the standards required to implement Open Banking.

In contrast, the proposals outlined for the delivery of the new holistic digital justice system contemplate creating standards and Application Programme Interfaces to support the sharing of what could amount to a considerable volume of personal and case-level data, much of which is currently unstructured. The detail of the data to be shared has not been defined. Unlike the retail banking sector, the legal services sector is highly fragmented – with nearly 9,600 firms providing services for consumers and small corporates.[134] This figure does not include not-for-profit providers and charities, or the eighty existing approved Alternative Dispute Resolution Providers and twenty Ombudsmen schemes. The body tasked with developing and specifying data and technical standards across this diffuse range of stakeholders is the Online Procedure Rule Committee, a committee comprising six members (three judicial members appointed by the Lord Chief Justice and three expert members appointed by the Lord Chancellor) supported by two sub-committees[135] staffed by volunteer members. The Ministry of Justice has allocated just £10,000 per year to pay for travel, subsistence, and publications. The impact statement published by the Ministry of Justice states that any additional costs associated with digitizing services or providing additional digital support will be funded by the HMCTS Court Reform Programme – it is not clear whether the creation and implementation of data and technical standards is included in this,[136] or who will fund this work if resource is not made available by government.

[132] OBIE, *Annual Report 2020*, at 29 (2020), https://assets.foleon.com/eu-central-1/de-uploads-7e3kk3/48197/obie-ra-artwork-10096a5716bf30-2.5853a6c2c203.pdf (last accessed Feb. 4, 2025).

[133] Press Release, Comp. & Mkts. Auth., *Millions of Customers Benefit as Open Banking Reaches Milestone* (Jan. 12, 2023), https://www.gov.uk/government/news/millions-of-customers-benefit-as-open-banking-reaches-milestone (last accessed Feb. 4, 2025).

[134] PricewaterhouseCoopers LLP, *UK Legal Services Market Report 2022*, at 6 (2022), https://www.pwc.co.uk/industries/assets/uk-legal-services-market-report-2022.pdf (last accessed Feb. 4, 2025).

[135] *Online Procedure Rule Sub-committee Member*, U.K. Gov't (Nov. 2023), https://web.archive.org/web/20240419152736/https://apply-for-public-appointment.service.gov.uk/roles/7909 (archived page) (last accessed Feb. 4, 2025).

[136] Ministry of Just., *Judicial Review and Courts Bill: Overarching Impact Assessment* 3 (2021), https://publications.parliament.uk/pa/bills/cbill/58-02/0152/JudicialReviewandCourtsBilloverarchingIAfinal.pdf (last accessed Feb. 4, 2025).

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A timetable for implementation, or agreed definition of either the vision or goal, has not yet been published, and an explanation of how access to the APIs will be regulated and by whom has not yet been provided. These details may yet be forthcoming.

It is still early days, but the experience of Open Banking, an initiative that has been described as "ambitious, complex and world leading"[137] despite its comparatively limited scope, when contrasted with the new vision articulated for the digital justice system of the future, demonstrates the importance of moving swiftly to provide.

12.6.5 *What Changes to Regulation May Be Needed to Support the Adoption of Online Information, Advice, and Dispute Resolution Services?*

The delivery of the new vision for the digital justice system relies on consumers adopting and using private online information, advice, and dispute resolution services. However, as described above in Section 12.2, many of these services fall outside of the scope of existing legal services regulation, exposing consumers to the risks of transactional harms for which there is little accessible or meaningful redress. Research published by the Legal Services Board shows both that consumers are "more dissatisfied with the service they receive from unregulated providers"[138] and further that the absence of regulation and effective redress leaves unregulated businesses facing a "credibility gap" that may inhibit their growth.[139] The UK government-funded Centre for Data, Ethics and Innovation has highlighted both that an absence of clear regulatory standards and quality assurance is a key driver of public distrust,[140] and further that "in the absence of trust, consumers are unlikely to use new technologies or share the data needed to build them."[141] The imperative to deliver the new vision for a digital justice system may therefore strengthen calls to review and extend the regulatory framework established by the LSA 2007.

12.7 CONCLUSION

This chapter has attempted to demonstrate, by reference to the experience of England and Wales, that deregulation of legal service provision, while superficially attractive, is not a panacea to the access-to-justice crisis. Deregulation alone is unlikely to be sufficient to prevent market failure in the provision of effective legal services to high-need individuals on low incomes. In relation to the prospect of harnessing technology to advance access to justice, deregulation may in fact prove

[137] *See* Baker, *supra* note 25, at 3.
[138] Legal Servs. Bd., *supra* note 27, at 34.
[139] *Id.* at 47–48.
[140] AI Barometer Report, *supra* note 28, at 4.
[141] *Id.* at 6.

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counterproductive. Evidence suggests that lack of regulation may increase uncertainty for providers and foster mistrust that reduces, rather than increases the prospect of consumer adoption. As such, rather than deregulation, reregulation of legal service provision may be required – with new, evidence-based frameworks structured to respond flexibly and effectively to sources of systemic and transactional harm, including those posed by advancements in technology.

In relation to the role that courts themselves might play in encouraging new services that address legal need, judges and policymakers in England and Wales have offered two approaches. The first focused on investing in improvements in court technology to make it easier for self-represented litigants to understand their rights and navigate court processes, thereby reducing the need for legal services. This approach was exemplified by the proposal to create a new Online Solutions Court. Lack of publicly available information about why exactly the Online Solutions Court has failed to materialize makes it difficult to draw firm conclusions about the viability of this approach, although successful experience in other jurisdictions offers encouragement.

The second and most recent suggestion for the role that courts might play in improving pre-court legal services is both more novel and more speculative. It relies on the courts using their new powers to set data standards to encourage a shift in the way legal services are designed and delivered. Proponents argue that the desire of private providers to support the seamless transfer of cases to the courts will encourage the adoption of court-defined approaches to collecting and sharing data. These common standards will make it easier for individuals to transfer between providers, reducing referral fatigue and improving the navigability of legal services in the pre-court space. While successful implementation could prove transformative, at present, these proposals pose significant questions, and their complexity suggests that reaching answers may take some time. In the context of a growing access-to-justice crisis, the most pressing question is arguably whether consumers, and indeed the courts, can afford to wait.

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