

# Issues in the Reform of UK Legal Services

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# The English Mafia

# Background

## Legal system

- Provides the fulcrum from which all other governance structures balance themselves
- But is also itself an interesting case study of a sometimes archaic system which operates largely through informal governance structures
- Clients suffer from an absence of legal redress balanced by informal (professional) checks (c3?)
- Lawyers may discipline lawyers but don't like others doing so
  - close ranks and keep it in the family.
- Lack of accountability and transparency

A major policy question (congruent with a theme in the theory of economic governance as expressed by Avinash Dixit yesterday):

Can we, and if so how, successfully transition from the current system of informal relationship-based governance to a coherent system of rule-based governance?

“...problems of introducing formal institutions ... where informal ones prevail ... informal systems work well in small stable groups with good communications but cannot keep up with expansion of trade” AD

## Evidence to the Joint Committee on Draft Legal Services Bill By ROCAS (Reform of complaints against solicitors)

“The position of solicitors in our society is unique in that solicitors are the gateway to remedies available to the citizen who has suffered a legal wrong. ...  
A client who brings a complaint against a solicitor is severely disadvantaged. ... Solicitors may have more legal knowledge ... They are in a position ... to generate evidence, ... .  
If a client has a medical or financial complaint, he can turn to a lawyer for help. Unfortunately, as experience has shown time and time again, he cannot turn to another lawyer with any hope of getting real help if he has a legal complaint.”

Note:

- Only says clients find it hard to discipline other solicitors directly.
- But other solicitors may have an interest to do so indirectly (to safeguard the profession). i.e. set up a ‘Mafia’.
- Clients as a body may do by taking their custom elsewhere.

This is an atypical piece of evidence ...

## Evidence to the Joint Committee on Draft Legal Services Bill By Independent Solicitors

“... to allow the provision of legal services to be provided through commercial organisations which are not controlled by lawyers who are subject to *professional standards*. There is no other example of this world-wide apart possibly from New South Wales in Australia. It does not happen in Europe and it does not happen in America. The Americans are a most consumer and commercially orientated country and yet, the American Bar Association, having considered the issue, does not feel that the provision of legal services can be put into the hands of commercial organisations. Other European countries have considered the issue in various European Court decisions and supported the *principle of independence*.”

Note:

- Says it is the consensus view of lawyers that it is better to have lawyers control lawyers than the market.
- Doesn't actually contradict previous view.

Evidence to the Joint Committee on Draft Legal Services Bill  
By the Association of Personal Injury Lawyers

“APIL further believes that the supplying of legal advice is conducted as a *profession* rather than simply an industry. It would seem, however, that this distinction has been lost in the Government’s drive to introduce competition into the marketplace. As a result, legal services, such as personal injury, will become ‘*commoditised*’. It is extremely debatable whether the claimant would regard this as a welcome development.”

Note:

- Reiterates the view taken by previous quote.
- Note the emphasis on professional

# The Clementi Review

**Clementi Review** of Dec 2004

Leading to the **white paper** of May 2006.

**Joint committee** of House of Lords and Commons has recently, July 2006, taken evidence (the previous quotes are part of this evidence.)

The terms of the Clementi Review were:

- 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 interest, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified.

# **This Talk - Objectives**

Examine the potential risks to customers and the wider public associated with alternative business structures (proposed by Clementi) for legal service delivery.

## **Focus on incentives:**

- 1. to enter / remain in the legal profession**
- 2. to deliver services in the public interest.**

**& conflicts between 1 and 2..**

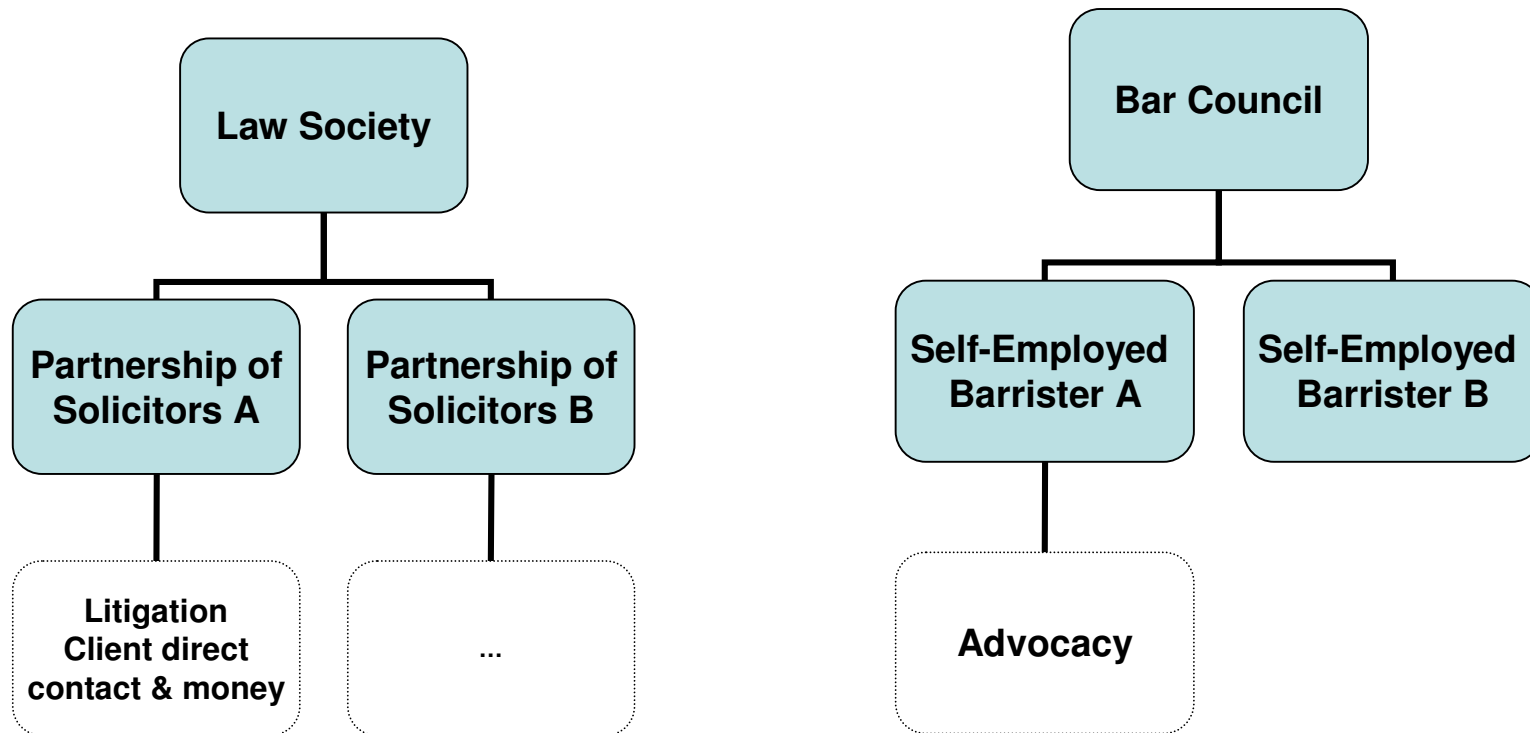
# Roadmap

First, elements of the proposed reforms ...

Second, professional recruitment, retention and certification effects ...

Third, formal governance replacing informal  
a la Dixit chapter 2

# Current Regulatory Structure

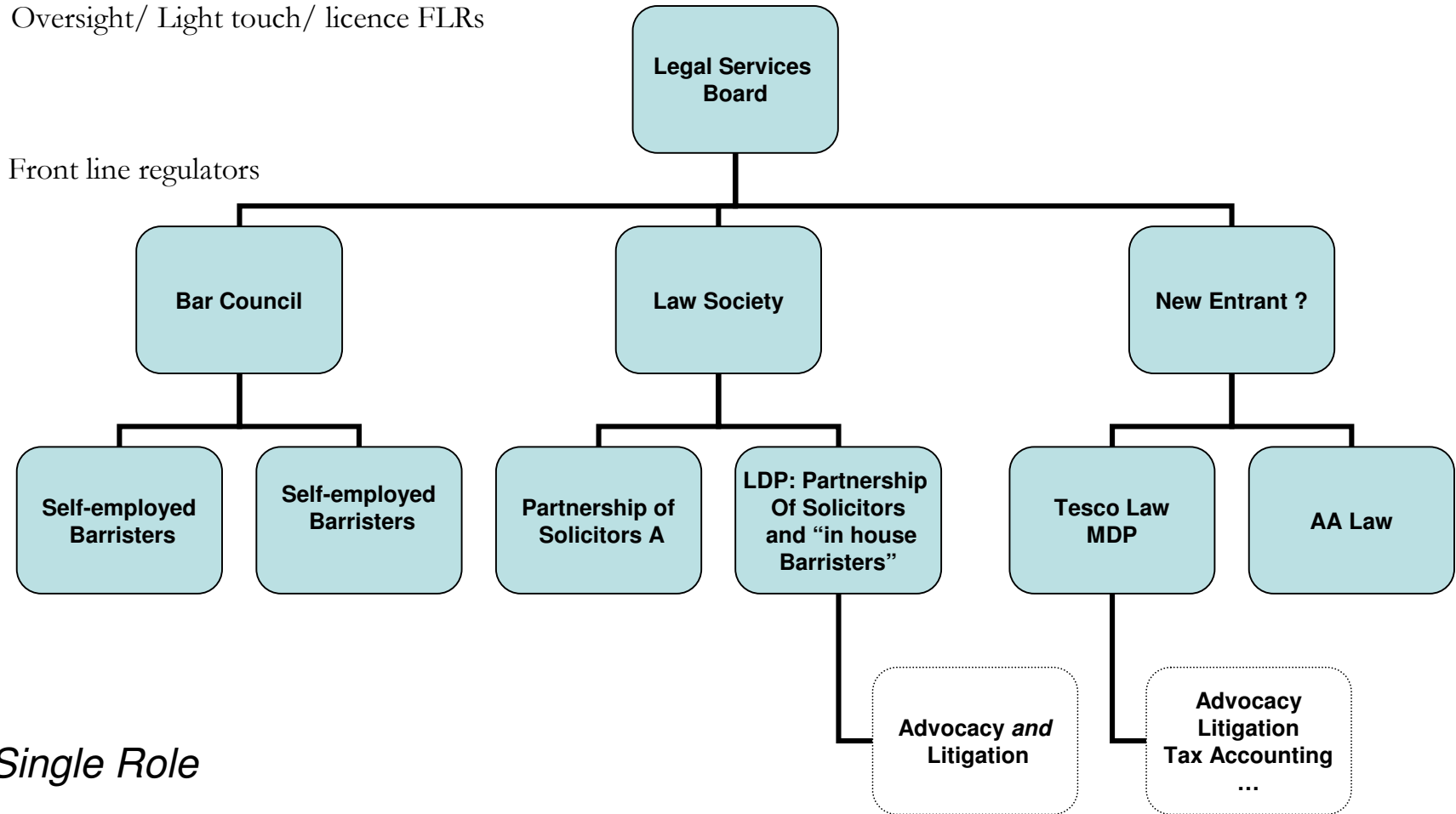


*Top regulator has dual role*

*Simplified Version of "Regulatory Maze"*

# Proposed Regulatory Structure

Oversight/ Light touch/ licence FLRs



*Single Role*

*Simplified Version of "Coherent Structure"*

# Current Business Structures

		<i>Management</i>		
		Sole Trader	Partnership	Government
<i>Ownership</i>	Sole Trader	Barristers	-	-
	Partnership	-	Solicitors, Solicitor- Advocates	-
	Government	-		Employed Barristers

# Alternative Business Structures (ABS)

		<i>Management</i>		
		Barristers, Solicitors	Barristers, Solicitors, Non-lawyers	Barristers, Solicitors, Other profs.
<i>Ownership</i>	Managers own firm	<b>Type 1 LDP</b>	<b>Type 2 LDP</b>	Internal MDP
	External ownership		<b>Type 3 LDP</b>	External MDP

## Issues Raised by Type 1 LDPs

Partnerships between barristers & solicitors may:

- a. Encourage lack tying in (switching costs)
- b. but improve recruitment and retention (particularly among women)

Dichotomous regulation of self employed & “in house” barristers may create certification effects that:

- i. aid consumer choice
- ii. but discourage entry into LDPs (undoing b. above)

## Issues Raised by Type 2 LDPs

Concern that profit motives stemming from non-lawyer partners will erode legal standards (lack of independence again).

Written evidence to the Joint Committee on Draft Legal Services Bill by Robert Banks the Bar Sole Practitioners Group,  
26 June 2006

... may I put in writing our fundamental objection to ABSs. The ABSs put the consumer at risk. The following example I hope shows the problem. ... an estate agent whose only motive is profit ... recruits a rather shy solicitor at a low salary who is just qualified. ....

The estate agent, a forceful character, secures a customer for a business lease and the agent's commission is considerable. The potential purchaser is persuaded to use the agent's legal services. The solicitor notices that the lease is wonky and says the customer should be told. The agent, fearing the sale will fall through, tells the solicitor without the sale the firm may not be able to pay its rent or "I will have to find a new solicitor as you have no concept of commerce" or "you can forget your bonus". The solicitor knows that without the job s/he will not be able to pay his/her mortgage on the flat s/he has recently purchased.

The risk to the client is there for all to see. The customer should never be exposed to such risks or the solicitor to such pressure. Nothing in the Bill can remove the risk because: -

The solicitor is not wholly independent. Put another way the solicitor should have only one interest, namely that of his/her client. The solicitor should be paid the same whatever the advice is.

...

ABSs should not become CARs (Consumer at Risk centres)."

## Issues Raised by Type 3 LDPs

New issues:

Will external owners be driven by a stronger profit motive?

Will this create adverse incentives?

Will external owners be able to instil these (or other) motives in their managers?

What can be done to alleviate the problem?

# Modelling Approach

Simplest first pass is to model “professional standards” as sustained by repeated interactions under various scenarios.

Following Tirole (1996) distinguish between

1. Delegated exclusion, equilibrium supported by the legal profession itself which generates ex-post rents to lawyers (possibly spent in fees etc.)
2. Direct exclusion, equilibrium when lawyers are disciplined by reputation among clients.

Different classes of clients.

1. Short-term (Infrequent I- Clients)
2. Long term (Corporate C-Clients)

Aim to attend to interrelationships between different markets

# Policies

1. Admit new types of legal services firm not subject to existing professional disciplines
2. In conjunction with 1. allow *certification* of traditional lawyers distinguishing them from new ones.
3. In conjunction with 2. improve *transparency* i.e. informal non-contractible information flows (could be statistics correlated with performance, league tables, feedback internet sites like e-bay)
4. In conjunction with 1. or 2. improve *accountability* i.e. contractual basis (could be other statistics correlated with performance)

# Status-Quo

Lawyer behaviour is supported by a system of delegated exclusion (Tirole (1996)) in a collective-reputation equilibrium in which lawyers get ex-post rents.

Rents depend on lawyer discount factor and the cost saving from opportunistically cheating the client

Rents presumably spent as pre-committment subscription fees to e.g. Law Society, Bar Council. (Mafia)

# Example: Market for “C-client” services

Four constraints:

1) Lawyer’s PC

2) Lawyer’s IC

3) Client’s PC

4) Client’s IC: client must be willing to pay out bonus to abiding lawyer.



also present in I  
market

Assume equilibrium most favourable to client

# Policy Impact/Client Types

(- + -)=(Client, Lawyer, Total Surplus)

Policy\Client	Short-term (I)	Long Term (C)	Both (I) & (C)
1. Indistinguishable No delegated excl.	- - -	- - -	
2. + Certification	<i>0 0 0</i> <i>(st choose best eqm)</i>	<i>→ ditto</i>	
3. (compare 2.) + Transparency	<i>0 0 0</i> <i>(if delegated = direct)</i>	+ - +	
4. (compare 2.) + Accountability	+ - (-→+)	<i>→ ditto</i>	
5. (compare 3.) + T & A	+ - (-→+)	- 0 (-→+)	

- Simple model illustrates Clementi proposals in general not in the interest of suppliers (since ex-post rents are reduced).
- May also be against the public interest, number of reasons
  - Admit fake lawyers, Gresham's Law effects
  - Clients may capture rents at cost to efficiency
  - Formal contracts undermine informal relationships
- Tension between protecting the interests of different types of user of legal services
- Different partial moves towards formal governance (transparency, accountability) impact differently in different markets

## Concluding Remarks

1. “Law and Economics” comes full circle with “Lawlessness and Economics”
2. Delicate problem for the same reasons that transition from relational to contractual forms of organisation is difficult in development context. Can unbalance the forces which currently regulate the market with those which might not.
3. Local knowledge of informal institutions is crucial in governance (Avinash Dixit again). New role for economists : translating reservations of those steeped in traditions into language which admits evaluation and analysis. (In contrast to dismissing “local traditions” and imposing markets).
4. For legal services, reform is probably overdue, but there is a lot to lose if clumsily done. We should begin by trying to appreciate reservations of the professionals closest to the institutions.
5. For any profession, the quality of people comprising it is paramount. Hence, emphasis on recruitment and diversity.

**End**

## Recruitment Again

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	Men		Women	
	Row %	Col %	Row %	Col %
Self-Employed Bar	70.5	83.8	29.5	73.6
Employed Bar	56.3	16.2	43.7	26.4

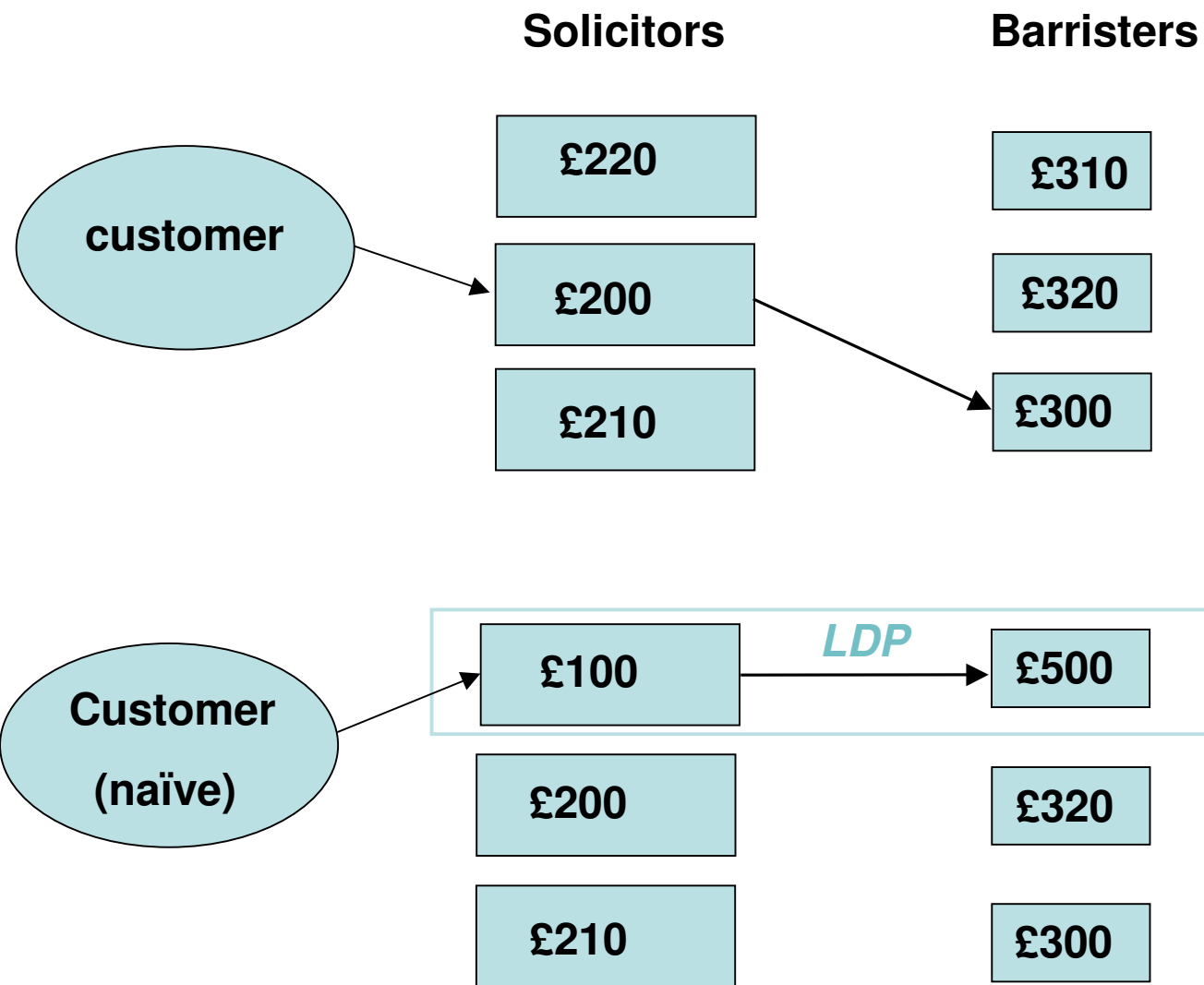
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	Men		Women	
	Row %	Col %	Row %	Col %
Partner or Sole Practitioner	78.1	38.1	21.9	15.7
Other private practice	52.3	42.7	47.7	57.2
Employed Bar	51.1	19.2	48.9	27.1

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We return to discuss more effective consumers below

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# Recruitment & Retention

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	Men		Women	
	Row %	Col %	Row %	Col %
Self-Employed Bar	70.5	83.8	29.5	73.6
Employed Bar	56.3	16.2	43.7	26.4

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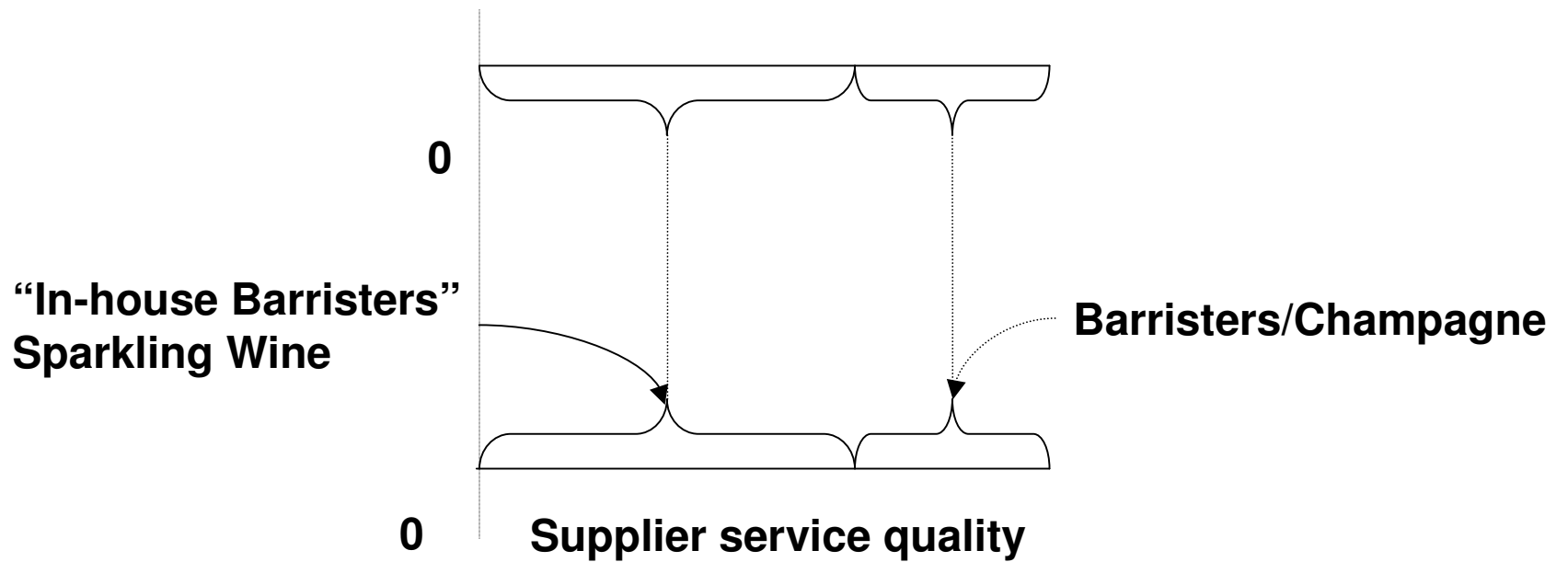
	Men		Women	
	Number	%	Number	%
Outflow to the Roll of Solicitors	131	1.3	104	2.2

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# Certification - Good

**Customer values for service**



# Certification - Bad

## Written evidence to the Joint Committee on Draft Legal Services Bill

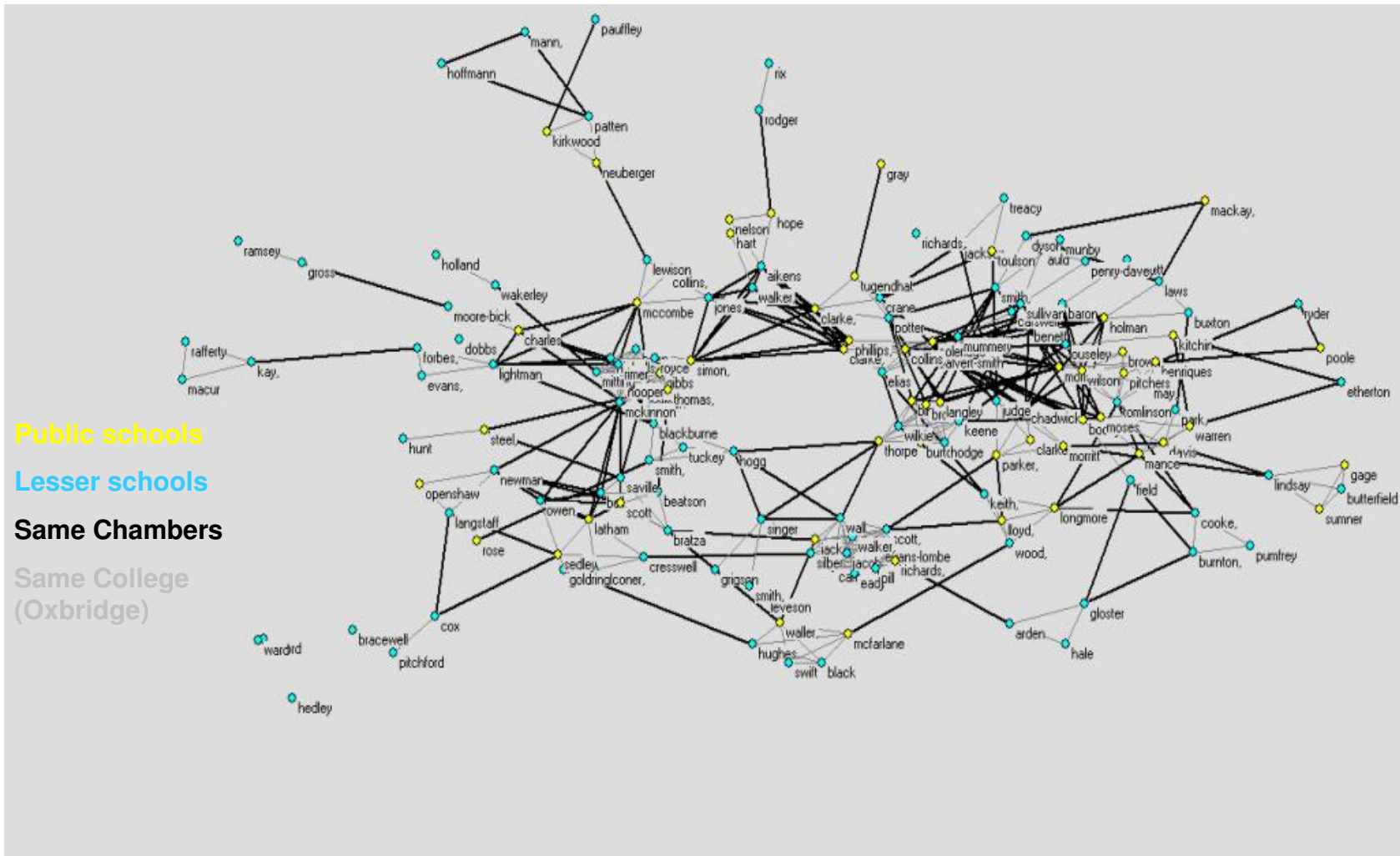
David Wolfe (A “maverick” barrister, Matrix Chambers)

“Indeed, I believe that the Bar Council wishes to ever narrow its focus and regulate only those barristers doing “case presentation” and advocacy work in “independent practice” and not, for example, employed barristers whose day to day activities for their employers (and indeed their employers’ clients) may already look much more like the work traditionally by a solicitor, let alone those who choose to take part in ABSs.

In my view it would be against the public interest (to) allow that to happen. In particular, there remains a (quite unjustified, in my view, as it happens) snobbery about the Bar and being a barrister (over and above, say, a solicitor): the Bar trades on it and the Bar Council’s actions to date suggest that the Bar Council has little intention to dispel it. In that context, the ever sharper delineation of “barrister” from other providers of legal services operating within LDPs, to my mind cuts against the public interest in making it easy for those people who wish to pursue a flexible career at the Bar (perhaps for child care or other reasons) to do so. It seems clear to me that ABSs (in which barristers could do the work which they have substantively done in the past but within a partnership), could bring real equality benefits including by enabling more women to pursue better careers as barristers. If an ever sharper boundary is drawn, they will ever more be forced to choose between a career as a barrister and the other pressures and pulls which may exist. In the end, not only they, but also, more importantly for these purposes, the public interest will be compromised.”

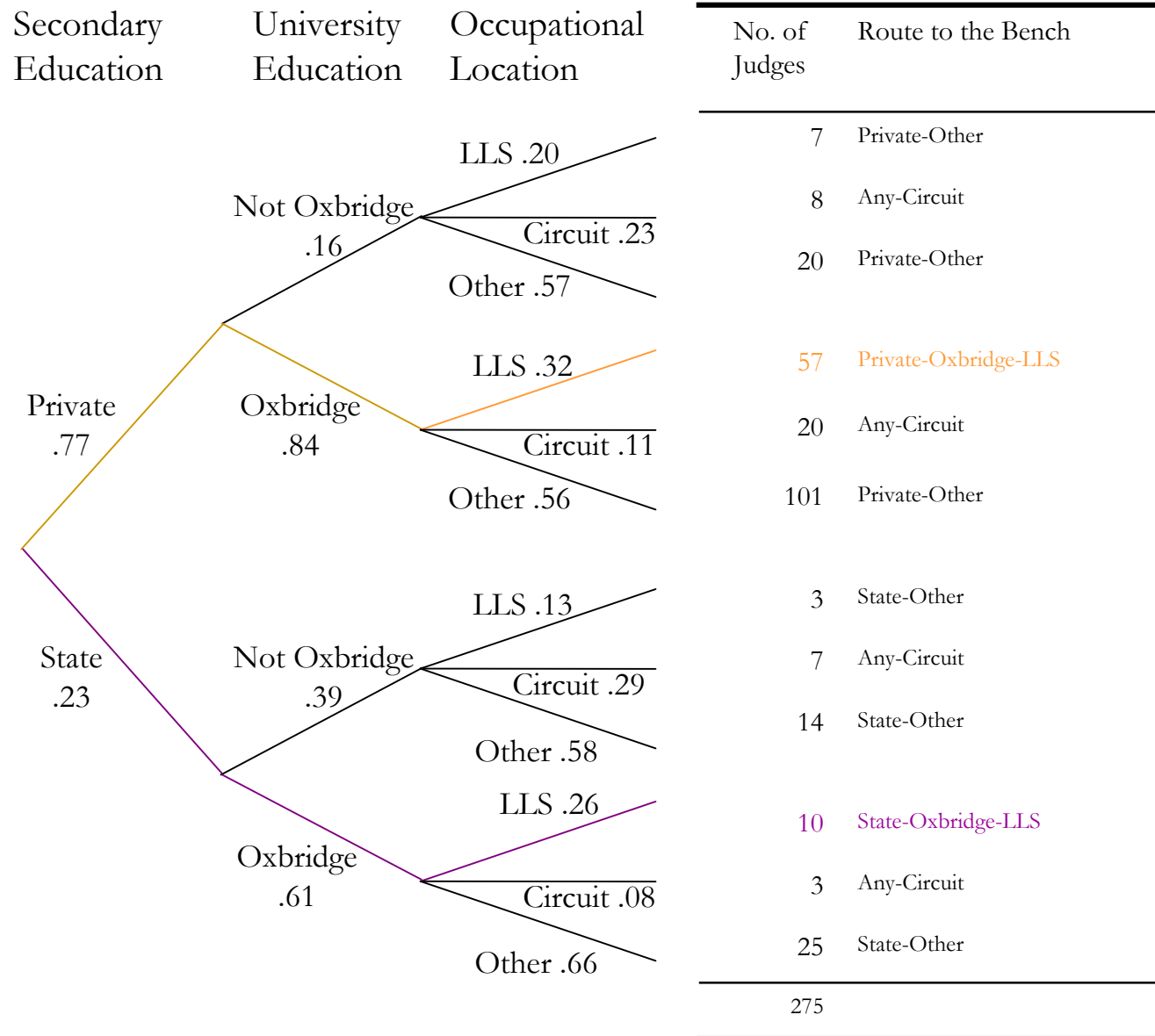
How important is this? Network data.

Effect of Network/Status on Career Progression. Active Judges.



(Source: Blanes i Vidal and Leaver (in progress))

# Routes to the Bench



(Source: Blanes i Vidal and Leaver (in progress))

## Inaugural Speech of Stephen Hockman QC, Bar Chairman to the Bar Council, London 2006

“The significance of his recommendations is sometimes not fully understood. Clementi came down conclusively in favour of the continuation of a range of different and competing regulatory regimes for lawyers in this country.

He expressly rejected the idea that everyone should practise under the same regime and under exactly the same rules. He gave strong support to the continuation of the Bar (employed and self-employed) as a profession of specialist advocates and advisers.

This ought to lay to rest forever the suggestion that it would be in the public interest for the different branches of the profession to be fused together. He also stressed the importance of independence from government.”

Translates as we'll maintain the distinction between proper barristers and others?

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# Verbal evidence to the Joint Committee on Draft Legal Services Bill

**Lord Campbell of Alloway (member of cttee):** ... I totally accept that we are all in the business of making money on the way. Fair enough, but all my life I have been in another business of professional obligation to get independent and proper advice to the client. There have been occasions at the Bar when a solicitor has sent work to me. It has landed on my desk and the clerk has said, "You cannot do it. I am sending it back. You do not know enough about it." I would say, "Really?" and he would say, "No. It would not be good for chambers. You would mess it up." How do you cope with the quality of advice unless you have a solicitor and an independent Bar? ... How do you get this quality with a one-shop? I do not understand how you do it.

**Mr Banks (Bar sole practitioners group):** That sounds very favourable for barristers - the independent Bar, but it is exceptionally important when there are competing pressures ... . The solicitor can go to the independent Bar and have the clearest, independent advice ... . It will only be given if he or she has the expertise to do it. The danger of not having a fully independent Bar is shown by, regrettably, the lack of success – I hope you do not feel offended – in certain solicitors trying to do work as solicitor advocates, which they are not properly qualified to do, for commercial reasons. Please accept that I am sure most solicitors know when they go too far but you know those people who have gone too far, those solicitors who then take that they should not do, which should have gone to an independent barrister who is a specialist in this area.

**Q417 Mr Kidney (member, lawyer, PPS Secretary of State):** I am sure Mr. Banks is not taking about solicitors who have an accreditation to be an advocate in a higher court when he says that.

**Mr Banks:** I regret some of those have done certain things. I hope I am not offending the solicitors here.

**Q418 Lord Bach (member, barrister):** What about some barristers who also appear who are not up to it?

**Mr Banks:** They do not have Henry as a clerk.

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