



The Notaries Society
Old Church Chambers
23 Sandhill Road
St James
Northampton NN5 5LH



**SCRIVENER
NOTARIES**

The Society of Scrivener Notaries
95 Aldwych
London WC2B 4JF



Legal Services Board
One Kemble Street
London WC2B 4AN

20 January 2017

Dear Sirs,

Notaries – objections to application by ICAEW for designation as an Approved Regulator for notarial activities

We represent the two professional associations for notaries in England and Wales.

We refer to the application being made by the Institute of Chartered Accountants of England and Wales for designation as an Approved Regulator for notarial activities. Reference is made hereinafter to the “ICAEW” or the “the Applicant”.

Reference is also made to “Rules for applications for Approved Regulator and Qualifying Regulator designation” published by the Legal Services Board: “the LSB Rules”.

We believe that it would not be in the public interest for the application to be granted.

The LSB Rules for determination of applications

From the LSB Rules, we note that:

“Board approval of a new body as an Approved Regulator and/or Qualifying Regulator, or of an Existing AR Applicant as an Approved Regulator in relation to an additional Reserved Legal Activity, or a Qualifying Regulator in relation to immigration advice and services represents an assessment that:

- a) the Applicant appears well prepared and appears to understand the roles and responsibilities granted to Approved Regulators and/or Qualifying Regulators under the 2007 Act; and*
- b) no valid objections have been made to the Applicant’s Application by the Consultees.”*

We conclude that the Legal Services Board will not be able to make such an assessment if it is not satisfied that the Applicant is well prepared and has an understanding of notarial activities.

We further conclude that the LSB will not be in a position to issue such an assessment if it is in receipt of a valid objection from a Consultee. Whilst a common sense interpretation of the Rules is that it must be for the LSB to draw its own conclusions as to whether an objection is “valid”, we suggest that the threshold for approval is high. An application should be declined by the LSB if there is any doubt or concern about its merits.

We note also the Criteria For Determining Applications in the LSB Rules. Our objections to the Application also relate to these Criteria and the Regulatory Objectives of the Legal Services Act 2007.

The history of the application

The ICAEW published its Application in draft on 12 February 2016. The draft Application was limited to notarial activities in the field of taxation.

We wrote to the Applicant in April 2016 to indicate that we did not consider the Application to be in the public interest and that we would give our reasons to the LSB should the Application proceed.

It was announced on 21 July 2016 that an Application had been made to the LSB. The final Application contained a significant amendment, in that it had been extended to include all notarial activities, not just those relating to the provision of taxation services.

On 12 January 2017 a report appeared on the website of an online news source, indicating that the Applicant had withdrawn its application in the areas of litigation and rights of audience.¹

Consultation under the LSB Rules

Part III, paragraph 4 of the LSB Rules states:

¹<http://www.legalfutures.co.uk/latest-news/exclusive-accountants-abandon-bid-train-litigators-advocates-now>. The alert from the publisher states: *“The growing land-grab by accountants in the legal world should also be a continuing theme, but we [Legal Futures] revealed this week that the Institute of Chartered Accountants in England and Wales has abandoned its attempt to train accountants in tax litigation and advocacy; instead, at least for the time being, accountants who want to offer those services will have to employ a lawyer”.*

“The Board will normally expect to see evidence of consultation with other Approved Regulators and the OLC on matters (such as code of conduct) where there is likely to be an interaction between the Applicant and the existing Approved Regulators.”

A meeting took place between the Applicant and the Master of the Faculties in March 2016.

The Applicant produced a memorandum of that meeting which it used in support of its Application.

That memorandum suggests that the Master of the Faculties was supportive of the Applicant’s decision to extend its Application to include all notarial activities. We do not agree with this interpretation. Our understanding is that the Master of the Faculties is opposed to the application and has given reasons to you separately.

The same section of the LSB Rules continues:

“The Applicant should also consult with members of, and representative bodies for, professions that may be affected by the Application and with the regulators of these professions.”

The Applicant attached a list of “stakeholders” at Annex 27 to the Application. The Annex states that stakeholders will be “alerted by e-mail” to the consultation.

We suggest that consultation between a prospective regulator and an existing group of authorised persons (under the Legal Services Act 2007) ought to be more than publishing an application and alerting others to the fact by e-mail. We appreciate therefore that this provision of the LSB Rules has been included, as it will be obvious that notaries are affected by the Application. The Notaries Society and the Society of Scrivener Notaries were not “alerted” by e-mail, approached for the benefit of their experience in notarial practice, or indeed consulted directly as part of the process of the application at any stage.

In case it is suggested that this objection is disproportionate given the relatively small size of the profession, we note the inclusion of The Association of Law Costs Draftsmen (ALCD) on the Applicant’s list of Consultees. The ALCD represents approximately 600 costs lawyers authorised to conduct certain reserved legal activities in England and Wales.

We are not aware of any contact between the Applicant and individual members of the notarial profession. We do not believe any reference is made to such contact in either the draft Application or the final Application.

It appears therefore that the Applicant’s preparations for an Application for designation as an Approved Regulator of notarial activities did not extend to meeting any practising notaries at all.

The consequences of this omission for the Application itself are considered below. As the LSB Rules suggest, we agree that any entity seeking to regulate notarial work would, in order to develop an understanding of notarial practice, have sought contact with the relevant professionals as part of its preparations.

By the time the profession became aware of the draft Application (and on reading the details) we concluded that the Applicant was determined to press on with its Application to regulate all the various reserved legal activities, irrespective of any comments made by the profession.

The lack of investigation into how the profession operates is even more remarkable given the Applicant's decision to expand the Application to all notarial activities. The profession only learned of this amendment indirectly; when the announcement was made that the Application had been filed with the LSB.

Mandatory Consultees - the Competition and Markets Authority (CMA)

The Competition and Markets Authority (CMA) is one of the Mandatory Consultees for this Application. In December 2016 the CMA published *Legal services market study - Final Report*. This is a major report on the legal services market and it has been studied carefully by notaries, given its relevance. The profession provided evidence to the CMA following publication of the Interim Report in the summer².

We noted the following section in respect of ICAEW:

*"In addition, we note that that ICAEW has recently proposed to become an approved regulator and licensing authority under the Legal Services Act 2007 for the reserved legal activities: conduct of litigation; rights of audience; reserved instruments activities; notarial services and administration of oaths. The scope of this application is restricted to taxation services. This suggests that some of the taxation services offered by chartered accountants may include some legal advice."*³

In this regard at least, the authors of the CMA report seem to be unaware that the Applicant removed the restriction from its Application. We would therefore welcome the LSB's reassurance that the CMA as Consultee was aware of the amendment to the Application.

Mandatory Consultees – the Lord Chief Justice

The two notarial societies submitted advice to the Lord Chief Justice to assist him in his deliberations. A copy of this advice is attached at Annex I.

Absence of vested interest

For the sake of completeness, we confirm that neither society has an interest to declare. We do not seek designation as an Approved Regulator of any reserved legal activities or accountancy services. Nor are we aware that the Master of the Faculties is seeking designation as an Approved Regulator to become a regulator in other areas of legal practice.

²<https://assets.publishing.service.gov.uk/media/57d2a0fced915d6c2f00003e/society-of-scrivener-notaries-response-to-ls-interim-report.pdf>

³CMA, *Legal services market study - Final Report*, p. 125, note 394

The independence of the Applicant from its membership

One of the main recommendations of the Clementi Report, which led to the enactment of the Legal Services Act 2007, was that representative and regulatory functions needed to be separate. We note the following provisions relating to regulatory independence in the LSB Rules:

57. In accordance with paragraphs 13(2) and 13(3) of schedule 4 to the 2007 Act for Approved Regulator and Reserved Legal Activity Applications, and paragraphs 5 (2) and 5 (3) of schedule 18 for Qualifying Regulator Applications, the Board will only grant an Application if it is satisfied:

a) that, if the Lord Chancellor were to make an order designating the Applicant as an Approved Regulator in relation to the particular Reserved Legal Activity, or if an order were to be made under section 86A of the 1999 Act to make the Applicant a Designated Qualifying Regulator, the Applicant would have appropriate internal governance arrangements in place at the time the order takes effect and, in particular that the exercise of the Applicant's regulatory functions would not be prejudiced by its representative functions and, so far as is reasonably practicable, regulatory decisions would be taken independently of representative ones;

The ICAEW describes itself as a "world leading professional membership organisation that promotes, develops and supports more than 147,000 members worldwide. We provide our members with knowledge and guidance, and ensure ICAEW Chartered Accountants are meeting the highest ethical and technical standards".⁴

The ICAEW is a representative body comparable in size to the Law Society of England and Wales.

The Master of the Faculties (the Approved Regulator of notaries) is not a representative body. As far as the notarial profession is concerned, regulatory independence from the profession and government has existed since 1533. The independent jurisdiction exercised by the Court of Faculties of the Archbishop of Canterbury over notaries was preserved by The Courts and Legal Services Act 1990.

The Notaries Society, which represents approximately 800 Notaries Public in England and Wales was founded in 1882 and was incorporated in 1907. The Society of Scrivener Notaries was formed in 1999.

In the Clementi Report the notarial profession was singled out as having a clearly defined separation between the regulator and the representative bodies.

"The Notarial Profession also already distinguishes between regulatory and representative functions. It is distinctive amongst legal providers in England and Wales because the profession is primarily concerned with documents which are to take effect abroad and not in this country."

Sir David Clementi, 2004, Review of the Regulatory Framework for Legal Services in England and Wales

The reference to foreign law is important and is discussed below.

⁴<http://www.icaew.com/en/about-icaew>

We therefore welcome the consistent and unequivocal views of the Competition & Markets Authority views on regulatory independence:

"The independence of a regulator from the providers that it regulates is a key principle that should be taken into account in any review of a regulatory framework".

Competition & Markets Authority, Legal Services Market Study - Interim Report, 8 July 2016, 6.38, page 83

We note that the Ministry of Justice (MoJ) may consult on legislation to separate the existing legal services regulators from their representative bodies. At the time of publication of the CMA report the MoJ announcement had been delayed. We note the CMA recommendation that the MoJ should carry out the review on independence as soon as possible and that it should consider independence both from the profession and from government.

In its Final Report, the CMA noted:

"The LSB argues that the current lack of full independence between the approved regulators and their frontline regulatory bodies is unlikely to be sustainable in the future for a range of reasons, but in particular includes the potential scope for representative bodies to delay reforms that would benefit competition and consumers and thus creating regulatory uncertainty."⁵

Whilst this assessment is not quite accurate as far as notaries are concerned, we agree with the conclusion. Complete separation is the only way in which conflicts of interest can be avoided. Where the commercial organisation sets the rules, commercial pressures arise. This point was anticipated in relation to notarial services by Professor Mayson in 2013:

"There is also no case for self-representation here: an individual cannot credibly provide notarial services for themselves: the whole rationale of notarial services is independent verification."

Review of Legal Services Regulatory Framework, Sept. 2013

The Legal Services Board itself has argued extensively for regulatory independence. In recent months it has gone even further:

"We believe that a single regulator, covering the whole legal services sector and accountable to parliament, would be best placed to deliver improvement, deregulate, save cost and act strategically."

Legal Services Board, *Delivering better outcomes for consumers and citizens*, Sept. 2016

Whether this is the course chosen by Parliament remains to be seen. However, if the LSB does believe that there should be a single regulator for legal services it is hard to see any justification for the presence of two regulators in the section of the legal services market serviced by notaries.

Although the Applicant makes claims about its regulatory arm, the reality is that it is dependent on its representative parent. The impetus for applying to regulate other areas of legal services comes

⁵ CMA, *Legal services market study - Final Report*, p.192

from the profession that it represents. The CMA has considered the circumstances of those representative bodies that have applied to regulate reserved legal activities.

“Although new designations in principle have a positive impact on entry in the area of probate, the process to become approved regulators (called designation) can be complex and ultimately costly for the body to undertake.

This may discourage other bodies from undertaking the designation process. Both ICAEW and CILEx noted the length and the complexity of this process, although they appreciate that the aim of the long approval process was to ensure that the bodies had the capacity and capability to regulate probate activities.

ICAEW (regulatory arm) noted that the designation process is extremely long and tortuous and requires considerable investment by the applicant body. This means that the process could be out of reach for the smaller trade bodies which, even if they had the experience and capability, could not afford the paperwork and timescales required in order to secure the designation.”⁶

The fact that ICAEW and/or the CMA should regard “trade bodies” as being the natural regulators is a concern which we are sure the LSB will share. We are also concerned by the assessment that these circumstances favour the large trade associations to the potential detriment of the public interest.

Applying the CMA’s observations to notarial activities, we remind the LSB that the ICAEW does not have any experience in notarial practice. The “smaller trade bodies”, which do have the relevant experience in notarial work, share the legislator’s belief that it would not be appropriate for them to seek to regulate themselves.

As far as this Application is concerned, it cannot be said that representative and regulatory functions have been discharged and decisions made independently of each other. The representative function of the Applicant is rarely far away:

“ICAEW is of the opinion that a good business case can be made for it to regulate notarial services. Notarial services are required for service areas already provided by accountants such as transfer pricing and VAT.

Obtaining accreditation to carry out the further reserved legal activities for the service area of taxation is likely to be attractive to all sizes of ICAEW’s member firms. The debt recovery cases brought by HMRC in the civil courts can include low level debt and personal bankruptcy proceedings. This type of work would be within the scope of small firms as would the strict liability criminal cases that may be brought in the magistrates’ courts. Complex, high level debt cases and defended company winding up proceedings are more likely to be within the sphere of larger firms as would complex tax fraud/evasion cases. The ability to prepare documents relating to property and trusts is likely to be attractive to all sizes of firms as would administration of oaths. However, notarial services are more likely to be used by larger firms.” (para. 1.25 of the Application)

⁶ *Ibid.* page A67, note 247

The LSB Rules correctly identify the risk is that *“Decisions lack credibility and independence because of actual or perceived influence from the representative arm of an Approved Regulator”*. The representative functions of ICAEW are the motive for the Application.

The independence of the Applicant from other regulators

The LSB Rules require an Applicant to be able to prove that:

if such an order, were to be made, the Applicant would be competent, and have sufficient resources, to perform the role of Approved Regulator in relation to the Reserved Legal Activity or the role of Designated Qualifying Regulator (within the meaning of section 86A of the 1999 Act) at that time;

A characteristic of the Application is the section on authorisation processes. In relation to the various reserved legal activities, the proposal contains various syllabuses that ICAEW members would need to follow if they wish to be authorised for each of the reserved legal activities. “Learning outcomes” are specified in relation to most of them.

The syllabus for prospective notaries is brief. There are no learning outcomes other than:

Notarial Syllabus

“An applicant must be a notary and either –

(a) Has in force a practising certificate as a solicitor issued under the Solicitors Act 1974 (c.47), and is duly entered in the Court of Faculties of the Archbishop of Canterbury in accordance with rules made by the Master of Faculties, or

(b) Has in force a practising certificate as a public notary issued by the said Court of Faculties in accordance with rules so made”.

The Applicant is expecting the Master of the Faculties (and the profession) to operate the authorisation process on its behalf. In practice, this means consideration of the candidate’s eligibility by the Master’s Qualification Board and education/training delivered by notaries authorised by the Master of the Faculties. For this reason, the Applicant’s decision not to engage with notaries as to feasibility of such a proposal is surprising.

We suggest that the Applicant does not feel prepared to offer a qualification route of its own or is not confident as to what makes a good notary.

The LSB also needs to be certain under its own Rules that:

if such an order, were to be made, the Applicant would be competent, and have sufficient resources, to perform the role of Approved Regulator in relation to the Reserved Legal Activity or the role of Designated Qualifying Regulator (within the meaning of section 86A of the 1999 Act) at that time;

The Applicant’s proposal relies on the Master of the Faculties and the existing corpus of practitioners in order to discharge its functions in respect of the authorisation process. As

qualification/authorisation is a key part of any Regulatory Arrangements, we do not see how the Applicant can “borrow” the Regulatory Arrangements of the Master of the Faculties. Either the Applicant has the expertise and capacity to manage the authorisation process in its own right, or it does not.

Whilst we respect the ICAEW’s work in the field of accountancy, we are therefore confident that it will be clear to the LSB does not have the required expertise or experience in relation to the work of notaries.

This “borrowing” is particularly unsatisfactory given the potential for regulatory conflict. The ICAEW proposes to apply entity regulation arrangements that will (as far as notaries are concerned) prevail over the regulatory arrangements of the Master of the Faculties.

Regulatory conflict

Notaries (Post-Admission) Rules

On admission, newly-qualified notaries are required to undergo a two-year period of supervision by a notary who has 5 years of professional experience. This period of mentoring is regarded as a beneficial transition into general practice for inexperienced notaries. The financial benefit to the supervisor is extremely modest. Most regard the responsibility as being for the public benefit and that of the longer-term future of the profession.

The Application is silent on these arrangements. We do not know whether the Applicant is expecting the existing corpus of notaries to provide supervision to potential ICAEW-regulated notaries, or whether it regards its “own” prospective notaries as not requiring supervision in the post-admission period.

It is therefore unfortunate that the Applicant proceeded to a full Application without a more considered period of research into how the profession operates.

We note also the requirement for ICAEW members to hold professional indemnity insurance cover of £500,000, if involved in the conduct of probate activities.

The Master of the Faculties requires notaries to hold cover to a minimum of £1,000,000.

We therefore see a circular and unsatisfactory prospect in which an accountant-notary is required to buy a higher level of cover in order to satisfy one regulator, even though the entity regulator imposes a lesser requirement.

We remain of the view that resources need not be expended on resolving regulatory conflicts if a multiplicity of regulators is avoided.

Competition issues

The combination of consumer law and the regulatory arrangements of the Master of the Faculties has created an environment in which members of the public can access notarial services in a competitive market.

The Applicant's assertions regarding accountants' interest in providing notarial services

The Applicant enclosed at Annex 28 a Report which contains a research project undertaken to ascertain the likely interest in applying to ICAEW for accreditation in reserved legal services. It is asserted that there is demand among ICAEW members.

We note that the Applicant's decision to withdraw part of its Application in January 2017 was motivated in part by a realisation that this level of demand has been miscalculated.⁷

We have the following observations to make regarding this research.

The research was carried out "shortly before" the consultation period. However, the research does not appear to have been published at the same time as the consultation. By this stage the ICAEW draft application must have been at an advanced stage. It seems therefore that the Applicant must have decided to apply for Approved Regulator status some time before it conducted research of its members.

No details are given of the questions asked. It is unclear whether any distinction was drawn between notarial services and the other reserved legal activities in respect of which the Applicant is seeking Approved Regulator status. We assume that no distinction was drawn as "firms were screened out to check that they offer tax services" – a distinction that applies to the other reserved legal activities.

At page 992 it is stated "*Firms anticipate that they will need to consider the application more closely to understand what is required to help them decide whether to apply or not*". Most respondents were therefore not aware of the detail of the application. As far as notarial services are concerned, they would not be able to familiarise themselves without referring to the regulatory arrangements of the Master of the Faculties.

The costs used by the Applicant were "based on probate accreditation and training costs". No details of the cost of qualification as a notary were given.

The respondents in the survey are ICAEW members, not consumers.

We do not see how any conclusion can be drawn from the research, other than that some accountants would be interested in taking on additional work if they think it would be profitable for them to do so.

⁷See footnote 1 above. Duncan Wiggetts, executive director of professional standards at the ICAEW is quoted as saying: "*Furthermore, even if ICAEW's application were to be approved, the demand for qualifications for litigation and advocacy will still remain very uncertain as these courses will be lengthy and costly and firms may well prefer to employ a solicitor or barrister to carry out these activities, rather than train an accountant to do so.*" The same analysis can and should be made in respect of notaries.

The market for notarial services - supply

A more reliable source of evidence is the historical data relating to the numbers of practising notaries. This gives the LSB a more informative picture of the number of notaries that the market will support.

We therefore submit figures received from the office of the Registrar of the Court of Faculties showing the number of notaries practising in England and Wales for the period 2011-2016.

Year	Number of notaries on the Roll
2011	876
2012	869
2013	796
2014	795
2015	779
2016	793

Source: The Faculty Office

During that period the Notaries (Qualification) Rules 1998 were in force. Entry to the profession of notary was open to all who meet its requirements, including accountants. It is these qualification arrangements that the Applicant seeks to use. We infer therefore that they are not considered by the Applicant to be a barrier to entry.

The average number of practising notaries over this 6-year period was therefore 818. The data suggests therefore that the market for notarial services will support 775-825 practitioners, with the numbers remaining stable in recent years.

We also draw the LSB's attention to the survey conducted by the Master of the Faculties in 2015, enclosed as Annex II.

The data shows the number of practising notaries grouped by region, together with details of annual income.

The LSB will note that whilst some practitioners are reaching significant levels of fee income, others record very low levels of income.

We submit to the LSB that these figures are most objective picture of the market for notarial services in England and Wales.

Competition – consumer pricing

The Application contains a number of assertions as to how an unspecified number of ICAEW-regulated accountant-notaries would affect the market for consumers. We draw the LSB's attention to a more reliable source of evidence – historical data.

Notaries in England and Wales do not operate under the system of *numerus clausus* or fixed fees. They all operate with the same regulatory cost base (and the Applicant proposes to adopt this cost base in support of its proposed authorisation process).

If disproportionate fees were a feature of the market there would be evidence of it in the form of consumer complaints.

We are grateful to the Legal Ombudsman for compiling the enclosed data at Annex III in respect of notaries. The data covers a 5-year period.

The LSB will note:

The Legal Ombudsman has heard 9 complaints against notaries since 2011.

In two of the financial years no complaints were received at all.

In the 5-year period 3 complaints were heard in respect of notarial activities. The Ombudsman found no evidence in poor service in any of them.

One complaint was made in respect of fees, in 2011-2012. The ombudsman found that *"the notary carried out a lot more work than the £50 that was charged and had provided a reasonable service in all circumstances."*

Promotion and protection of the public interest

We agree with the CMA that the public interest is the most significant of the Regulatory Objectives.

The reservation of notarial activities tends to be justified mainly on public interest considerations: commentators and stakeholders agree that the use of notaries provides considerable certainty to business or individuals involved in international transactions, particularly with civil law countries. There is also a consumer protection justification in the sense that reservation avoids potentially costly litigation after the event should the validity of a document be disputed.⁸

We urge the LSB to rank this objective ahead of the professional agendas. Serving the public interest is dependent on the ability of notaries in England and Wales to ensure that their acts are recognised in all other jurisdictions, whether civil law or common law.

It is likely that the currently limited role of unauthorised providers in this area relates to the fact that notaries are a recognised 'brand' and business or individuals involved in international transactions use them as a guarantor of quality. Moreover, as noted by the Master of Faculties, unauthorised providers seeking to authenticate legal documents for use abroad would find it difficult to get these documents recognised by counterparties in European jurisdictions. Being a 'notary' and being recognised as such by other lawyers in foreign jurisdictions is crucial to the delivery of these services.⁹

⁸ CMA, *Legal services market study - Final Report*, page G17, para. 53, referring also to a publication by Professor Mayson

⁹ *Ibid.* page G17, para. 55.

Any analysis of legal services regulation in England and Wales therefore needs to take into consideration the interaction between the law of England and Wales and the laws and legal systems of other countries. The role of the notary as a public, independent, certifying officer means the majority of a notary's services are rendered to consumers who have legal interests in other jurisdictions. In most cases, notaries in England and Wales practise in an export market.

As the United Kingdom & Ireland Notarial Forum points out:

*"The notarial system is an integral part of the legal structure of jurisdictions founded on the civil law. Such jurisdictions include most of the United Kingdom's partners in the European Union. In those jurisdictions, the notary's intervention is necessary in order to complete many of the most important legal transactions. In England and other common law jurisdictions, the notarial system is less deeply rooted; notaries exist primarily in England to enable parties to authenticate documents or give effect to legal transactions in jurisdictions outwith the United Kingdom."*¹⁰

There is an unfriendly, minority view within civil law jurisdictions that notaries in England and Wales are not "lawyers" at all. As an example of this, a recent case was heard in Spain involving a land registrar in Mazaron, Murcia, a notary in Albacete and a power of attorney certified by a notary public in Liverpool. The decision considers the formal validity of both the Spanish notarial deed and the power of attorney notarised in Liverpool. Near the end of the decision, the Director General of Land Registries and Notaries of Spain embarks on series of unfortunate comments in respect of notaries in England:

"Within the Anglo-Saxon notarial systems the equivalence of notarial documents differs appreciably [from our own]. The "Notary Public" does not issue confirmation as to the capacity of the appearers and cannot be considered to be equivalent; whilst the notaries-at-law or lawyer-notaries, can be considered to be equivalent.... In this particular case, the English Notary Public has restricted his intervention to solely certifying the signature, without such certification being equivalent to the public document which is referred to in article 1280.5 of the [Spanish] Civil Code previously referred to."

This caused some disruption to the circulation of notarial acts; and the profession was required to make strenuous efforts to correct this lack of understanding. That task would have been much harder if we were required to also explain why the accountants' association is ultimately responsible for the regulation of the notarial profession in England and Wales. Further reading on this case is available at Annex IV.

The worst-case scenario is that the recognition of Anglo-Welsh notarial acts becomes sporadic and unpredictable, meaning that consumers in England and Wales are unable to access notarial services at all. The potential detriment to the consumer is obvious and there would be wider economic implications.

¹⁰ The Forum is a multilateral body consisting of associations from the various parts of the United Kingdom and Ireland - see <http://www.ukinf.org.uk>

We note that these concerns were raised by the Master of the Faculties with the Applicant. However, the Application does not address them, and we suggest that this is because the Applicant is unfamiliar with the system that applies within civil law jurisdictions.

Given the new relations between the United Kingdom and our European neighbours, this observation is particularly apt. Regulatory force means not only statutory authority but recognition by the United Kingdom's main trading partners and allies. These partners and allies have legal systems which respect professional title and independence, and the separation of regulation and representation.

We have articulated similar concerns to the Justice Committee of the House of Commons, having submitted written evidence to the inquiry into the "Implications of Brexit for the justice system". A copy of this evidence is attached as Annex V. We ask you to note paragraphs 6.3 and 6.4 in particular.

We also attach as Annex VI a letter from the President of the International Union of Notaries which concisely explains the risks.

We reiterate therefore that the public interest can only be promoted and protected through the recognition and acceptance of the status and activities of notaries in England and Wales in civil law and common law jurisdictions. If the status of Anglo-Welsh notarial acts abroad is weakened due to inappropriate regulation or regulatory changes, the ability of consumers to access justice will be affected proportionally.

In conclusion, whilst we respect the work of ICAEW on behalf of chartered accountants, we do not think it would be in the public interest for it to be designated as a regulator of notarial activities. We submit that the Applicant is not independent of the accountants' profession and that there is no justification for two regulators in this sector of the legal service market.

We are grateful to you for your consideration of the views of the notaries of England and Wales.

Yours faithfully,



Edward Gardiner
Chairman
The Society of Scrivener Notaries



Sally Osborn
President
The Notaries Society

The Society of Scrivener Notaries

The Notaries Society

The Legal Services Board – Application by the ICAEW for designation as an approved regulator of notarial activities

Annex I



The Notaries Society
Old Church Chambers
23 Sandhill Road
St James
Northampton NN5 5LH



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NOTARIES**

The Society of Scrivener Notaries
95 Aldwych
London WC2B 4JF

The Right Honourable The Lord Thomas of Cwmgiedd
The Lord Chief Justice
The Royal Courts of Justice
Strand, London WC2A 2LL

8 November 2016

Dear Lord Chief Justice,

Notaries - observations on application by ICAEW to regulate notarial activities

We represent the two professional associations for notaries in England and Wales.

We are writing to you in connection with the application being made by the Institute of Chartered Accountants of England and Wales to become a regulator for notarial activities and the administration of oaths.

In the interests of balance we confirm that neither society proposes or intends to apply to become a regulator of accountancy services. Nor are we aware that the Master of the Faculties is seeking to become a regulator in other areas of legal practice.

Notaries in England and Wales

Halsbury's Laws of England contains the following definition of a notary's role:

"A notary public is a legal officer appointed by the Court of Faculties, whose general role it is, amongst other matters, to draw, attest or certify, under an official seal, documents which are intended for use in other jurisdictions. A notary may also prepare wills or other testamentary documents, note or certify transactions in relation to negotiable instruments and draw up protests or

other formal papers relating to shipping and the cargo conveyed therein. The office further confers the right to administer oaths and declarations."

Notaries in England and Wales verify the capacity of the parties appearing, they confirm the identity of such parties, and, in the case of documents executed in public form, their understanding of the instrument itself. Notaries maintain detailed records of the verification process, including keeping proper records of all instruments certified and or created by the notary leaving an evidentiary record which can be called upon by interested parties in the event of a future dispute. A notary has therefore a duty to the transaction which extends beyond the party or parties seeking his or her services but also toward those individuals, corporate bodies and foreign government bodies relying on it in a receiving jurisdiction.

This duty to the transaction makes the work of a notary "atypical" in that it does not follow the "adversarial" role generally associated with common law practitioners. The advantage is considered by Professor Stephen Mayson in *The Regulation of Legal Services: What Is The Case For Reservation?* (Legal Services Institute, July 2011):

"Not only does this provide a certain level of reassurance for the other parties in a transaction, but it also serves a wider purpose in helping to combat international fraud".

The role of the notary as a public, independent, certifying officer means the majority of a notary's services are rendered to consumers who have legal interests in other jurisdictions. In most cases, notaries in England and Wales practise in an **export market**.

Any analysis of the legal services regulation in England and Wales needs to take into consideration the interaction between the law of England and Wales and the laws and legal systems of other countries.

The demand for the services of a notary public comes from foreign countries which stipulate the use of a notary public. It is interesting to note that the laws of many foreign countries expressly state that where certain important legal documents are executed outside the jurisdiction they must be signed before a notary public. It will not be accepted in the foreign jurisdiction if signed before a solicitor. The availability of a recognised notarial profession means commerce and the public can effect foreign transactions without needing to spend time and money visiting the foreign jurisdiction.

In India, for example, s. 14 of the Notaries Act 1952 provides that notarial acts lawfully done by notaries within a country outside India shall be recognised within India for purposes set out in so-called notification. Such notification issued on August 18, 1960 extended recognition to the acts of notaries of the United Kingdom.

Many legal documents executed outside the People's Republic of China (including Hong Kong) should be executed in the presence of a notary public.

Many Commonwealth countries in particular expressly request the use of a notary public. In Grenada, the Evidence Act (Chap. 92, s.84) states:

"The Court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, magistrate, British Consul or Vice-Consul, or representative of Her Majesty, was so executed and authenticated."

A definitive list of these countries and the relevant laws can be found in *Brooke's Notary* 14th edition by N P Ready published by Sweet and Maxwell (14th edition. 2013).

Legal services offered by notaries may be "reserved" (within the meaning of the Legal Services Act 2007) or "non-reserved". Reserved legal activities would include notarial activities, probate, conveyancing and the administration of oaths. Non-reserved activities would include translation & interpreting services, consular legalisation.

Consumers of notarial services enjoy the benefits of the protections offered within the regulated sector. Where a non-reserved legal activity is offered by a notary, it is nevertheless contained within the regulatory framework by virtue of the fact that it is offered to the consumer by a notary.

"A notary's practice includes the preparation and performance of notarial acts and any other service undertaken as a notary whether or not such service may only be undertaken by a notary."

(Rule 2.2.1, Notaries Practice Rules 2014)

Notaries favour a single regulator (the Master of the Faculties) and oppose the ICAEW application on public interest grounds. The Notaries Society and the Society of Scrivener Notaries indicated to the ICAEW during the latter's public consultation period that it would give its reasons for doing so in due course.

In the "public" consultation the ICAEW application was restricted to "taxation services". However, the formal application to the LSB was to include all notarial work.

We will be submitting a full response and evidence in due course to the Legal Services Board. It will demonstrate why the public interest requires there to be a single and independent regulator of notaries in England and Wales. That submission will also include data from the Faculty Office and the Legal Ombudsman, and will provide evidence of the size of the market for notaries in England and Wales and the most reliable analysis of why the current regulatory arrangements are best suited to the public interest.

Our reason for writing to you directly at this stage is that we wish to alert the judiciary to our concerns for the reputation of the English (and Welsh) legal systems within the international arena. These are threefold and correspond to the Regulatory Objectives contained in the Legal Services Act 2007: the independence and strength of the legal profession, the ability to compete in an international legal market, and, most crucially, the promotion and protection of the public interest.

Encouraging an independent, strong, diverse and effective legal profession.

The notarial profession and its regulator have been independent of each other for centuries. We therefore welcome the unequivocal views of the Competition & Markets Authority views on regulatory independence:

"The independence of a regulator from the providers that it regulates is a key principle that should be taken into account in any review of a regulatory framework".

Competition & Markets Authority, Legal Services Market Study - Interim Report, 8 July 2016, 6.38, page 83

Complete separation is the only way in which conflicts of interest can be avoided. Where the commercial organisation sets the rules, commercial pressures arise. This point was anticipated in relation to notarial services by Professor Mayson in 2013:

"There is also no case for self-representation here: an individual cannot credibly provide notarial services for themselves: the whole rationale of notarial services is independent verification."

Review of Legal Services Regulatory Framework, Sept. 2013

The Legal Services Board has argued extensively for regulatory independence. In recent months it has gone even further:

"We believe that a single regulator, covering the whole legal services sector and accountable to parliament, would be best placed to deliver improvement, deregulate, save cost and act strategically."

Legal Services Board, *Delivering better outcomes for consumers and citizens*, Sept. 2016

Whether this is the course chosen by Parliament in due course remains to be seen. However, if the LSB does believe that there should be a single regulator for legal services it is hard to see how it can justify the presence of two regulators in the section of the legal services market serviced by notaries.

Competition

The Legal Services Board is required to consult with both the Legal Services Consumer Panel (LSCP) and the Competition and Markets Authority (CMA) in connection with the ICAEW application.

In January 2016 the CMA published a market study notice in relation to the supply of legal services in England and Wales. It considered whether legal services regulation currently has an adverse effect on competition. Its provisional view is that legal services regulation does not create significant barriers to entry or distort competition between regulated and unregulated providers of legal services, but that it does impose significant costs on providers that in some cases may be excessive relative to the benefits in consumer protection.

The CMA called for evidence as part of that investigation. Notaries provided extensive written evidence on the market for notarial services and this evidence is available at item 24 of the Responses to the CMA Interim Report on the CMA website: <https://www.gov.uk/cma-cases/legal-services-market-study>

The profession's view is that the current combination of consumer law and the regulatory arrangements of the Master of the Faculties has created an environment in which members of the public can access notarial services in a competitive market.

Lawyers in England and Wales are also competing with those other jurisdictions. In civil law jurisdictions notaries have traditionally occupied a particular role in conveyancing, inheritance and commercial matters. In some jurisdictions the role is tantamount to being a State official, with responsibility for the collection of taxes. Civil law jurisdictions place great store by the concept of the "authentic act" (l'acte authentique/escritura pública/notarielle Urkunde) which has probative value and, in many cases, executory force.

One example of this role can be found in EU Regulation no 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. Notaries in EU jurisdictions have begun to issue such certificates, which confirm the entitlement of beneficiaries to an inheritance. The United Kingdom, Denmark and Ireland opted out of the Succession Regulation and the ECS cannot be issued or recognised in those jurisdictions.

Notarial acts in England and Wales do not enjoy executory force (and we do not expect it). However, under Rule 32.20 of the Civil Procedure Rules 1998: "*A notarial act or instrument may be received in evidence without further proof as duly authenticated in accordance with the requirements of law unless the contrary is proved.*"

The above changes has been of immense use to UK consumers who have personal or commercial business in civil law Europe. Nevertheless, when it comes to competition from other European notaries, notaries in England and Wales are generally at a disadvantage.

From our point of view, the Regulatory Objective of promoting competition in legal services includes promoting the ability of UK lawyers to compete with those from other jurisdictions.

Promotion and protection of the public interest – recognition of notarial acts

A quality service to consumers is dependent on the ability of notaries in England and Wales to ensure that their acts are **recognised** in all other jurisdictions whether civil law or common law.

There is an unfriendly, minority view within civil law jurisdictions that notaries in England and Wales are not "lawyers" at all. As an example of this, a recent case was heard in Spain involving a land registrar in Mazaron, Murcia, a notary in Albacete and a power of attorney certified by a notary public in Liverpool. The decision is lengthy and considers the formal validity of both the Spanish notarial deed and the power of attorney notarised in Liverpool. Near the end of the decision, the Director General of Land Registries and Notaries of Spain embarks on series of unfortunate comments in respect of notaries in England:

"Within the Anglo-Saxon notarial systems the equivalence of notarial documents differs appreciably [from our own]. The "Notary Public" does not issue confirmation as to the capacity of the appearers and cannot be considered to be equivalent; whilst the notaries-at-law or lawyer-notaries, can be considered to be equivalent.... In this particular case, the English Notary Public has restricted his intervention to solely certifying the signature, without such certification being equivalent to the public document which is referred to in article 1280.5 of the [Spanish] Civil Code previously referred to."

This caused some disruption to the circulation of notarial acts; and the profession was required to make strenuous efforts to correct this lack of understanding. That task would have been much harder if we were required to explain the complexities of the Legal Services Act 2007 to our European neighbours. They would immediately query why the accountants' association is ultimately responsible for the regulation of the notarial profession in England and Wales, and whether these are "proper" notaries at all.

We do not wish to sound plaintive about such matters, as we are used to clearing up such confusion through bilateral and multilateral meetings with our colleagues and counterparts in other jurisdictions, including the International Union of Notaries, and the United Kingdom and Ireland Notarial Forum.

However, it does explain why we are vigilant in matters that relate to the reputation of the English legal system overseas. As a profession we want to be able to continue to serve the public.

The worst case scenario, in which the recognition of Anglo-Welsh notarial acts becomes sporadic and unpredictable, would mean that consumers in England and Wales are unable to access notarial services at all. The potential detriment to the consumer is obvious and there would be wider economic implications.

The dangers are not new. Indeed, they were being considered by impartial observers such as Prof. Mayson in 2013:

"Without regulatory force [for notarial acts], confidence in the activities and promises of English participants in international trade could be compromised, to the detriment of the nation's growth and economic well-being."

Review of Legal Services Regulatory Framework, Sept. 2013

This observation seems particularly apt, given the new relations between the United Kingdom and our European neighbours. Regulatory force means not only statutory authority but recognition by the United Kingdom's main trading partners and allies. These partners and allies have legal systems which respect professional title and independence, and the separation of regulation and representation.

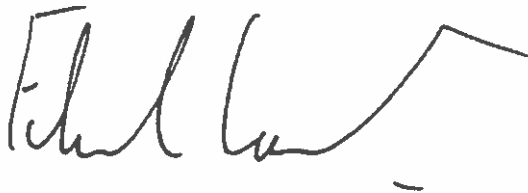
Our concern in these matters is shared by our counterparts abroad, who are respectful of the common law tradition but who have a keen sense of their own legal traditions. We enclose a letter from the President of the International Union of Notaries which concisely explains the dangers.

It comes as no surprise to us therefore that the Justice Committee of the House of Commons has set up an inquiry into the "Implications of Brexit for the justice system". We intend to submit evidence to this inquiry and to make it available to the Legal Services Board.

The public interest can only be promoted and protected through the recognition and acceptance in civil law and common law jurisdictions worldwide of the status and activities of notaries in England and Wales. If the status of Anglo-Welsh notarial acts abroad is weakened due to inappropriate regulation or regulatory changes, the ability of consumers to access justice will be affected proportionally.

We are grateful to you for your consideration of the views of the profession.

Yours faithfully,



Edward Gardiner
Chairman
The Society of Scrivener Notaries



Sally Osborn
President
The Notaries Society

enc. Letter from President Daniel Senghor, International Union of Notaries

The Society of Scrivener Notaries

The Notaries Society

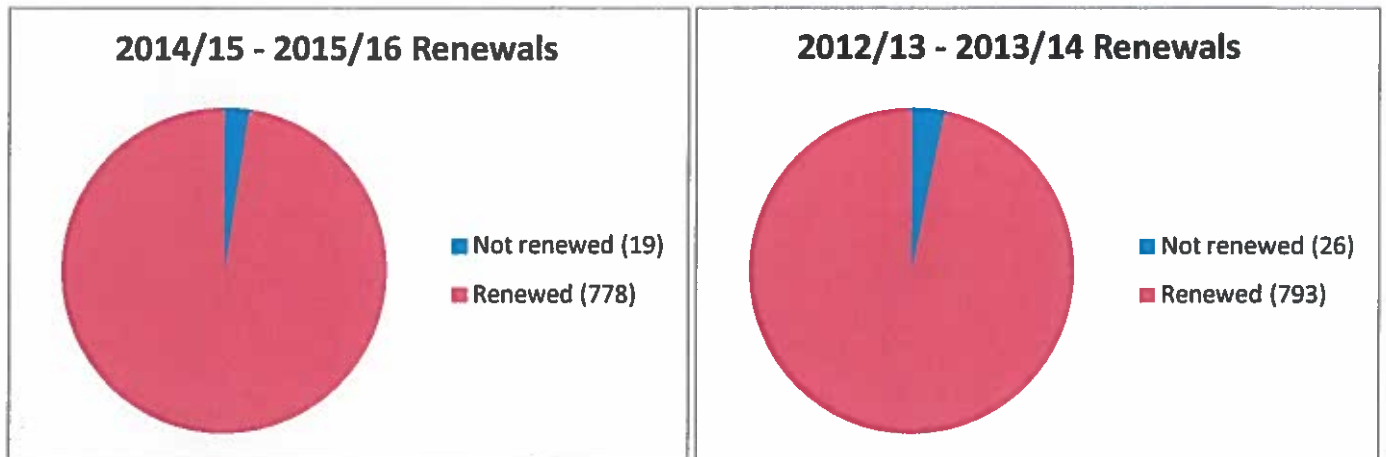
The Legal Services Board – Application by the ICAEW for designation as an approved regulator of notarial activities

Annex II

Analysis of 2015/16 practising certificate renewal information

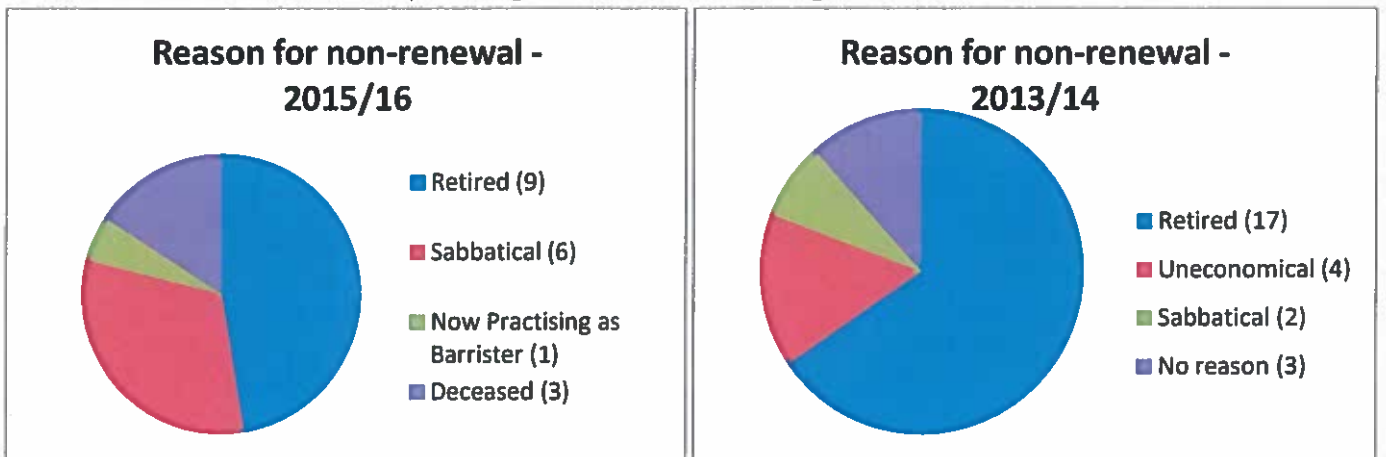
As part of the 2015/16 practising certificate renewal process, additional information was requested from the members of the profession to better enable the Faculty Office to understand its regulated community. What follows represents an analysis of the information gathered under various headings. Much of the information was also collected in the 2013/14 renewal round and, where there is a direct comparison, the relevant chart for that round is also shown adjacent.

Numbers of renewals



Reasons for non-renewal

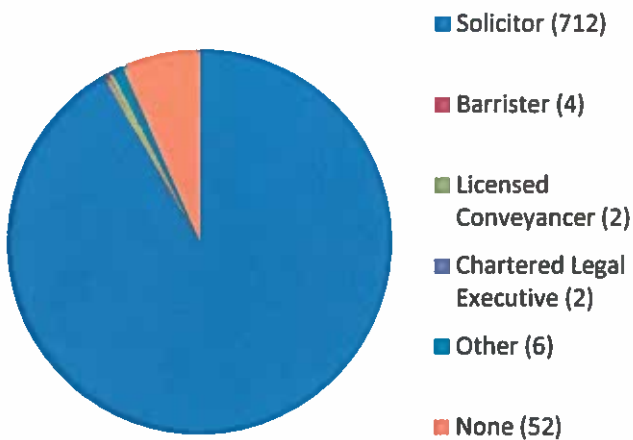
Of those who did not renew their practising certificate, the reasons given were as follows:



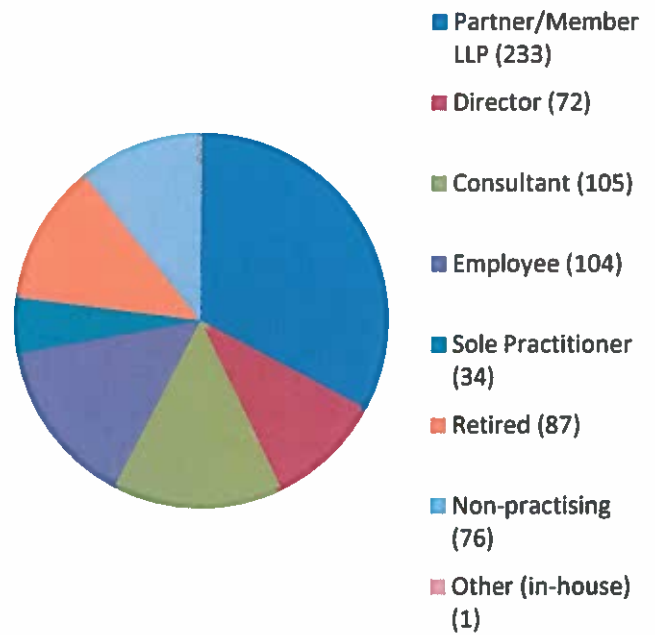
(Under the Bar Standards Board Rules, a barrister holding an annual practising certificate is not entitled to hold a practising certificate issued by another Approved Regulator.)

The majority of the notarial profession are dual qualified, with the overwhelming majority (91.5%) also qualified as solicitors. However, nearly 21% of those qualified to act as solicitors are not currently practising as such (being either non-practising or retired):

Other Legal Qualifications



Solicitor Notaries



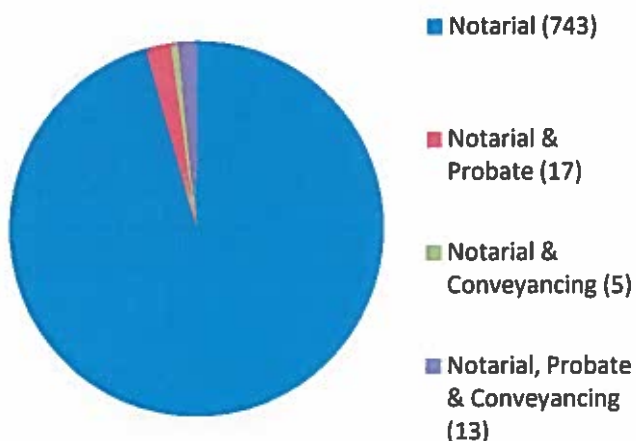
(Of the six 'Other' legal qualifications, five are qualified lawyers in overseas jurisdictions and one is a Chartered Mediator.)

Of the 778 who have *renewed* (as at 1 January 2016), the following information has been provided which will be used to inform the Faculty Office's risk assessment of its regulated community.

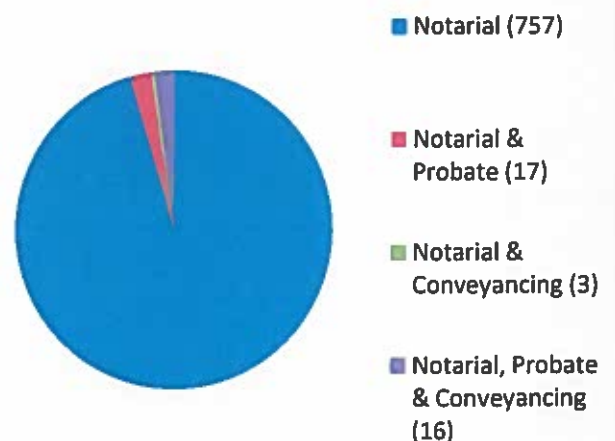
Reserved legal activities undertaken in their capacity as a notary

Notaries are entitled to carry out four of the reserved legal activities set out in the Legal Services Act 2007. We did not ask how many of the regulated community act as Commissioners for Oaths (for use in this jurisdiction) but focussed solely on notarial activities, probate activities and reserved instrument activities (conveyancing):

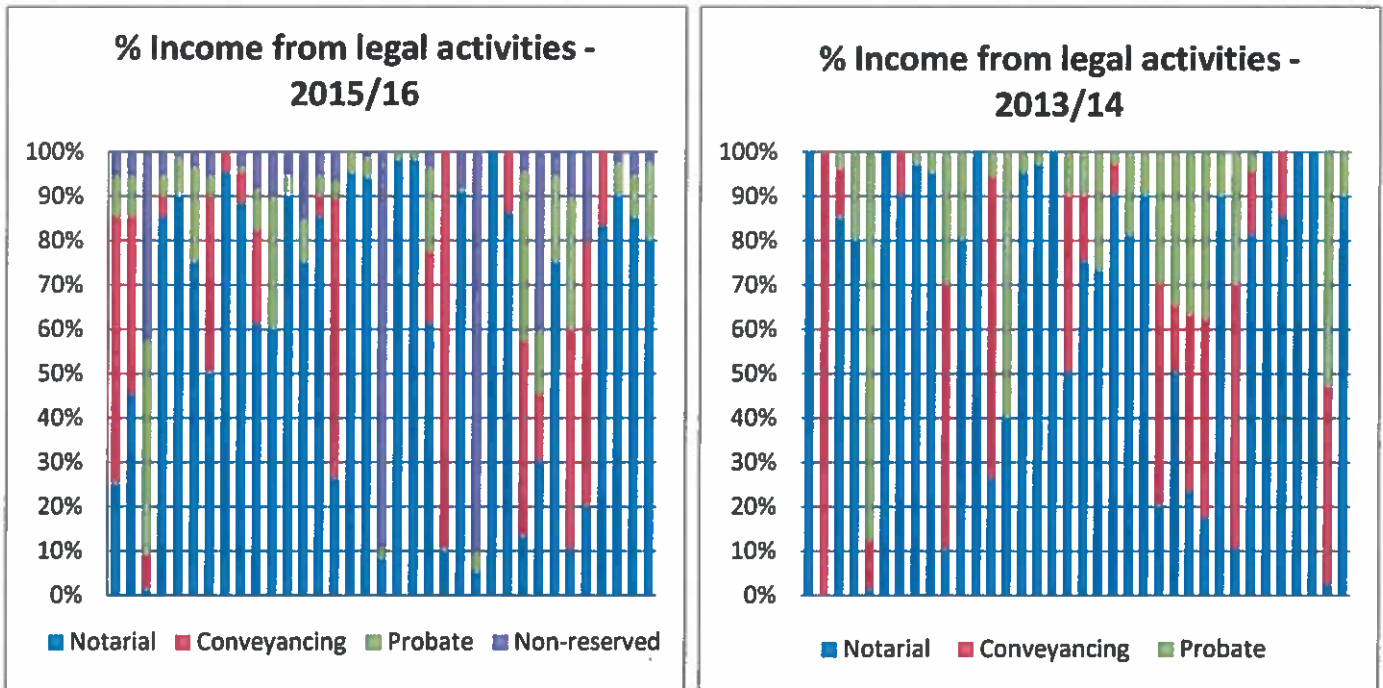
Reserved Legal Activity - 2015/16



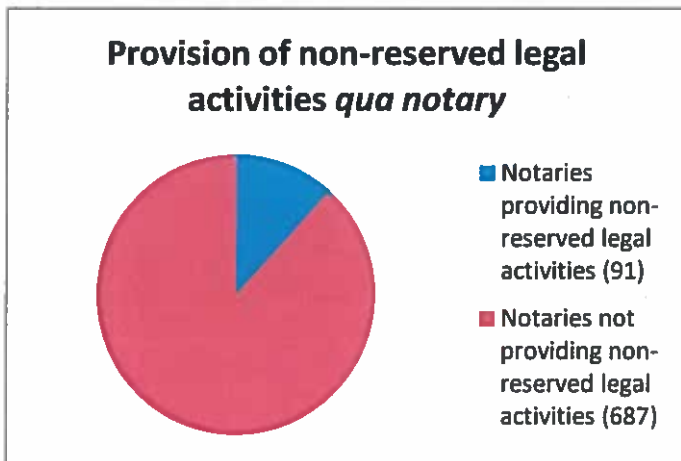
Reserved Legal Activity - 2013/14



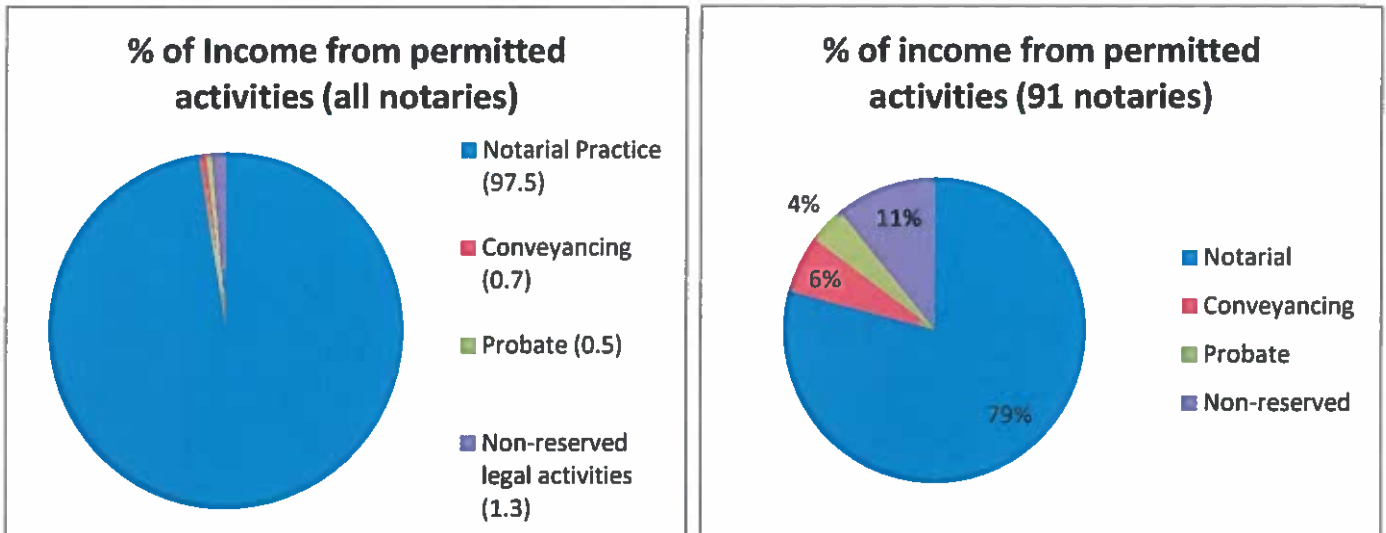
Of those 35 notaries who undertake conveyancing and/or probate in their notarial capacities in addition to pure notarial activity (36 in 2013/14), the percentage of their gross fee income from the respective areas is shown below:



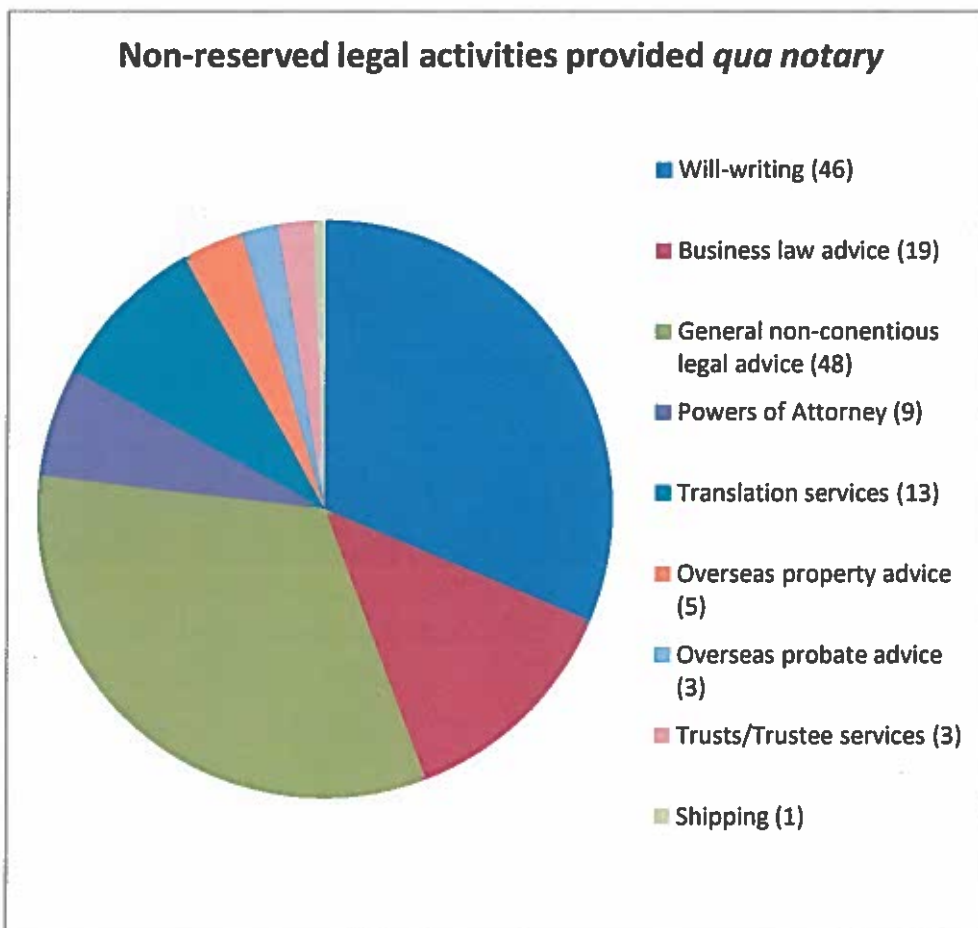
As will be noted, we also asked notaries how many carry out non-reserved legal activities in their capacity as a notary public. The information obtained is set out below:



We also asked for an approximate breakdown of the percentage of gross income attributable to the various areas of practice:

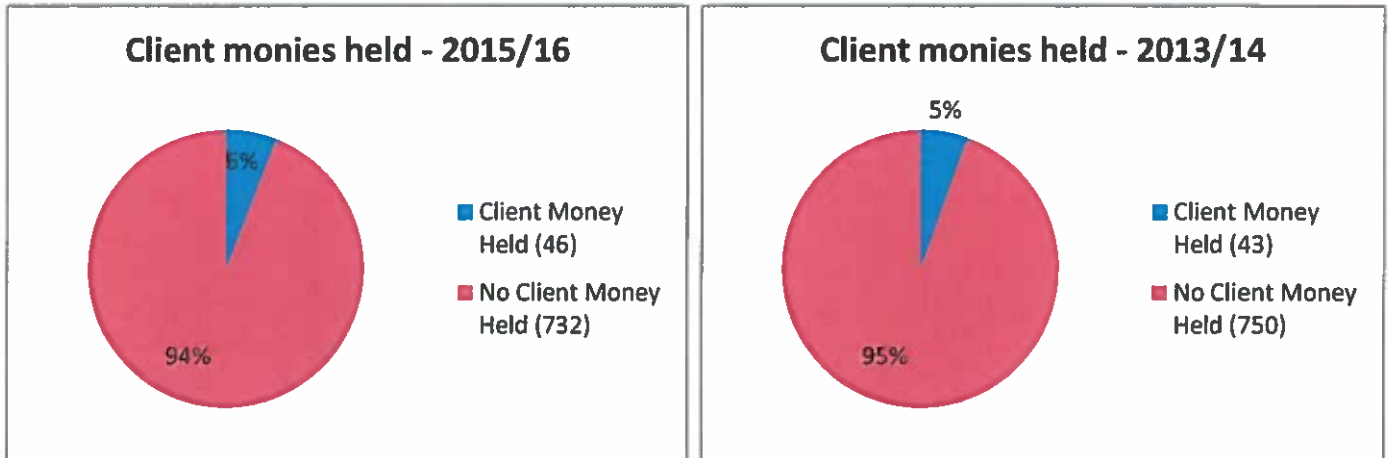


The types of non-reserved legal activities carried out *qua notary* fell broadly into nine work-types:



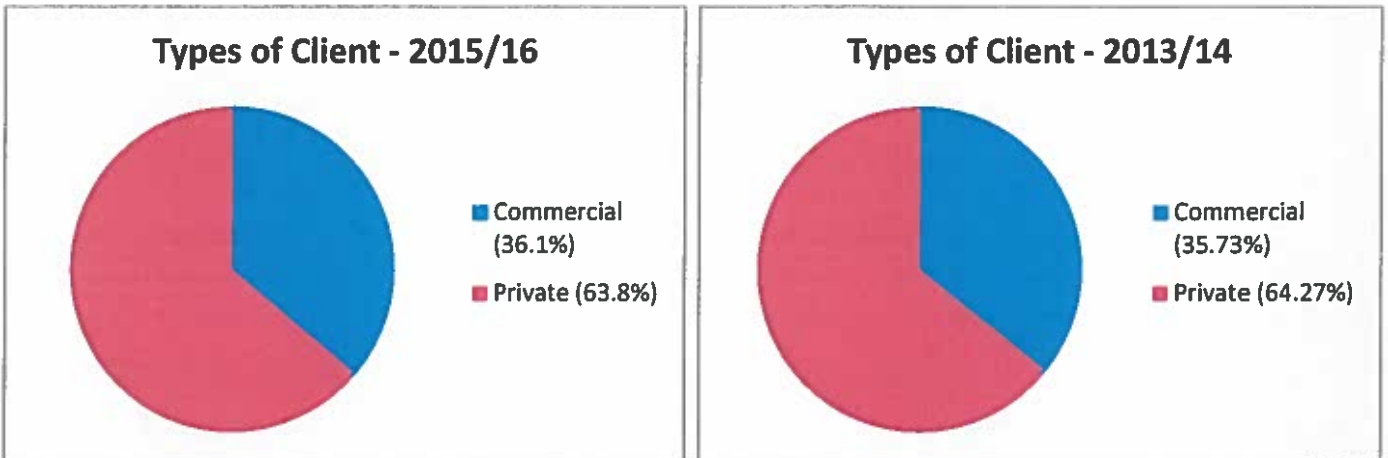
Does the notary hold client money?

One of the acknowledged 'risk areas' for lawyers is the holding of client monies in connection with their work. Very few notaries do hold client funds (as defined in the Notaries Accounts Rules 1989 (as amended)).



What type of clients instruct notaries?

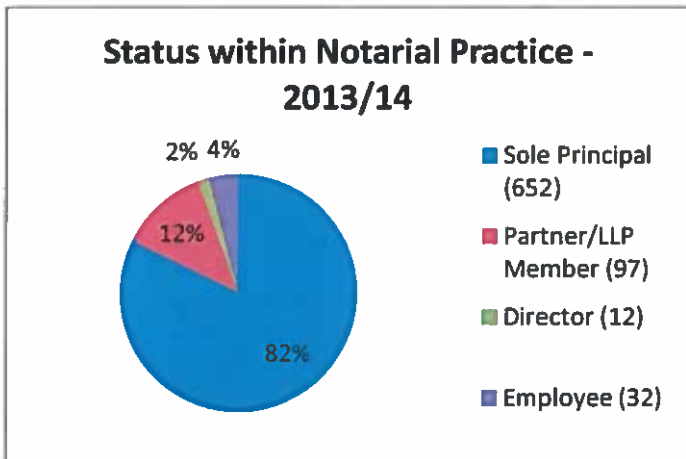
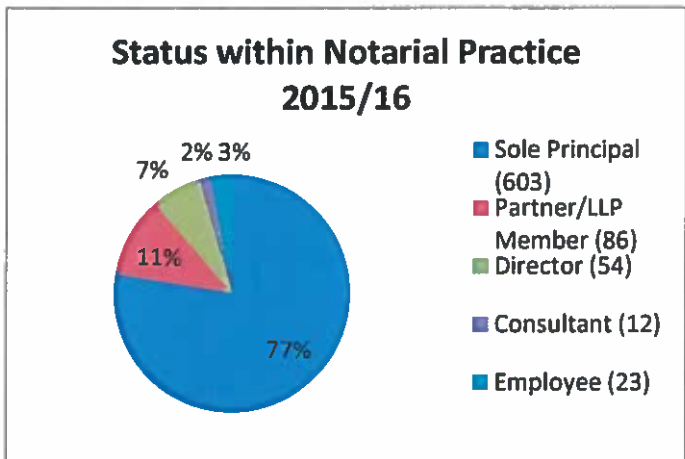
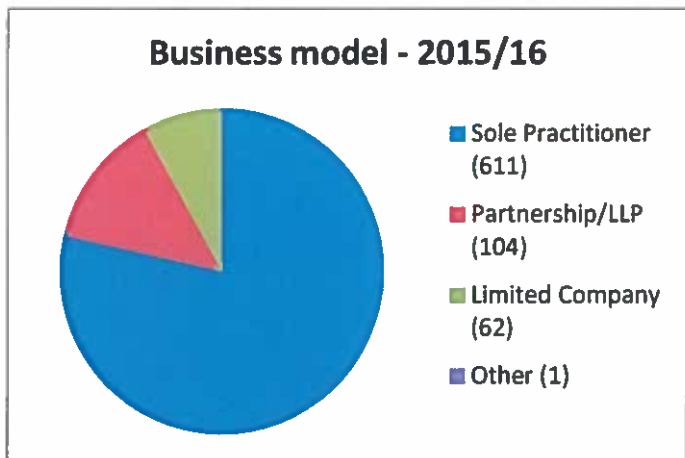
We asked notaries to estimate the percentage split between commercial clients and private clients?



NB – the above represents the average across the 778 (793 in 2013/14) active members of the profession. However, there is very wide divergence with some notaries having 100% commercial clients and others relying 100% on private client business.

Notarial practice business model

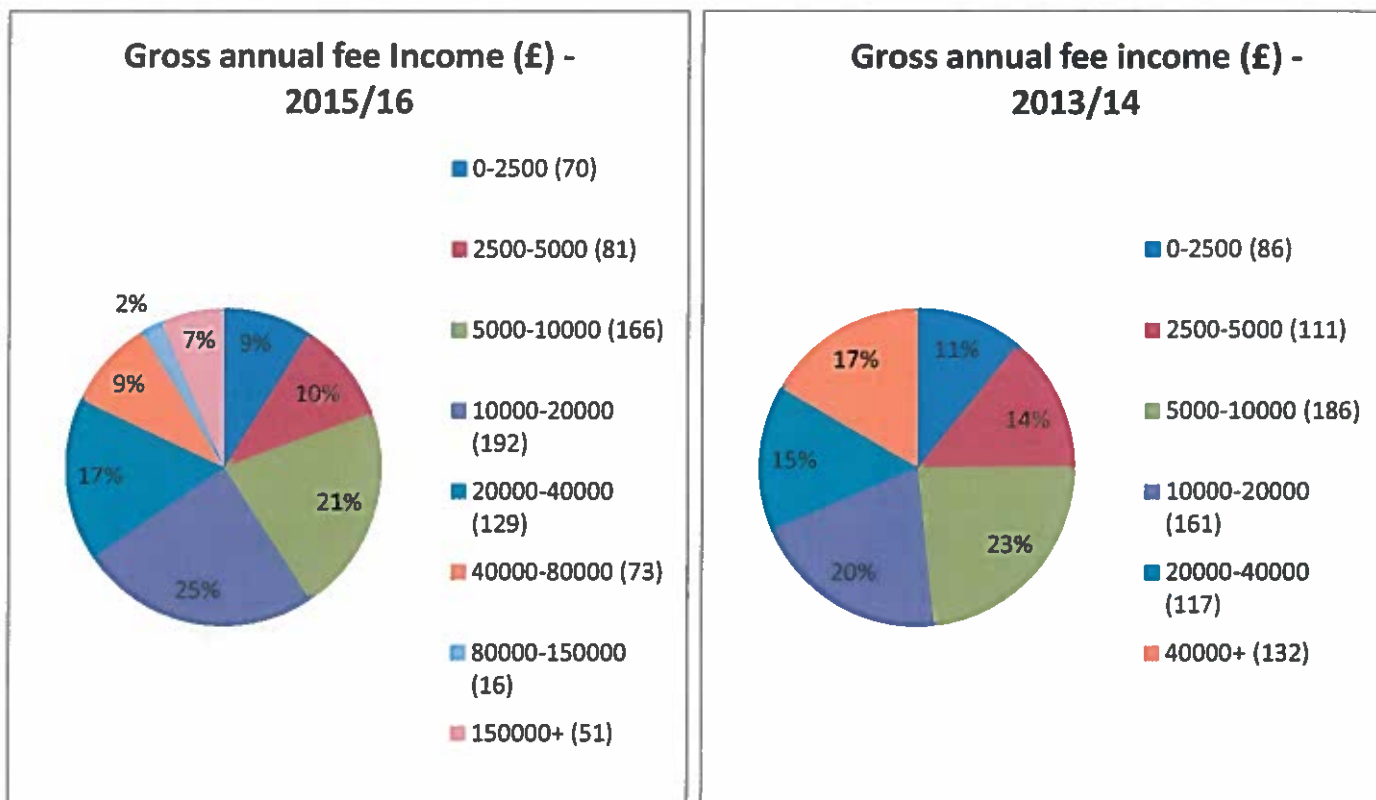
In order to further inform the Faculty Office's work on possible entity regulation, we ask for details of the type of business model which notaries operated their notarial practice through and their status within that practice:



As can be seen, by far the largest proportion of notaries practice as sole practitioners. We asked a similar question in 2013/14 when I had some doubts as to the accuracy of the information collected due to the potentially ambiguous wording of the question. The wording was amended this time and I am more confident that the resulting information is accurate.

Gross annual fee income (£)

We once again asked the profession to disclose their gross annual fee income but with an increased number of income brackets (the figures relate, of course, to the last complete financial year of each notary) :

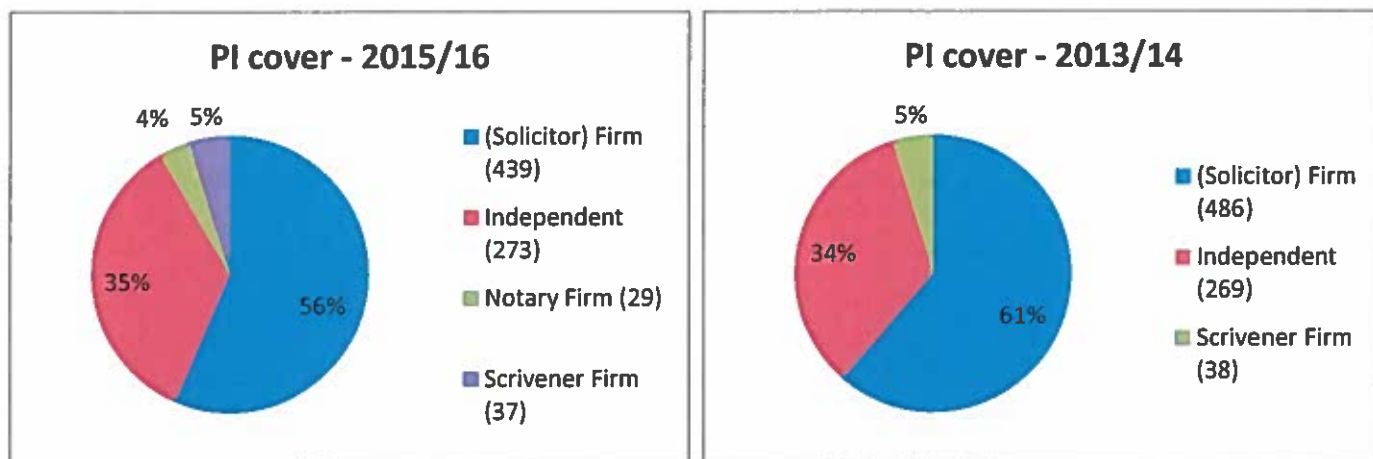


Again, there is wide divergence across the profession and it is possible that a number of those who indicated that their gross fee income is £150,000+ may be earning considerably more. What is worth noting is that the gross annual fee income of some 40% of the profession is less than £10,000 (down from 48% in 2013/14), with just under one-fifth earning less than £5,000 per annum (down from one-quarter in 2013/14) and 9% whose income is below £2,500 (11% in 2013/14). A detailed breakdown is given in Appendix I.

Insurance arrangements.

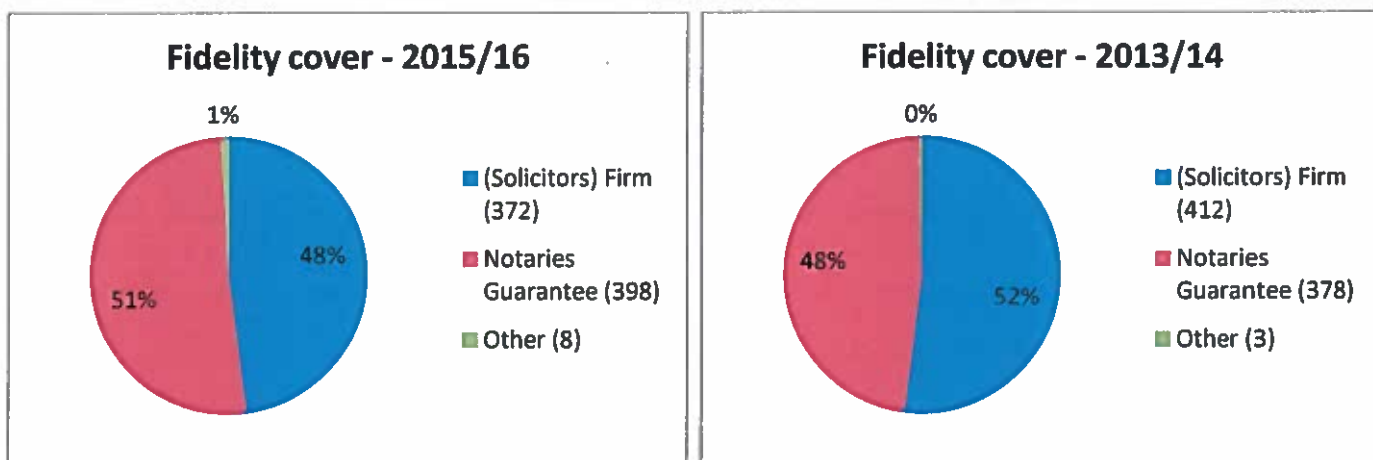
Professional Indemnity insurance cover is obtained through one of four sources. Notaries who have a dual legal qualification (often but not exclusively as solicitors) may be able to rely on the professional indemnity policy of their (solicitor's) firm to provide cover for their notarial activities. An increasing number of notaries are finding that it is more cost effective to take out their own independent indemnity insurance cover, not least because of the very high excesses which many solicitor's policies run in order to reduce the premium. Some notaries who practice in notary only partnerships have their own firm's insurance. Most of the Scrivener notary firm's carry their own indemnity insurances which cover all the notaries in the firm.

Professional Indemnity insurance cover:



Similarly, fidelity insurance which all notaries are required to hold in lieu of a central compensation fund, may be available through the solicitor's practice insurance. However, sole practitioners cannot insure themselves against their own dishonesty and the Notaries Guarantee scheme operated by the Notaries Society was set up to assist. Increasing numbers of non-sole practitioner solicitor notaries are now taking advantage of this scheme. Scrivener notaries are similarly able to make use of an insurance backed fidelity scheme where the Scrivener firm's insurance does not offer fidelity cover.

Fidelity insurance cover:



Of the other questions which we asked:

10 notaries reported having had a complaint made under an approved first-tier complaints handling procedure during the 2014/15 practising year. 32 had had complaints made against them in their capacity as another qualified legal professional under an approved first-tier procedure.

17 Suspicious Activity Reports (SARs) under the Money Laundering Regulations 2007 were submitted by notaries (in their notarial capacity) during the last practising certificate year.

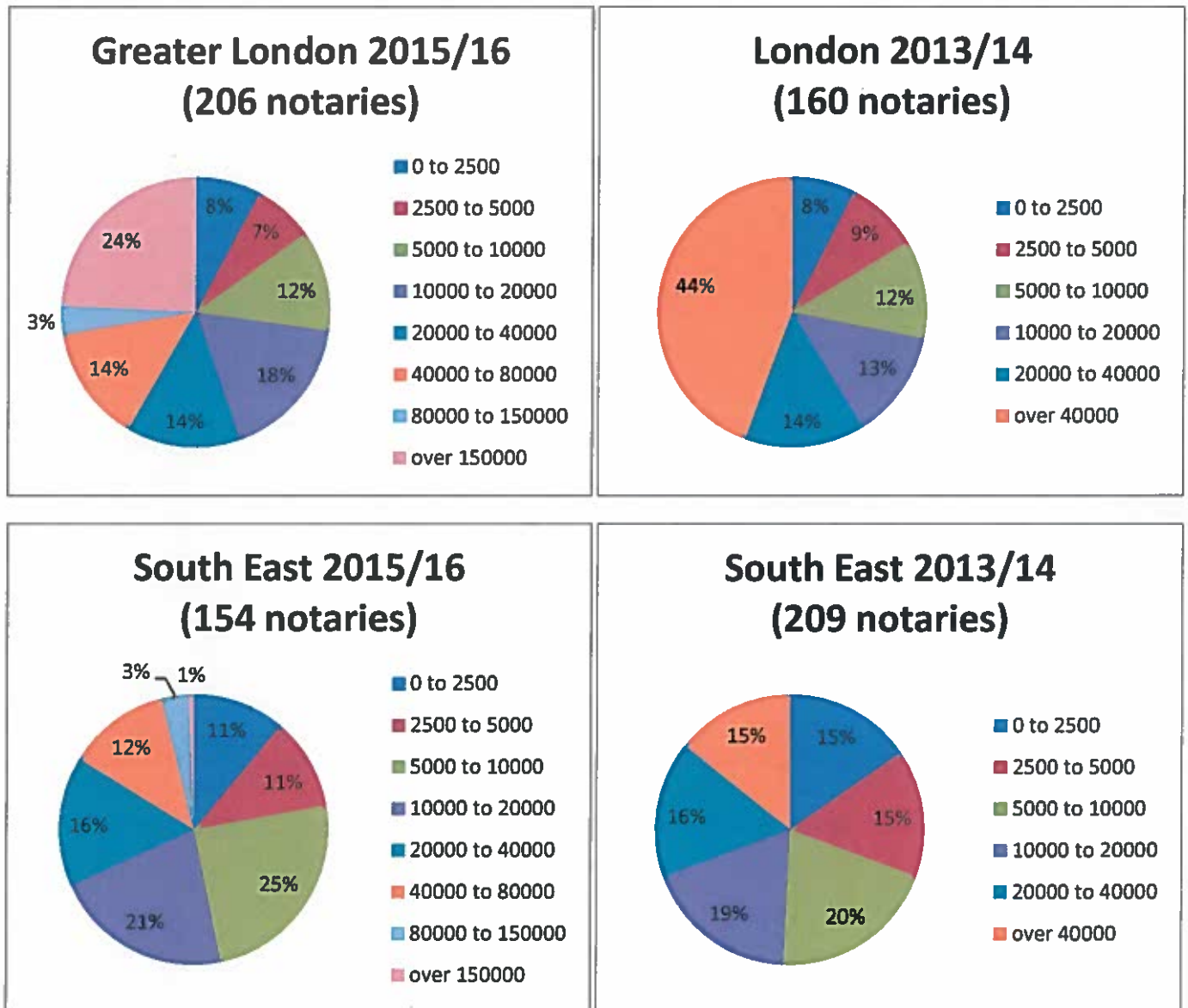
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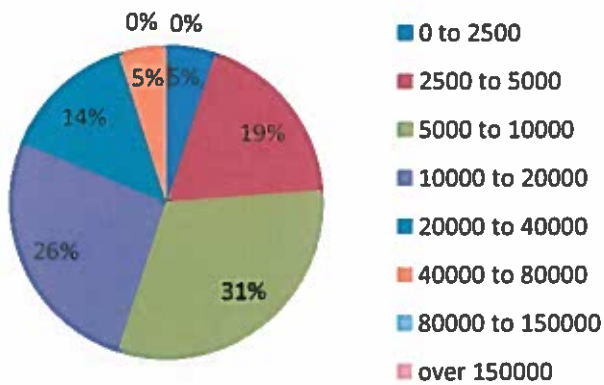
Appendix I

Breakdown of gross notarial income by regions in 2015/16 (compared with 2013/14).

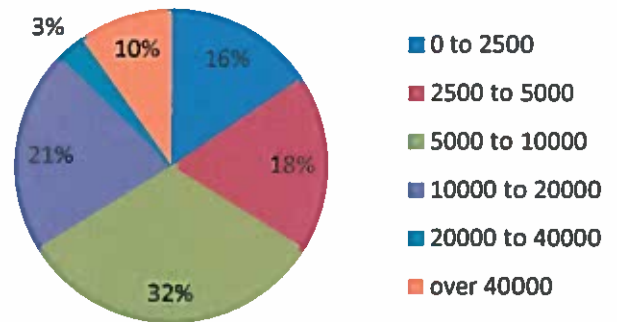
[NB - the differences in the numbers of notaries in each Region are largely explained by a slightly different approach by the compiler. I think that in 2013/14, I only counted the inner London postcodes as being London whereas in 2015/16 this was extended to include postcodes of the outer London Boroughs resulting in an increase of notaries in London and a corresponding decrease in the South East and East of England. In addition, the postcode areas do not correspond precisely with the Regions (for example SY covers parts of Shropshire but also extends across to the Welsh coast, taking in a large swathe of mid-Wales, so for the purposes of this analysis all SY based notaries have been counted as being in Wales)]



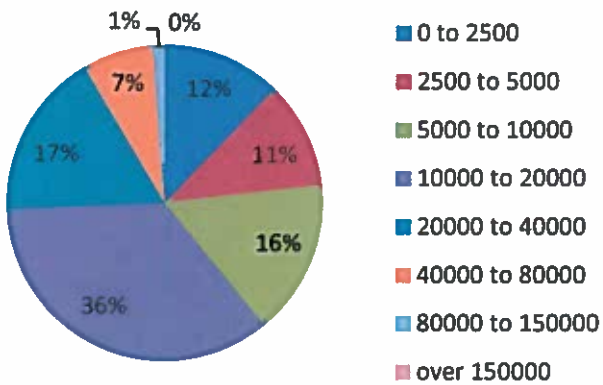
South West 2015/16 (80 notaries)



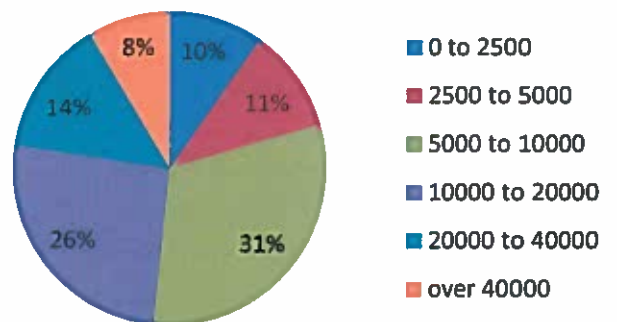
South West 2013/14 (71 notaries)



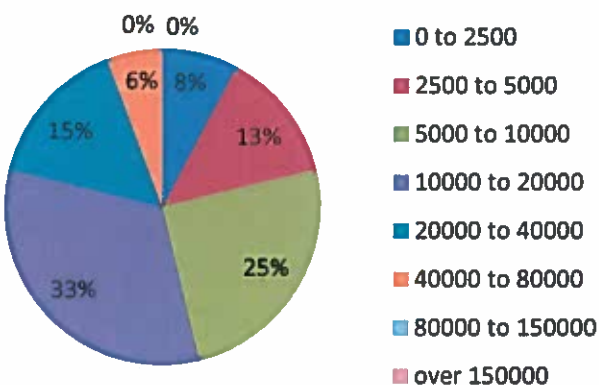
East of England 2015/16 (82 notaries)



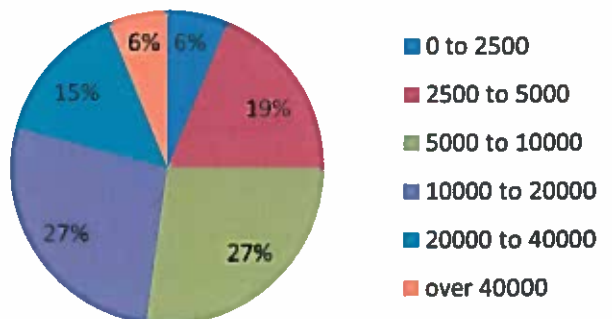
East of England 2013/14 (93 notaries)



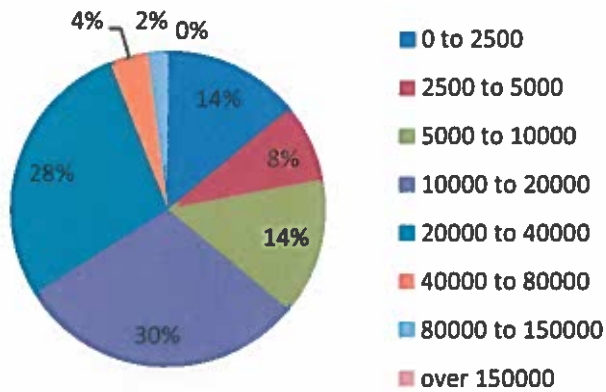
East Midlands 2015/16 (52 notaries)



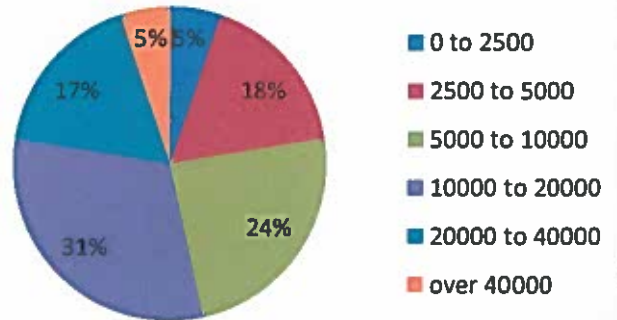
East Midlands 2013/14 (48 notaries)



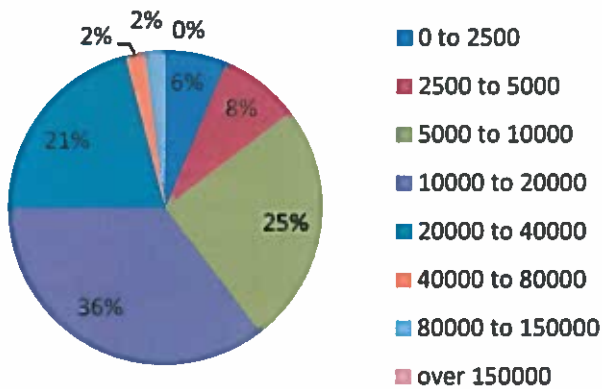
West Midlands 2015/16 (50 notaries)



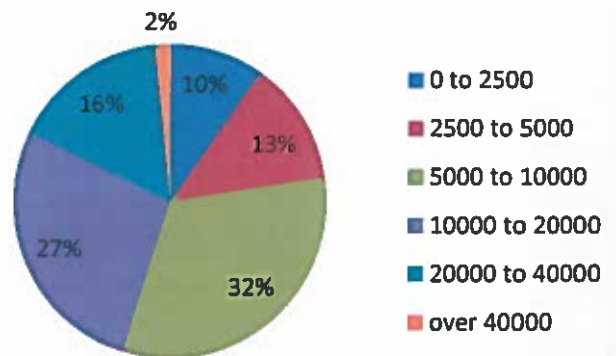
West Midlands 2013/14 (58 notaries)



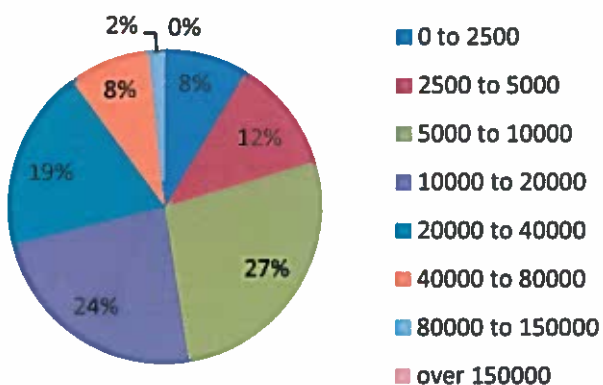
Yorkshire & The Humber 2015/16 (48 notaries)



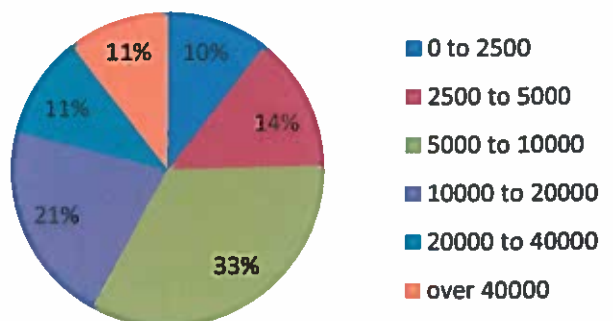
Yorkshire & The Humber 2013/14 (62 notaries)



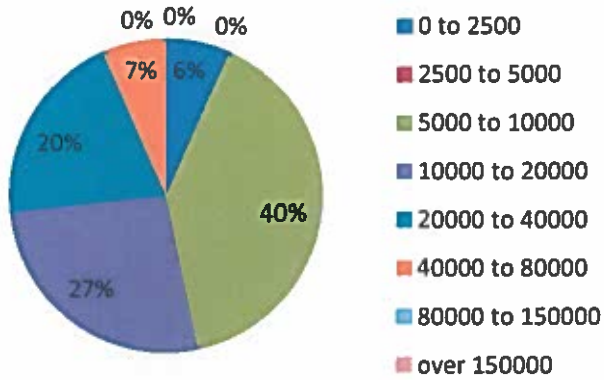
North West 2015/16 (59 notaries)



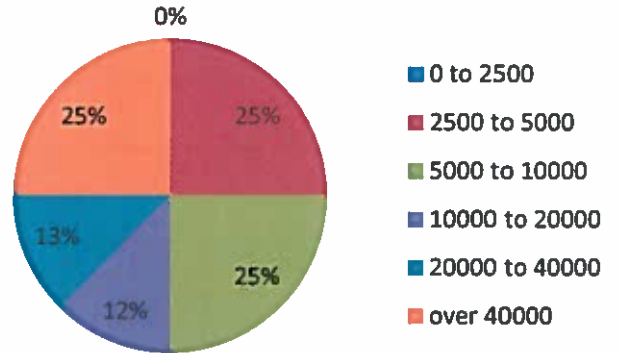
North West 2013/14 (57 notaries)



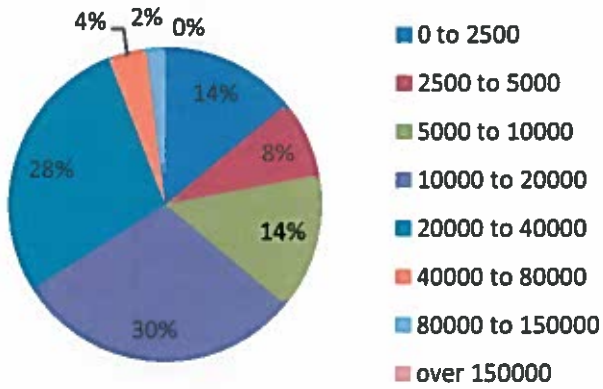
North East 2015/16 (15 notaries)



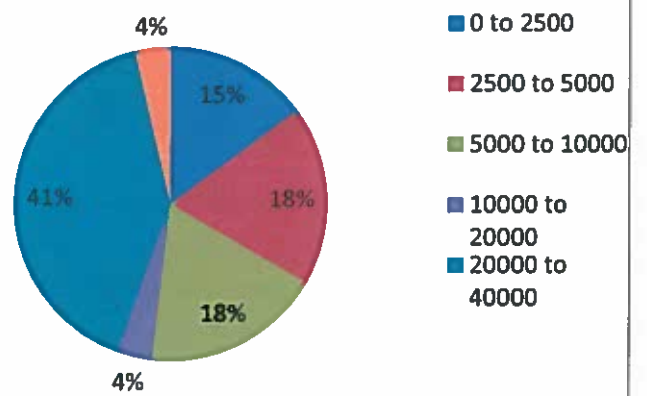
North East 2013/14 (8 notaries)



Wales 2015/16 (31 notaries)



Wales 2013/14 (27 notaries)



The Society of Scrivener Notaries

The Notaries Society

The Legal Services Board – Application by the ICAEW for designation as an approved regulator of notarial activities

Annex III

October 2016

Notaries data

All figures are correct as of 24 October 2016 when the reports were generated and have been taken from an Excel datasheet. Where figures do not total 100% could be due to computer rounding or the removal of 'blank' fields.

Financial year	Number of cases resolved about notaries	Service provided	Resolution method	Was outcome accepted/rejected by complainant?	Brief summary	Evidence of poor service
2011/12	1	Notary	Ombudsman's Decision	Rejected	The complainant instructed the service provider to notarise documents when he was moving abroad. He complained to the Legal Ombudsman (LeO) that the notary had carried out unnecessary work and charged £50 for a service he did not need. The ombudsman found that the notary carried out a lot more work than the £50 that was charged and had provided a reasonable service in all circumstances.	No
2012/13	0					
2013/14	8	Notary	Ombudsman's Decision	Rejected	The complainant instructed a notary to certify a document for him. He complained to LeO that the notary was slow to respond to his complaints and produced a document that contained errors and was defective. The ombudsman found that the notary had responded to the complaint within a week and that the document produced was sufficient for submission. As the complainant had not suffered any detriment no remedy was recommended.	No
		Conveyancing	Ombudsman's Decision	Rejected	The service provider was instructed for the purchase of a flat. The complainant came to LeO as they were unhappy that they lost documents and failed to advise him on the lease. The ombudsman agreed that they had lost documents and therefore provided a poor service and recommended compensation totalling £350 be paid.	Yes
		Notary	Ombudsman's Decision	Rejected	The complainant instructed the service provider to notarise documents that were required for the sale of her property abroad. She complained to LeO that he completed work incorrectly. The ombudsman found that the notary had acted reasonably and did not award a remedy.	No
		Notary	Informal	Rejected	The complainant instructed the service provider to	No

				(assumed as no response)	nolarise two documents for his daughter. He complained to LeO that the work was done incorrectly and it meant they could not be legalised by the Foreign and Commonwealth Office (FCO). The ombudsman found that the work completed by the notary was correct, the service reasonable and awarded no remedy.	Yes
	Probate	Informal resolution	Accepted	The firm were instructed in the administration of an estate which the service provider was the executor and trustee of. A beneficiary of the estate complained to LeO that the service provider had delayed matters, failed to follow instructions and not fully answered questions. The investigator found that there had been some delays attributable to the firm and through discussions with both parties the complaint was resolved informally - that the firm would finalise the estate by an agreed date and keep the beneficiaries informed.	Yes	
	Probate	Informal resolution	Accepted	Joint complaint with above from another beneficiary	Yes	
	Probate	Informal resolution	Accepted	Joint complaint with above from another beneficiary	Yes	
	Probate	Informal resolution	Accepted	Joint complaint with above from another beneficiary	Yes	
2014/15						
2015/16	0					
	Probate	Informal resolution	Accepted	The complainant instructed a notary to deal with an estate that he was a beneficiary of, as there was a property abroad involved. The property sold for £30,000 but, after receiving a fraudulent email from people claiming to be one of the beneficiaries, the notary transferred the proceeds into a fraudulent bank account. The complainant came to LeO as he believed the notary should not have taken these instructions via email or from the individual beneficiary. The notary took a complaint to FOS about the £30,000 and they found the bank to be liable. As a result, they paid £30,000 plus interest to the notary who passed it on to the complainant. The complaint was resolved informally on this basis.	No	

The Society of Scrivener Notaries

The Notaries Society

The Legal Services Board – Application by the ICAEW for designation as an approved regulator of notarial activities

Annex IV

General Directorate of Registries and Notaries of Spain (DGRN)

Spain and other Civil Law jurisdictions require certainty that overseas Notaries are legally trained and, by inference, governed by an independent regulator that is well versed in such matters

An example of the sensitivity of this point is highlighted by a decision issued on 14th September 2016 by the General Directorate of Registries and Notaries of Spain (DGRN) which was subsequently published in the [Spanish] Official State Bulletin (BOE) (hereinafter, the "Decision"). A link to the Decision is <https://www.boe.es/boe/dias/2016/10/05/pdfs/BOE-A-2016-9151.pdf>

The Decision relates, in part, to the rejection by a Spanish Property Registrar of a power of attorney for having been attested by an English Notary. In the Decision, the Director General (erroneously) states as follows (in its translation in English): *"In English notarial systems, the equivalency of notarial documents differs broadly. The Notary public [in English in the original] does not rule on the capacity of the persons appearing before him/her and cannot be considered equivalent, while Notaries-at-law [in English in the original] or lawyer Notaries [in English in the original] can be considered equivalent."* This part of the Decision effectively renders the English Notary worthless for the purpose of attesting documents (in particular, powers of attorney) destined for use before Spanish Notaries and Registrars.

The assertion that English Notaries do not have the power to assess the capacity of persons appearing before them is incorrect but may be explained in part by the Director General conflating English and US Notaries (the latter not requiring any legal training). This reflects a pervasive attitude in Civil Law jurisdictions that Common Law Notaries are poorly qualified compared to their own.

The Decision is, in theory, binding on all Spanish Registrars (whether for commercial or property matters). Efforts are ongoing to find a way to overturn the inaccurate elements of the Decision, but for now we have been able to persuade Spanish recipients of English notarial documents that English notaries are in fact all legally trained professionals regulated by a body with traditions in the legal sector going back centuries.

Multiple regulation of English and Welsh notaries is likely to replicate the situation in other civil law jurisdictions, with a risk of diminishing the stature of English Notaries abroad, rendering their notarial acts less likely to be accepted. This would have adverse consequences for both business and consumers requiring international legal solutions.

Luis Hyde-Vaamonde (Cheeswrights), Peter Adams (De Pinna)
Notaries Public

The Society of Scrivener Notaries

The Notaries Society

The Legal Services Board – Application by the ICAEW for designation as an approved regulator of notarial activities

Annex V



**SCRIVENER
NOTARIES**

The Society of Scrivener Notaries
95 Aldwych, London WC2B 4JF, England
Tel: +44 (0)20 7395 4300
notary@scrivener-notaries.org.uk
www.scrivener-notaries.org.uk

10th November 2016

Written evidence of the Society of Scrivener Notaries

Justice Committee inquiry into the implications of Brexit for the justice system

1. The Society of Scrivener Notaries (“the Society”) is the professional body representing the interests of Scrivener Notaries practising in the City of London and beyond.

2. The role of Notaries in the English legal system

2.1 Notaries in England and Wales exercise the important public office and duty of preparing and authenticating legal documents creating or affecting rights, duties and obligations chiefly outside the United Kingdom. Their client’s include government departments and organisations, major industrial and trading companies and private individuals. In the case of many legal documents executed in England for use overseas, authentication under the official seal of the notary is a pre-requisite to the acceptance of such documents by the judicial or public authorities of the jurisdiction in which they are to be produced. Throughout the European Union and beyond reliance is placed on the truth of the matters stated in English notarial acts.

2.2 The notarial system is an integral part of the legal structure of jurisdictions founded under the civil law, such jurisdictions include the majority of the United Kingdom’s partners in the European Union as well as many jurisdictions with which the United Kingdom will be looking to enhance post-Brexit trading relationships. In these jurisdictions, the notary’s intervention is necessary to consummate many of the most important legal transactions, notably dealings in land. In England and other common-law jurisdictions, the notarial system is less deeply rooted and notaries primarily exist to enable parties to give effect to legal transactions outside the United Kingdom. This role is nonetheless an important one and integral to the United Kingdom’s status as a trading nation and in particular to the maintenance of the City of London as an international financial and trading centre.

2.3 Successive governments have recognised the need for the maintenance of a notarial system existing in its own right alongside providers of mainstream legal services. Notarial activities are designated as a “reserved legal activity” by the Legal Services Act 2007.

3. Appointment of notaries

All notaries in England and Wales are appointed by the Master of Faculties of the Archbishop of Canterbury in the exercise of the powers originally conferred on the Archbishop by the

Ecclesiastical Licences Act 1533; his regulatory powers now derive from the Legal Services Act 2007.

4. Qualification of notaries

An applicant for admission as a general notary must first obtain the practical qualifications specified in the Notaries (Qualification) Rules 2013. These require that the prospective notary must have followed and obtained a satisfactory standard in a course or courses of study covering all the following subjects: Public & Constitutional Law, Law of Property, Law of Contract; Law of the European Union, Equity and the Law of Trusts, Conveyancing, the Law and Practice of Companies and Partnerships, Wills, Probate and Administration, Roman Law as an Introduction to Civil-Law Systems, Private International Law and Notarial Practice.

In addition Scrivener notaries are also required to pass examinations and show proficiency in two foreign languages, in a foreign law relevant to notarial practice and in advanced notarial practice.

5. Regulation of notaries

The Legal Services Act 2007 maintained the regulatory role of the Master of the Faculties and, in common with other "front line" legal regulators, the Master's regulatory functions are now carried on under the supervision of the Legal Services Board established by Part 2 of the Act.

6. Implications of Brexit for notaries

6.1 The issue of practising rights of lawyers in the EU, including temporary provision of services and permanent establishment, has not been a matter of concern to the notarial profession since, unlike solicitors and other legal professionals, notaries are excluded from the relevant EU Qualifications Directives.

6.2 The acts of English and Welsh notaries are accepted, recognised and relied upon throughout the European Union ensuring that our citizens who have commercial or personal business in civil-law Europe have access to appropriate notarial services. The need for the bridge provided by United Kingdom notaries between the common law and the civil law will be all the greater following Brexit both in relation to the European Union and with other jurisdictions where the United Kingdom will be seeking to enhance trading relationships.

6.3 Following the United Kingdom's exit from the European Union the dominant legal system in the European Union will be the civil law. In fact, the Republic of Ireland will be the sole remaining common-law member State. The influence of the United Kingdom's lobbying of the European Commission in the areas of legal regulation and general heightened market approach to the legal professions, including notaries, will be lessened and civil-law lawyers will undoubtedly seek to reassert their hegemony. In particular, the Society is concerned that, following Brexit, attempts may be made by European civil-law notaries to differentiate between the effects of the acts of civil-law and common-law notaries thus placing United Kingdom businesses and private citizens at a disadvantage in cross-border transactions involving European Union member States.

6.4 The recognition within the European Union and elsewhere enjoyed by English and Welsh notaries owes much to the fact that they are independently regulated and licensed by the

Faculty Office of the Archbishop of Canterbury. Brexit makes it even more vital that such regulation and recognition is maintained both in relation to cross-border transactions involving remaining European Union members and other jurisdictions with which the United Kingdom will be seeking to enhance trading relationships with such as China, the Middle East and Turkey.

6.5 The Society is also examining the impact of Brexit on the EU Regulations currently in force in the United Kingdom relating to the cross-border enforcement of authentic instruments, general judicial cooperation in civil matters and, more generally, the consequences of Brexit for private international law in the United Kingdom as it affects notarial work. Notarial instruments in civil-law jurisdictions, in addition to their probative status, may currently be directly enforced in the United Kingdom as authentic instruments under the Brussels I regulation and subsequent recast. Such instruments are of course also enforceable in the United Kingdom under the Brussels Convention of 1968, the Lugano Convention of 2007 on jurisdiction and the enforcement of judgments in civil and commercial matters (implemented in the United Kingdom by the Civil Jurisdiction and Judgments Act 1982 and subsequent legislation). These conventions will presumably survive Brexit although the Society reiterates its concerns as to the lack of reciprocity inherent in their provisions.

7. Implications of Brexit for the clients and staff of notaries

7.1 Scrivener notaries' principal clients include multinational corporations, financial, insurance and trading institutions as well as international law firms based in the City of London and any loss of "passporting" rights or restrictions on open access to European Union markets would undoubtedly result in many of these businesses seeking to relocate to other jurisdictions in the European Union with the resulting loss to the United Kingdom's economic interests. Members of the Society have already been informed by several major corporate clients that they will be closing their London offices and re-locating to another location in the European Union.

7.2 Given scrivener notaries important role in facilitating cross-border transactions both within and without the European Union, our members frequently recruit staff from European and other overseas countries in order to provide the knowledge of foreign languages and law which are required to provide cross-border notarial services. We believe that continued access to skilled overseas labour is important to our members and to the continuance of the City of London as an international trading and legal centre. Again our members have already noted that valued foreign members of their staff have experienced hostility following the Brexit vote and have genuine fears about their future status in the United Kingdom.

Edward Gardiner
Chairman of the Society of Scrivener Notaries

The Society of Scrivener Notaries

The Notaries Society

The Legal Services Board – Application by the ICAEW for designation as an approved regulator of notarial activities

Annex VI



Rome, 28th October 2016

INTERNATIONAL UNION OF NOTARIES

Daniel Sédar Senghor
President

Edward Gardiner
Chairman
The Society of Scrivener Notaries
95 Aldwych,
London, WC2B 4JU,
United Kingdom

Dear Mr Chairman,

Re: the Institute of Chartered Accountants in England and Wales

I am grateful to your Society for keeping me advised as to recent developments affecting notaries in England and Wales, particularly in the light of the reforms to the legal professions consequent upon the Legal Services Act 2007.

I was concerned to learn that the Institute of Chartered Accountants in England and Wales (ICAEW) has applied to be the Legal Services Board of England and Wales to regulate notarial activities.

The reputation for independence and reliability which is currently enjoyed by English and Welsh notaries ensures that their notarial acts are accepted and acted upon in civil-law jurisdictions throughout the world.

It is my understanding that the ICAEW is a professional membership body whose principal role is representing and protecting the interests of its membership.

In this connection, I would stress that the international recognition enjoyed by English and Welsh notaries owes much the fact that they are independently regulated and licensed by the Faculty Office of the Archbishop of Canterbury.

I need hardly stress that independent and impartial regulation is the bedrock of the notarial profession across the world; the concepts of multiple regulators and regulation by a body such as the ICAEW which combines regulation with a representative function would seem entirely alien to that fundamental principle.

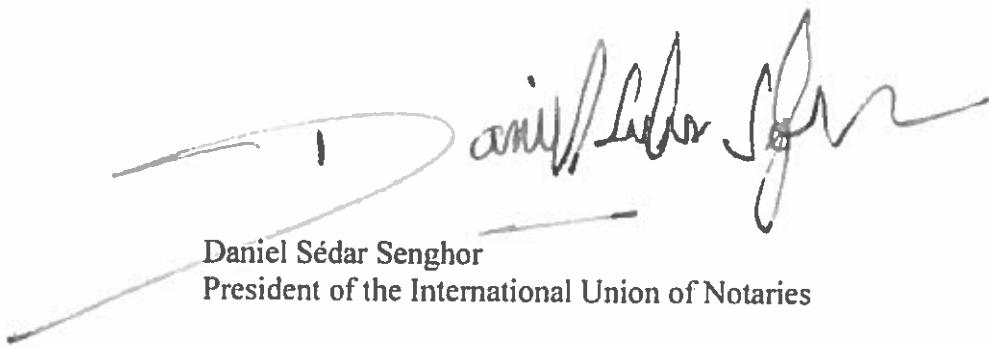
Furthermore, the appointment of an additional regulator would undoubtedly cause confusion in overseas jurisdictions and adversely affect the smooth circulation of English and Welsh notarial acts. All of this would be to the disadvantage of members of the public living in your jurisdiction.

/..

The blurring of the distinction between accountancy and the law will be counterproductive. It can only lead to confusion and misunderstanding and thus prejudice clients whose interests it is the duty of every profession to protect.

I would therefore urge your Society to take all appropriate steps vis-à-vis the appropriate authorities in England and Wales with a view to maintaining the public interest in the current regulatory position.

Yours sincerely



Daniel Sédar Senghor
President of the International Union of Notaries