

The smaller approved regulators

*An assessment of their capacity and capability to meet the requirements of the
Legal Services Act 2007, with analysis and recommendations*

Submitted by Nick Smedley to the Legal Services Board, June 2011

Contents

| | | |
|-----|-------------------------------------------------------------------------------|----|
| 1. | Executive summary..... | 5 |
| 2. | Introduction..... | 7 |
| | Part one: The capacity and capability of the smaller approved regulators..... | 8 |
| 3 | Section A: An overview of the SARs as a group | 8 |
| 4 | Section B: The SARs individually | 14 |
| 4.1 | The Faculty Office | 14 |
| 4.2 | Intellectual Property Regulation Board (IPReg)..... | 18 |
| 4.3 | ILEX Professional Standards (IPS) | 21 |
| 4.4 | The Council for Licensed Conveyancers (CLC) | 23 |
| 4.5 | Costs Lawyer Standards Board (CLSB) | 26 |
| 5 | Part two: The analysis | 28 |
| 5.2 | Two options for managing the change..... | 29 |
| 5.3 | Option one: managing the present | 32 |
| 5.4 | Option two: managing for the future | 36 |
| 5.5 | Conclusion..... | 44 |
| | Appendix A: Original invitation for research tender | 45 |
| | Appendix B: List of individuals interviewed for the research project..... | 49 |
| | Appendix C: Smaller approved regulator research questionnaire | 50 |

1. *Executive summary*

- 1.1. Following the debates about regulation of legal services in England and Wales, and the subsequent passage of the Legal Services Act 2007, those smaller legal services regulators which were also membership bodies decided to establish new regulatory arms. Because the Act required the separation of regulatory and representative functions, this was a natural and logical response to the statute.
- 1.2. As a result, a number of small regulators appeared on the scene in a short time – IPS, IPREG and CSLB – joining the CLC and the Faculty Office, which were regulators without representative functions. Although there was debate in Parliament during the passage of the 2007 Act, following implementation the existing representative and regulatory bodies were, understandably, simply ‘read across’ into the new regulatory arrangements. There was, accordingly, no robust assessment by an independent body of the requirements of the new legislation, nor of the fitness or otherwise of the pre-existing regulators and representative bodies to meet these requirements. Still less was there any attempted overview of what the net effect would be of having every representative body establish its own regulatory arm.
- 1.3. The introduction of Alternative Business Structures will further complicate an already complex regulatory landscape. The extension of entity regulation; the creation of partnerships and companies owned by and employing a mixture of different professionals each subject to a different regulator (in addition to the body regulating the entity); and the aspiration of some of the smaller membership bodies to extend their practising rights and to become Licensing Authorities – all these factors will introduce considerable complexity into the field of legal services regulation.
- 1.4. The capacity and capability of the Smaller Approved Regulators (SAR) varies to some degree as things currently stand. There are information deficits to at least some degree right across the sector; there is not always sufficient understanding and experience of risk management and the need to segment the regulated community and their clients by risk; there is fairly widespread examples of inadequate data on consumers, and little or no evidence of proper programmes to undertake consumer engagement; some of the regulators are so small that there must exist serious concerns about their resource base and sustainability under pressure; and, there are gaps in regulatory knowledge, skills and experience in some areas.
- 1.5. These concerns might cause the LSB some anxiety even in a stable environment – but the environment is turbulent. Some of the SARs plan to extend their field of regulatory activity considerably and at some speed. Others are still finding their feet in a rapidly changing world. The LSB will more likely than not demand higher standards and better performance from the regulators, in pursuit of regulatory excellence, proportionality and flexibility. Many practitioners work in fields where there are no statutory restrictions on who might operate, and their presence in the regulated market is uncertain and unstable, and highly cost-sensitive.
- 1.6. The risk of any consumer detriment which may be posed by these gaps in the SARs’ capacity and capability is not so pressing as to cause immediate grave concerns but, given the fast-moving changes to the market, the risks are likely to

multiply. There is a serious question about whether the current complicated, multiple-regulator arrangements will prove sustainable in the coming years. It is possible, though perhaps not inevitable, that there will have to be some consolidation in this sector and some pooling of knowledge and resources. There is a chance that not all the current regulators will survive in their present form.

- 1.7. The LSB therefore has a choice as to whether to sit back and wait and see how the SARs respond to the changes already in hand; and, ultimately, whether they can individually and collectively survive the regulatory tests to come; or the Board can decide to intervene now to help steer the SARs in quicker time towards a more stable and durable future. If the Board does choose the latter option, then it might wish to offer the SARs some resource and some guidance to enable the SARs to analyse the options for change and to decide among themselves how they might wish to restructure to meet the challenges of the future.
- 1.8. If the SARs are given some time to come to a view on these matters, then the Board might wish to invite them to consider combining forces in whole or in part; examine other options for combining with other regulators, such as the SRA or the BSB; and, analyse the possibilities for maintaining their individual identities as regulatory arms, but sharing functions and resources.
- 1.9. If the LSB chooses to do nothing at this stage, it of course will still remain open to any or all of the SARs to consider combinations, restructuring and pooling resources. The issue for the LSB is to determine how closely it wishes to engage with the SARs, how much the Board wishes to manage the future (as distinct from letting things happen organically), how fast the Board wants to see progress and how directive the Board will wish to be in shaping that future.
- 1.10. A number of the comments and conclusions in this report may be felt to apply equally to the larger two regulators in this sector, namely the Law Society and Solicitors' Regulation Authority, and the Bar Council and Bar Standards Board. However, consideration of these two Approved Regulators and their regulatory arms was not part of my terms of reference.

2. *Introduction*

- 2.1. In October 2010, I was asked to undertake a review of the SARs, to assess their capacity and capability to meet the regulatory requirements imposed by the Legal Services Act 2007. A copy of the research brief governing this work is attached as **Appendix A**. Included within the definition of SARs are the Faculty Office of the Archbishop of Canterbury; the Council for Licensed Conveyancers (the CLC); the Institute of Legal Executives (ILEX), who have delegated their regulatory role to ILEX Professional Standards (IPS); the Chartered Institute of Patent Attorneys (CIPA) and the Institute of Trade Mark Attorneys (ITMA), who have jointly delegated their powers to the Intellectual Property Regulation Board (IPREG); and the Association of Costs Lawyers (ACL), whose powers are delegated to the Costs Lawyer Standards Board (CLSB).
- 2.2. This report is divided into two parts. In part one, I present an overview of my findings relating to the capacity and capability of the SARs as a group, followed by a more detailed analysis of each of the SARs in turn. In part two, I present recommendations for two options for the LSB to consider in going forward.
- 2.3. I would like to make a brief comment about the quality of information on which I have had to rely in reaching my conclusions. I mean no implied or direct criticism of any individual or organisation when I say that there was a paucity of hard data in this sector. I found the series of interviews I conducted with the various organisations illuminating and often stimulating. I was able to look at annual reports, where they existed, and some background papers provided to me by the LSB. I supplemented the gaps in data with a special questionnaire, issued to the SARs on my behalf by the LSB. Nevertheless, the SARs were unable to provide me with data in many of the areas of concern to the LSB in assessing the capability and fitness of the SARs and, at times, I have accordingly found no evidence to support some of the SARs' assertions or statements of capacity.
- 2.4. I would like to express my sincere thanks to all those who gave up their time to speak to me, as well as the staff at the LSB who provided such unfailing help at all stages of this project. A list of those consulted during the preparation of this report is at **Appendix B**.

Part one: The capacity and capability of the smaller approved regulators

3 Section A: An overview of the SARs as a group

The Statutory Objectives and their impact

- 3.1 The Legal Services Act 2007 introduced a set of statutory regulatory objectives which provide the framework for considering the effectiveness of the current Approved Regulators. Any assessment of the SARs must therefore begin by reference to these objectives. For reasons which will become clear, however, I have found that something more specific is needed than the statutory objectives.
- 3.2 The objectives cover the following issues:
- Protecting and promoting the public interest
 - Supporting the constitutional principle of the rule of law
 - Improving access to justice
 - Protecting and promoting the interests of consumers
 - Promoting competition in the provision of services in the legal sector
 - Encouraging an independent, strong, diverse and effective legal profession
 - Increasing public understanding of citizens' legal rights and duties; and
 - Promoting and maintaining adherence to the professional principles – independence and integrity; proper standards of work; observing the best interests of the client and the duty to the court; and maintaining client confidentiality.
- 3.3 Regulators are required by section 28 of the Act to regulate the community for which they are responsible in a way compatible with these objectives. So, every regulator must devise and implement systems to ensure that the public interest in legal services provision is protected, for example, while promoting competition and, at the same time, promoting consumer interests while ensuring proper standards of work. As if this were not challenging enough, regulators are meant in addition to improve access to justice, increase public understanding of people's rights and also promote diversity in the legal profession. Regulators, while balancing these different priorities and discharging these divergent functions, must maintain a focus on the consumer while simultaneously encouraging an independent and strong legal profession.
- 3.4 This is immensely challenging. On one view, these objectives are admirably comprehensive and cover all of the duties of a modern regulator. From another perspective, the list may be criticised for being no more than that – a (long) list of

everything which a regulator might be asked to do, regardless of the specific market being addressed (in this case, the legal services market) and the task at hand (most probably in this context, a desire to liberalise what was seen as a self-interested and protectionist solicitors' and barristers' profession). The statutory objectives might appear to some to contain some inherent contradictions: a consumer protection agenda sits uncomfortably alongside a competition agenda, a requirement to educate the public rests next to a desire to strengthen the profession – and so on. The Act is both a creature of competition and de-regulation (or lighter touch regulation), *and* a vehicle for consumer protection and fiercer, tighter regulation.

- 3.5 The objectives may be the result of a consensual Parliamentary process, in which every interest group and all shades of opinion were allowed to have 'their' objective included. No-one was offended or ignored but, on the other hand, no clear regulatory philosophy was imparted. The problem with such a catch-all approach is that it provides no proper direction or focus for the regulators. The objectives impose competing priorities in consequence, and it hardly seems possible for a regulator to give every one of these objectives equal attention.
- 3.6 Moreover, the objectives seem in some places to be more fit for membership bodies than for regulators – it might be asked, for example, why regulators should be responsible for improving access to justice, for instance, or for promoting diversity in the profession.
- 3.7 The apparent complexity and confusion inherent in these objectives is not an academic point. As a reference point for assessing the capability of the SARs, the objectives present a problem. If the focus were to be on competition and de-regulation, for example, then one might look to the SARs for a different approach than if the focus were on consumer protection. But when the 'focus' is on *all* aspects of how legal services might be provided – on competition, consumer protection, professional standards, accessibility, education, the rule of law and quite a few other things – then, of course, it is not possible to focus on anything in particular. So in looking at the SARs, although one can start with the statutory objectives, it is necessary to go further and look for something more practical and specific. This is exactly what the LSB has done, and I return to this shortly.

The Regulators' self-assessment of the statutory objectives

- 3.8 The SARs were asked how they see themselves carrying forward the statutory objectives, and it may be helpful to review their responses before proceeding any further. In terms of **protecting and promoting the public interest**, some pointed towards their robust rules and codes of conduct and a proper complaints system. In addition, mention was made of standards setting in general, including; licensing conditions (or granting practice certificates); education and CPD; and, requirements to maintain adequate insurance and compensation arrangements. One SAR referred in the context of public interest to its role in increasing public awareness of the new regulatory environment. Overall, this generic first objective was met, argued the SARs, through the basic infrastructure of a regulated and controlled profession.
- 3.9 **Supporting the constitutional principle of the rule of law**: this objective, high-sounding and somewhat theoretical, led most of the SARs to respond by repeating elements of how they met the previous objective. One elaborated that 'adherence to sound constitutional principles [is the] *raison d'être* of those in regulation'.
- 3.10 **Improving access to justice**: this objective was interpreted by some as a means of promoting competition in the legal services market. Access to justice would be taken

forward, it was thus argued, by removing current restrictions on who could practise in reserved areas. By expanding the available legal personnel who can act for a client in, say, conveyancing or litigation, then access to justice will be improved. IPS, CLC and CLSB all made this point. The Faculty Office made the point that geographical spread of notaries was important in respect of this objective, while IPREG explained that its client base was different from that of other SARs (with the implication that access was not an issue). Improving access to justice may be about increasing the number and range of suppliers but, equally, the forces of competition may result in the disappearance of smaller, local firms. It is a moot point whether the SARs are, therefore, meant to 'control' their sector of the market to ensure that some of the less viable units do not go out of business (while somehow promoting competition, under another objective).

- 3.11 **Protecting and promoting consumer interests:** a number of responses merely cited earlier answers, seeing consumer interests as automatically promoted by regulatory standards and by increased choice. IPREG made specific reference to a Board member with experience of consumer issues, and to 'sounding boards' which allowed consumers to feed their views to the regulator. Interestingly, apart from this, no respondent mentioned any specific programmes to take forward consumer engagement, a key interest for the LSB and the Legal Services Consumer Panel.
- 3.12 **Promoting competition:** IPREG and IPS saw the introduction of ABS as key to this objective, and mentioned their own work to consider becoming a Licensing Authority. The CLC saw its risk-based and proportionate regulatory approach as contributing to the fulfilment of this objective.
- 3.13 **Encouraging an independent, strong, diverse and effective legal profession:** the responses here were very varied. CLSB mentioned an accessible training course and a robust Code of Conduct; the Faculty Office had nothing to add to the over-arching points on regulation made in response to the first objective; the CLC offered a response to this objective no different from the previous objective; IPREG thought in terms of recruitment to the profession; IPS referenced the diverse base of its current membership, its entry and training standards and engagement with the regulators.
- 3.14 **Increasing public understanding of citizens' rights and duties:** some added little or nothing to previous answers, while others talked of their web presence and the provision of information. IPS mentioned pro bono work. IPREG made the point that many of its consumers were 'not within the mainstream of "citizens' legal rights" as they would be generally understood'.
- 3.15 **Promoting and maintaining adherence to the professional principles:** this led most of the respondents to reference once again their Codes of Conduct and other aspects of regulation in general.
- 3.16 As these responses perhaps demonstrate, there is no clear picture of a consistent regulatory approach or philosophy across the sector. Some of the objectives appear hardly relevant to some of the SARs. Others merely prompt the regulators to state and re-state the existence of regulatory standards and rules, and the provision of education and training. There are different interpretations of access to justice, of promoting competition and of promoting consumer interests.
- 3.17 What emerges quite clearly, however, is that the existence of the statutory objectives has not created any coherent regulatory programme to give effect to them. This is hardly surprising given the strikingly disparate nature of the objectives,

and I intend no criticism of the SARs. But it does demonstrate that the objectives will not in themselves precipitate a change in regulatory actions or approaches by the SARs.

- 3.18 We need more, therefore, than these objectives in order to assess the capacity and capability of the SARs to achieve the standards and style of regulation which the LSB will look for in future. There is also a requirement in section 28 of the Act for regulators to have regard to best regulatory practice, including the Better Regulation Task Force's key principles – that regulation should be transparent, accountable, proportionate, consistent and targeted. While all of this is, of course, meant to be helpful, as I have argued elsewhere¹ so many prescriptions can be confusing and counter-productive. In such circumstances, the LSB will have to determine the style and focus of the regulatory regimes it wishes to see enacted. The SARs are entitled to look to the LSB to articulate what style of regulation it is seeking, more clearly than does the Act. Fortunately, the LSB has recently turned its mind to doing just that.

A new approach to regulatory excellence

- 3.19 The Legal Services Act 2007 provides a catalyst for profound change in the legal services sector, particularly through the introduction of Alternative Business Structures (ABS), due to come into being later this year (2011). The changes to the market which ABS will bring have, in turn, significant implications for the regulation of that market. The Legal Services Board (LSB) has sought to define what constitutes the key elements of regulatory excellence, and thus how regulation should operate in the new environment of a more competitive, more accessible, more transparent and more consumer-focused legal services market.

- 3.20 The key elements of this revised regulatory framework, or 'jigsaw', are signposted clearly in the LSB's draft Business Plan for 2011-12² :

- Regulators who focus on outcomes for consumers, rather than the qualifications and membership rules which have governed entry to the various streams of legal practitioners
- Regulators who understand the different risk profiles of their regulated community, of the services which that community provides, and of the types of consumer served
- Regulators who adapt their style of supervision according to their analysis of risk
- Regulators who have the resources, knowledge and flexibility to intervene appropriately, proportionately and quickly where problems arise, and who can adapt their systems as the market changes.

- 3.21 Accordingly, I have carried out a series of interviews with the SARs and, where different, their regulatory arms, and issued a questionnaire. A copy of the questionnaire is included at **Appendix C**. This research has been focused on

¹ Smedley, N *Review of the Regulation of Corporate Legal Work*, London: Law Society, 2009.

² Legal Services Board, *Putting consumer and public interests at the heart of legal services regulation: Draft Business Plan 2011/12*, Legal Services Board, December 2010, <http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/lbs_business_plan_10_web_final.pdf> accessed March 2011.

understanding the SARs, and then assessing how well-prepared they are for the style of regulation which the LSB will now be seeking. I provide an analysis below of each of the SARs in turn. Before doing so, I will summarise some of the overarching themes which emerge from the research.

An overview of the 'fit' with regulatory excellence

- 3.22 The SARs have a good grip on the numbers of *authorised persons* who they are responsible for regulating, as one might expect. There is less certainty about how many of these persons are active at any one time. The SARs, however, as a rule have little or no information about the extent of *unregulated activity* in their domain (and often these domains overlap, both among the SARs themselves, and also between an SAR and one or more of the two larger regulators, the Law Society/SRA and the Bar Council/BSB).
- 3.23 The move towards ABS, among other changes, will bring with it a consequent focus (for those regulators who wish to become Licensing Authorities) on *entity regulation*. Currently, there is some tentative movement by the SARs towards the segmentation of their regulated communities by type of practice – sole trader, private practice, in-house. The CLC, IPS and IPREG have this sort of information. The CLC reports that it currently regulates 215 entities, and IPREG reports that it regulates 170 entities. IPS do not regulate any entities, but they do have information on the types of business or firm in which their community works.
- 3.24 Looking at *segmentation by different types of client* (and hence different levels of risk), it is apparent that the SARs have little or no data on their consumers. This presents a significant challenge for the SARs and a potential risk to the LSB's desire to see a more consumer-focused approach to regulation. Some of the SARs have some data on the *different types of service* provided by their regulated community – for example, IPS can break down their members by (self-reported) work specialisms – but there is as yet no properly developed risk segmentation or risk analysis. The SARs are, of course, aware of where risk might be greater – for example, in conveyancing transactions involving large sums of money, where people work as sole practitioners – but a systemic approach is currently lacking, and the evidential basis for much of what is presented as risk analysis is, in truth, anecdotal. The CLC are perhaps the most advanced in this respect, already adopting a rather different approach to the supervision of sole traders and smaller operators from that in respect of large businesses which have more robust risk management systems in place. The CLC intend to develop this approach further.
- 3.25 Data on *regulatory overlap* is not as robust as it might be. The Faculty Office 'anticipate' that 80% of their members (713 out of 885) are solicitors and, as such, regulated by the SRA as well; IPS estimate that only 2% of their members work outside the supervision of a solicitor. The other SARs do not have information on any regulatory overlaps.
- 3.26 The SARs vary quite widely in terms of their *size and resources*, ranging from the CLC with a staff size of 20 full-time equivalents, the IPS with around 10 FTEs, to the Faculty Office with 4 and IPREG and CLSB at around 1.5 and 1 respectively. The question of capacity and capability to meet the demands of the new regulatory environment is likely to be more pressing for these smaller organisations with limited resources.
- 3.27 The SARs vary too in the *level of complaints* which they are used to managing. The CLC dealt with 151 complaints in the most recent year for which figures are

available, and the IPS conducted 41 investigations. The Faculty Office considered 12 complaints, and the forerunners of CLSB and IPREG considered 5 and 1 respectively. If any SAR wishes to enter the world of ABS as a licensing authority, it will be required to display a robust investigatory and disciplinary infrastructure – again, this may be easier for some than for others.

- 3.28 Finally, there may also be a less tangible risk to the success of the new regulatory requirements. This relates to the ‘culture’ of the SARs, and their willingness or otherwise to embrace a changed style of regulation, with the consequent disruption and investment of time and resources which will be needed.

Conclusion

- 3.29 Overall, it appears that there are issues and challenges for many, if not all, of the SARs in the realm of resources, skills and experience; in data sufficiency, including risk segmentation and analysis; and in consumer engagement and focus.
- 3.30 In addition, I judge that the risks to the consumer are magnified considerably when any SAR decides to expand its activities and/or move to become a Licensing Authority. Such a move brings a regulator into the field of mixed practices, entity regulation, perhaps an expansion of different types of consumer, and so on. It is much more than simply stepping up the regulation which has historically been (and is still currently) carried out – in other words, doing more of the same. It will require a very different approach. The emphasis will have to switch from scrutinising entry-level qualifications and adherence to the rules which control continuing membership of one of the legal services organisations. Instead, the focus will move towards consumer engagement and the outcomes, or services, delivered to different types of consumer.
- 3.31 This will entail a sophisticated understanding of the consumer base, and correspondingly robust data on segmentation and risk. It will entail also an ability to supervise different entities in different ways, combining an assessment of risk and a proportionate level of regulation. The regulators and their governing boards will need to have people who are skilled and knowledgeable about regulation and risk management, and have access to resources which can enable proper consumer research. An understanding of the insurance market is likely to be more critical under entity-based supervision (this is because multi-disciplinary practices could mean higher insurance costs for those who were not handling client monies, but were working alongside others that did). The provisions in the Act regarding ‘fitness to own’ tests, and the requirements to appoint a Head of Finance and a Head of Legal Practice, will require Licensing Authorities to have the skills base to judge these matters. It will be up to the regulators to *demonstrate* that they have the capacity and capability to undertake the role of Licensing Authority, rather than assume that their regulatory history will be enough to allow them to ‘rollover’ their current arrangements into the new world.
- 3.32 I now review in more detail the issues surrounding each SAR in turn.

4 Section B: The SARs individually

4.1 The Faculty Office

Introduction

- 4.1.1 The Faculty Office is responsible for the regulation of notaries and it has the exclusive jurisdiction in this area. Notaries attest legal documents, verifying the identity and authenticity of parties to a transaction. There are 885 practising notaries and scriveners (a sub-set of notaries) in the country. The majority – the Office believes about 80% - are dual-qualified as both notaries and solicitors and, as such, have double regulatory cover, by the Faculty Office and by the SRA. About 170 of the regulated community are not solicitors, including around 30 scriveners, who are not normally solicitors.
- 4.1.2 As well as conducting notarial activities, notaries can (and do) carry out conveyancing and probate work. Notaries carrying out conveyancing work are not necessarily solicitors, and so one cannot assume dual regulation in these cases. The Faculty Office assert that the ‘vast majority’ of notaries conduct only notarial work, and report that, ‘based upon [our] regulatory experience ... a small proportion’ of notaries who undertake conveyancing and probate are not solicitors. The clients of notaries are, as a rule, members of the general public, and cannot be assumed to have a sophisticated understanding of the law.
- 4.1.3 The Faculty Office has a very long history, dating back to the reign of Henry VIII. When ecclesiastical powers were taken over by the Henrician monarchy, the Archbishop of Canterbury’s office was given authority to carry out a wide range of legal matters on behalf of the Crown. The regulation by the Faculty Office of legal officers, that is notaries, derives from these reforms of 1533.
- 4.1.4 The Faculty Office understandably see themselves as having a venerable history with centuries of experience of regulating notaries. Accordingly, the Office has a healthy scepticism regarding the need for a new oversight regulator in the LSB, and officials in the Faculty express concern about the additional work imposed on them by the requirements of the LSB and the 2007 Act. They have limited staff resources to meet the further demands of the Act, as administered by the LSB. The new arrangements have caused the Office to raise practising fees for notaries by £80 a head, the largest rise (in percentage terms) of any of the Approved Regulators. The Office supports the reform of the complaints system under the 2007 Act as a worthwhile and necessary change.
- 4.1.5 Although Sir David Clementi, in his review of the Legal Services Regulatory Framework,³ recommended that the Faculty Office should lose its powers to supervise notaries (partly on the grounds that the system was ‘somewhat anachronistic’), Parliament decided otherwise. The Government took the view that the Office, while ancient, was operating a system which worked well. The Government were also acutely conscious of the international considerations and

³ Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales, Final Report (December, 2004)*.

complexities in any re-modelling of the system for notarial regulation. This is because the acceptability of English notarial acts overseas is related to the standing of the notarial professional internationally, including the Scrivener Notaries' membership of the International Union of Latin Notaries. Membership of the Union and international acceptance depends, to an extent, on the robustness and independence of the regulatory regime.

- 4.1.6 The Master of the Faculties has shown little ambition to become a Licensing Authority for ABS. This is a significant caveat, as it reduces substantially the challenges facing the Office in adapting to the new regulatory requirements. The Office has so far rejected the option of becoming a licensing authority because they do not consider a notary's position in an ABS firm to be wholly consistent with his or her duty of impartiality in carrying out notarial acts. As the Office put it to me, 'the Master does not at this time see the wisdom of "bundling" notarial services with other legal services in the same entity'. When providing notarial services a notary will almost always offer those services as a sole practitioner. The exception is a small (but important) number of notarial firms in the City of London. The vast majority of notarial acts are destined for use in overseas jurisdictions. The acceptance of notarial acts overseas relies to a large extent on the independent (including non-governmental) character of their regulation, and on the independence and impartiality of a notary's practice. This reflects the quasi-judicial status of the notarial act, and the notary's primary duty to the transaction and to all parties who place legitimate reliance on it (not only the client). For this reason employed notaries who practise in firms of solicitors are required to give a statement of independence to their employer and cannot carry out notarial acts for clients of the firm. It is likely that, if notaries were to work in an ABS firm or company, they would also need to give such a statement of independence to the Head of Legal Practice.
- 4.1.7 The Faculty Office's approach has been to concentrate on notaries as individuals: their education, qualification and discipline. Their regulatory resources have been targeted at ensuring that notaries are properly qualified, are persons of probity, and are disciplined in cases of misconduct. The Office recognises that, if it were to seek to become a Licensing Authority, they would have to reallocate their resources from the current focus on individual notaries to a business-led focus on entities. The Office is quick to accept that this may seem like an old-fashioned way of looking at the provision of legal services, but they believe strongly that such an approach is intrinsically linked to the nature of a notary's independence. The Office is clear that it wishes to continue to concentrate on what they do well, rather than risk entering the field of new business structures and entity-based regulation.

Assessment

- 4.1.8 The Faculty Office was not always able to provide comprehensive data on some of the questions raised by the new approach to regulation, and made one or two assertions based upon their long experience of regulating the notarial community. The Office assumed, for instance, that members holding a current practising certificate were active, but did not know. In respect of the types of business structure in which notaries work, the Office did not have data, but knew that most notaries are sole practitioners *as notaries*, although the 'vast majority [work] in legal offices'. When notaries are employed, they keep their notarial work separate, thus maintaining independence from their employer and guarding in this way against conflicts of interest.
- 4.1.9 Again lacking precise data, the Office took the view that notaries either practised on their own or, when working in solicitors' offices, would be in small or medium-sized

firms. As mentioned above, the Office believes that around 80% of notaries are dual-qualified as solicitors.

- 4.1.10 The Office has many more functions than the regulation of notaries, and so its staff devote only part of their time to the regulatory role. The Office estimates that it has around 4 full-time equivalent staff working in the regulatory function. The Faculty Office has not taken a risk-based approach to regulation hitherto. It recognises that the key area of risk for notaries is where they undertake high-value conveyancing and that, within this parameter, sole practitioners constitute a particularly high risk. There is an absence of hard data to support this anecdotal (but not necessarily inaccurate) impression. In particular, one would like to know exactly how many notaries are conducting conveyancing and probate transactions for 'lay' consumers and, of this group of notaries, precisely how many are not also regulated by the SRA (and exactly who are the individuals).
- 4.1.11 The Office is thinking about whether further safeguards are needed to cover this potential lacuna. The Master's Advisory Board has been looking at whether there needs to be greater supervision of the small number of notaries who do not work in an office with other legal practitioners and lack the collegiate support that such an office can provide. This is of particular concern where that notary is holding client monies and carrying out conveyancing and probate as a notary only. There have been no complaints against such notaries, but this does not negate the risk of problems occurring in the future. The Office already requires such notaries to have professional indemnity and fidelity insurance, and there are strict rules of professional conduct regarding handling clients' money. Additionally, recent CPD regulations introduced a requirement that those notaries who carry out any probate and conveyancing as a notary must obtain a minimum number of hours of continuing professional education in those areas each year. The Advisory Board has also been considering whether the supervision requirements for these notaries should be increased when a new notary is appointed, and the Office will be taking this project forward in 2011.
- 4.1.12 In addition to this, the Office is now embarking on an extensive debate about outcomes-based regulation and risk assessment, as it seeks to react to the changing nature of regulation in this country in the light of the 2007 Act.
- 4.1.13 The position of the Faculty Office raises a number of interesting points in the context of the Act. First, it has not received its powers through a delegation from a membership body acting as the Approved Regulator, as is the case with many other legal services regulators. In this, the Faculty Office is similar to the CLC. The two notarial membership bodies (the Notaries Society and the Society of Scrivener Notaries) are 'genuine' membership bodies, rather than a hybrid of promotional professional associations and regulators. The Faculty Office's approach produces a regulator which is genuinely independent of its membership body or bodies.
- 4.1.14 Second, the international element of the work of notaries raises real difficulties in any attempt to re-model their regulatory arrangements. Any new body which sought powers to regulate notaries would have to secure acceptance from the International Union of the Latin Notaries. It would also be necessary to consider to what extent such a new body could regulate those overseas notaries who currently are regulated by the Faculty Office (in Australasia, the Channel Islands, Gibraltar and elsewhere).
- 4.1.15 Thirdly, the venerable history of the Faculty Office, while giving depth and experience, may also suggest a rather old-fashioned approach to regulation. As a result, the Office might be more focused on the 'older' regulatory culture, of setting entrance standards and maintaining restricted rights to practise. The LSB's more

modern approach, reflecting the requirements of the 2007 Act and current regulatory thinking, focuses on consumer outcomes and risks. There is a risk that the Office will not develop a consumer focus, and will not devote much energy or time to such issues as expanding access to the profession, looking for innovation, focusing on improving quality, or researching consumer demands.

- 4.1.16 There are very few complaints about notaries, and they are described by the Office as usually concerning small disputes over costs. Occasionally, a serious matter of negligence can arise. In the most recent year for which data is available, the Office considered 12 complaints, all about service rather than conduct. It has a well-developed complaints and disciplinary structure.
- 4.1.17 The Office represents a degree of risk for the LSB, in that it; is very lightly resourced, has an unapologetically critical stance in relation to the new regulatory arrangements; may need to develop a stronger approach to consumer betterment; has limited evidence of risk analysis; and, has a proportion of its regulatory community providing services direct to potentially vulnerable clients.
- 4.1.18 On the other hand, the Office can be said to be low-risk, given that; many of its members are dual-regulated; it has a very long history of regulation; it has systems in place for qualifications, standards, discipline and enforcement; it has very recently introduced rules for CPD; there are very few members and there are very few complaints; and, crucially, it has no aspirations to become a Licensing Authority.
- 4.1.19 In this context, and thus in the immediate term, I judge that the Faculty Office should be able to meet the demands of the 2007 Act, subject to one or two small concerns. It will need to improve its data and, in particular, the Office should be asked to consider whether the current arrangements for regulating conveyancing and probate are adequate. An alternative would be to invite the Office to consider 'outsourcing' the regulation of notaries' conveyancing and probate activities to another regulator (perhaps the SRA, or any other regulatory body which emerges in time and which is geared up to regulate these activities).
- 4.1.20 The very different nature of the Faculty Office from the other SARs – its history, and its lack of interest in becoming a Licensing Authority – may well mean that it can stand separately from the others. This has implications for my analysis and recommendations in Part Two of this report.

4.2 Intellectual Property Regulation Board (IPReg)

Introduction

- 4.2.1 IPREG is a recent arrival on the regulatory scene, having been established in 2010 by the two membership bodies for Patent Attorneys (CIPA) and Trade Mark Attorneys (ITMA). These two bodies are the Approved Regulators under statute, and have jointly delegated the regulatory arrangements to IPREG.
- 4.2.2 IPREG has established a joint Board comprising 4 lay members, who sit on both Patent and Trade Mark matters, and 6 members from the regulated community, 3 from the Patent Attorneys and 3 from the Trade Mark Attorneys. There is thus already a degree of co-operation and sharing resources between the two separate Approved Regulators.
- 4.2.3 IPREG itself is lightly resourced, with a part-time CEO, 1 full-time equivalent staff member and a part-time Board.
- 4.2.4 Patent Attorneys are scientists who understand patent law. They act for big industrial concerns, establishing patents for new processes, establishing international rights, and helping overseas clients to establish the operation of their patents here in England and Wales.
- 4.2.5 Trade Mark Attorneys do similar work to establish brands. They are not scientists, and tend to come from a more artistic/creative background. The clientele of Trade Mark Attorneys may be slightly more varied than that of the Patent Attorneys, as Trade Mark Attorneys are thought more likely to work for small and medium enterprises (there is no hard data to support this, however).
- 4.2.6 There are 1,501 Patent Attorneys and 456 Trade Mark Attorneys, and 358 practitioners are registered as both. 97% are thought to be active. Around 70% of Patent Attorneys and around 80% of Trade Mark Attorneys work in private practice, with almost a quarter of Patent Attorneys working as in-house agents (the corresponding figure for Trade Mark Attorneys is 13%). A handful work as sole traders (5% and 2% respectively for Patent Attorneys and Trade Mark Attorneys).
- 4.2.7 IPREG, along with the CLC, is one of the two SARs which already regulates entities. IPREG oversees 170 entities. Information is not held on the size of businesses in which Attorneys work, but IPREG is developing detailed data on this.
- 4.2.8 Both sets of Attorneys will have a small number of clients who are freelance inventors, known colloquially as 'Fred in the Shed' clients. They are much more likely to be potentially vulnerable when compared to the powerful and sophisticated clients such as AstraZeneca, who comprise the majority of clients in this area. The 'Fred in the Shed' sector of the client base is widely held to be miniscule to both sets of Attorneys although, again, there is no reliable data on the client base, nor on the types of service the regulated community provide (the regulators assume that all their members provide the full range of services).
- 4.2.9 The regulated community are, in effect, being subject to a wider regulatory scheme than is required by legislation. Practitioners have recognised the benefits of joining one (or both) of the two membership bodies, CIPA and ITMA and, in opting to do so, become subject to membership rules and regulations governing all of their work and

services. Yet there is no statutory or other legal restriction on acting in these fields, except where Parliament has introduced reserved rights (such as advocacy and litigation in the Patent County Court). Many practitioners, even those in CIPA or ITMA, still instruct a solicitor or barrister to act for them in litigation matters. There is a further complication, in that it is possible to register as a European Patent Agent, and hold yourself out as such in this country, without being registered with IPREG. IPREG do not know exactly how many such practitioners exist and are active, nor does it have data on the number of unregulated practitioners in this field in general.

- 4.2.10 There is some scope for potential friction between the membership bodies and IPREG. This flows from the fact that the profession has been self-regulating until very recently, and the new arrangements, imposed on the professions by the 2007 Act, are costly and likely to be more restrictive. Given that most practitioners could offer the full range of services (short of rights of audience) without being registered or otherwise regulated, there is a risk that any unduly expensive or burdensome regime will drive practitioners off the register and into the unregulated environment.
- 4.2.11 Moreover, there are no restrictions currently on business ownership and mixed practices, so both types of Attorney are already permitted to work in an 'ABS' environment – and many do. The 2007 Act introduced 'new' arrangements for mixed practices, aimed at liberalising the market currently occupied by solicitors and barristers. Such 'liberalisation' is not necessary for Patent Attorneys and Trade Mark Attorneys but, if they wish to continue to practise under the provisions of the Act, they will need to find a Licensing Authority to supervise them. There is a question as to whether *existing practices*, combining Patent Attorneys and Trade Mark Attorneys, would already constitute an ABS under the Act.
- 4.2.12 If the two Approved Regulators (CIPA and ITMA) do not seek to become Licensing Authorities then, where Patent or Trade Mark Attorneys wish to work in an ABS, they will have to seek regulation as entities elsewhere, perhaps via the SRA.
- 4.2.13 IPREG itself would like to protect the titles of Attorneys and to restrict a much wider range of patent and trade mark activities to registered persons only. Until this happens – and it must be said that there is no evidence at all that the LSB or Government are persuaded that it should happen – then the challenge for IPREG is to balance any desire to introduce further regulatory constraints on their members, without driving practitioners away from the regulated community altogether.
- 4.2.14 The level of complaints against Attorneys is extremely low (just one in the year for which we have the most recent figures), although occasional conduct issues have arisen with Patent Attorneys (for example, where a member has falsified a lodging-date, having missed the deadline). IPREG has systems in place to deal with complaints and has suitable enforcement powers.

Assessment

- 4.2.15 There are a number of interesting issues arising from this sector of the legal services world. First, the history of this sector is far more driven by competition considerations, and far less driven by regulation and protection issues. Bringing the Attorneys into the scope of the 2007 Act seems at odds with the presumed intention of the Act as a liberalising statute, designed to give consumers more choice and greater access to legal services at a competitive price. The opposite effect may be achieved in this particular sector, raising costs and reducing the incentives for practitioners to satisfy regulatory standards. Equally, it is not clear that imposing the

ABS regime on existing businesses will bring any advantages for consumers or practitioners.

- 4.2.16 The vast majority of clients are sophisticated and powerful, and there is not usually, therefore, an imbalance in knowledge and market position between consumer and adviser. Accordingly, the regulatory risks are very low (although precise consumer data is not available, and IPREG currently has no plans to conduct a detailed risk analysis of the workforce or the consumer base).
- 4.2.17 Overall, the main concern about IPREG is its very small size and its (inevitably) very short track record and experience. It will find it hard to resource itself to meet the demands for a more sophisticated risk-based supervisory regime, to carry out consumer engagement to the levels likely to be required by the LSB in future, and to manage the interface with the LSB in general. Its ability to manage complaints on any large scale is doubtful – this does not constitute a risk with its current consumer profile but, if this were to change with the advent of ABS, problems might well arise.
- 4.2.18 It is not yet clear how CIPA and ITMA will wish to take forward their interest in ABS and a Licensing Authority and, in particular, whether they will choose IPREG as their vehicle, as opposed, say, to the SRA or another body. This issue – the sustainability of IPREG in a changing environment – is considered in more detail in Part Two of this report.

4.3 ILEX Professional Standards (IPS)

Introduction

- 4.3.1 IPS was formed in 2008 as part of the regulatory-representative split which the 2007 Act requires. It has a part-time Board, and a full time CEO with a staff command of around 7 more full-time equivalents. IPS have access to additional resources which are under the management and control of the membership body, ILEX. It has produced all of the standard regulatory documentation and processes, including a Code of Conduct, discipline and appeals arrangements, CPD, and so on.
- 4.3.2 There are about 21,500 members of the Institute of Legal Executives, all of whom are subject to regulation and supervision by IPS. Around 7,800 are fully-qualified Fellows (FILEX), able to undertake reserved activities, and thus subject to the supervision of IPS under the 2007 Act. IPS also regulates the 450 or so Associate Prosecutors, most of whom are not Fellows. Only FILEX members are entitled to describe themselves as 'Legal Executives' (although there is no statutory protection of this title).
- 4.3.3 IPS estimates that 95% of Fellows are active. Legal Executives almost all work under the supervision of a solicitor, and there is thus double-regulation (IPS estimate that only 2% of Fellows are self-employed and work outside the supervision of a solicitor). Moreover, Legal Executives are not deemed responsible to the client for the services they provide, and thus the SRA manages the bulk of the client interface regulation. IPS nevertheless operates a full regulatory regime for the individuals who act as Fellows, offering in effect a regulated membership scheme.
- 4.3.4 IPS estimate that just under 70% of Fellows work in private practice, and just over 20% as in-house employed lawyers. IPS does not currently regulate entities. The regulatory arm has a grasp of the services of its regulated community, because FILEX were asked to record their area of specialism. 51% recorded themselves as primarily working in civil litigation, 32% in conveyancing, and smaller proportions working in such areas as private client, company law, family, public law, criminal litigation and costs and accounts (21% recorded their prime area as 'other'). The figures do not add up to 100% because, respondents were able to record more than one specialism.
- 4.3.5 IPS do not collect data on the types of client served by Fellows, although they believe that this information may be held by the SRA. IPS do not carry out any sophisticated risk analysis and consumer/practitioner segmentation, although it recognises that the self-employed Fellows represent the biggest risk, and that immigration and probate are higher risk, along with claims management, general advice and costs drafting where conducted by those working outside the supervision of a solicitor and the SRA. IPS is in the process of developing an approach to consumer engagement.
- 4.3.6 IPS has inherited from ILEX well-developed arrangements for complaints, investigations and discipline. In the year for which most recent figures are available, IPS conducted 41 investigations (leading to 28 disciplinary actions).
- 4.3.7 The current double-wrap arrangements, which make Legal Executives such a low risk, is set to change dramatically. ILEX (the Approved Regulator) intends to utilise the freedoms of ABS to enable its members to set up their own businesses and offer

services direct to the public in mixed practices. ILEX will wish to act as a Licensing Authority for these practices, and it also wishes to obtain a wider regulatory ambit for IPS. ILEX is therefore applying for wider rights for its members to practise in such fields as litigation, conveyancing and probate.

- 4.3.8 If ILEX is successful in this endeavour then it and IPS will become significant players in the legal services market, not least because their members work across the spectrum of law, rather than in a narrow field (such as Notaries, Costs Lawyers, and Patent or Trademark Attorneys).
- 4.3.9 IPS is the largest of the SARs (by reference to number of practitioners). Although it is not an adopted policy of IPS to position itself as the lead body in this community, it has had discussions with some of the other SARs to establish whether there is an appetite for IPS to provide regulatory services to the other players. Such services might include a centralised recruitment and appointments process, disciplinary tribunals and infrastructure, a centralised register, and so on. While there is potentially some advantage to the smaller players in not having to incur the expense and effort of establishing their own separate arrangements, so far the other SARs have not pursued this idea beyond initial exploratory discussions. This issue is considered further in Part Two of this report.

Assessment

- 4.3.10 IPS currently represent an extremely low risk in the regulatory landscape, because of the double-wrap regulation brought by the SRA. With the advent of ABS, and the clear aspirations of this regulator to enter the market in a far more forceful manner, IPS will soon occupy a space similar to that of the SRA. This raises particular challenges for IPS, embarking on an expansionist policy which will take it into uncharted (for IPS) regulatory territory – potentially quite a wide new territory, and moving quite rapidly into it.
- 4.3.11 IPS does not yet apply any true risk analysis or segmentation of its regulated community or its consumer base. Partly this is because it has not had to do so hitherto, as the SRA provides a very important regulatory ‘cushion’ for Legal Executives. The future may be very different, and the IPS will have to formulate a more sophisticated risk-based supervision regime.
- 4.3.12 IPS has good systems in place to deal with complaints, and has suitable enforcement powers - for its current levels of responsibility. It will be a significant step up for IPS to monitor and supervise a fairly large community providing services direct to the general public, and this is as yet untested.
- 4.3.13 The IPS strategy offers one of the most tangible elements of competition in the legal services market from the SAR sector, along with the CLC and possibly the ACL/CLSB (see below). Equally, it raises some of the highest regulatory risks given the scale of its ambitions. In Part Two of this report, I make some suggestions for how this circle might be squared.

4.4 The Council for Licensed Conveyancers (CLC)

Introduction

- 4.4.1 The CLC was established in 1986 following the ending of the solicitors' conveyancing monopoly. A new profession of licensed conveyancers was introduced. As the title suggests, their activities were at first restricted to providing conveyancing services to the public. In 2008, the Council obtained probate rights for the members of its regulated community.
- 4.4.2 The profession has always been overseen by a Council. In 2010, the Council's membership was reduced from 15 to 7, comprising 4 Licensed Conveyancers and 3 lay people, as required by the Administration of Justice Act under which the Council is constituted. The intention is to remove this requirement, and come into line with modern regulatory practice for a lay majority.
- 4.4.3 Under this recent modernisation, the Council has also wound up a number of its committees and now operates a clearer split between a policy executive (with a staff of 20 FTE) and a decision-making strategic Council.
- 4.4.4 The CLC commissions education and training delivery from approved external providers.
- 4.4.5 The profession comprises 1021 licensees. The Council estimate that around 90% of the workforce is in private practice, and about 10% are in-house employees. 10% are thought to be sole practitioners.
- 4.4.6 The Council distinguishes between Managers, who can provide services direct to the public, and Licensees, who can be employed by managers or companies to undertake conveyancing work. There is a 25%-75% split between Managers and Licensees.
- 4.4.7 The CLC supervises 215 entities, ranging from a large number of small to medium-sized practices and a handful of very large-volume conveyancing practices. These latter generate over 50% of the CLC's income.
- 4.4.8 Of the organisations within the scope of this research, the CLC have made the most effort to collect data, assess risks and regulate according to those risks. Despite this, the CLC could not be said to conduct a sophisticated risk assessment and segmentation of its licensees or their client base that is sufficient to satisfy the LSB's likely future expectations. In terms of the licensee's clients, the CLC estimates that a little fewer than 90% of clients are members of the general public, with about 10% being large businesses and the remainder small to medium-sized enterprises. The Council's data shows that just 5% of its members hold probate rights.
- 4.4.9 The CLC recognises that all of the activities of its members constitute risk, because of the large sums of money involved in both conveyancing and probate. Within this, the CLC is developing a risk-based approach to its regulation, particularly focusing on smaller practices and/or those whose own internal controls are weak. It thus distinguishes in its regulatory approach between those, often larger, firms, where the CLC's emphasis is on ensuring that there are proper systems in place (rather than checking individual transactions); and the smaller practices, where a more intensive scrutiny is undertaken by the CLC, including sampling individual transactions.

- 4.4.10 The CLC has experience of handling complaints, and in 2009-10 dealt with 135 service complaints and investigated 16 conduct complaints – in respect of the latter, no disciplinary actions were instituted.
- 4.4.11 The CLC intends to develop applications for civil litigation and advocacy. In this way, the CLC is positioning itself, like IPS, to extend its participation in the future ABS market and compete with solicitors and others to offer wide-ranging services in mixed practices.
- 4.4.12 The CLC sees itself as quite well prepared for this challenge, and contrasts itself favourably with IPS. The CLC argues that it has already developed considerable experience, and systems and structures, for regulating practitioners who provide services direct to the general public. By contrast, IPS has always regulated members who work under the regulatory protection of solicitors.
- 4.4.13 The CLC further points to the fact that it has developed educational products aimed at specialist areas of the legal services market, which are delivered in a modular fashion. It intends to develop further such products for specific areas as the CLC extends its activities.

Assessment

- 4.4.14 The CLC has aspirations to become a Licensing Authority and to regulate ABS practices. It sees itself as both wanting to expand into this area, and as having to do so. This latter pressure arises primarily because of the small number of large operators that already practise in 'ABS' structures. They will accordingly wish to migrate to the new ABS arrangements under the 2007 Act. If the CLC cannot continue to regulate them, then these companies will have to find another regulator to license their activities. This would seriously affect the CLC's income and quite possibly jeopardise its ability to continue. In these circumstances, the CLC will obviously wish to demonstrate its ability as a regulator not to be 'captured' by its major funders – a risk which the CLC regards as 'entirely groundless', it should be said.
- 4.4.15 The CLC has a strategic survival plan which envisages them expanding their operations considerably, building on the platform of their current regulatory experience.
- 4.4.16 The CLC, like IPREG, are faced with retro-fitting their existing focus on entities and on mixed practices, in order to align with the (theoretical) liberalisation impact of the 2007 Act. This is not necessarily progress from their point of view, and reflects the fact that the Act was primarily conceived through the prism of liberalising the activities of solicitors and barristers.
- 4.4.17 The CLC has a similar structure to the Faculty Office in that it is the Approved Regulator, with the representative body being a much less significant player. Indeed, the Society of Licensed Conveyancers does not have the same status as the representative bodies in other parts of the legal services market, and is barely recognised by the CLC.
- 4.4.18 The CLC see this lack of a representative body as giving rise to some issues. For example, they do not as a regulator see their role as being responsible for promoting diversity in the profession, as required by the Act. The CLC see this as an activity for a membership body. Again, their view is that this reflects the genesis of the Act as a tool to reform the solicitors' and barristers' professions. They do not wish to be

inhibited in what they do by solutions to problems which they have not caused, and which do not necessarily arise in their domain.

- 4.4.19 The CLC raise an issue about size and scale. While accepting that they are a small regulator in terms of number of licensees, the CLC wish to operate in the market broadly. Accordingly, the CLC view themselves as aspirationally 'large', even if organisationally 'small'.
- 4.4.20 The CLC here raise an issue which I regard as important in respect of the SARs as a whole. This is the ability of any one of the SARs to get the attention of the LSB and shape and influence the agenda as readily as can the SRA and the BSB, and their representative bodies. Part of the problem is the lower resource base for the SARs, and the draining effect of having to attend meetings, workshops and seminars, and respond to lengthy and detailed consultation papers and processes. Another dimension is the fact that the larger bodies can host events to which the LSB can be invited, and where networking and discussion takes place. I return to this in Part Two.
- 4.4.21 There is some evidence that the CLC applies a degree of risk analysis and segmentation of its regulated community. They argue that they have different styles of regulatory supervision for the larger operators from that applied to the smaller, higher-risk practitioners. This is promising. However, it will be a significant challenge for the CLC to develop an equally sophisticated system for its regulated community if it broadens its coverage as radically as it intends. Equally, while the CLC has good systems in place to deal with complaints, and has suitable enforcement powers, the potential volume and range of issues will stand to increase dramatically in the light of its plans to regulate a broader range of practising rights.
- 4.4.22 Overall, the CLC is a robust and experienced regulator of front-line services, with current experience of ABS-style structures and entity regulation. It offers the prospect of introducing greater competition into the legal services market through expanding its activities.
- 4.4.23 However, while the CLC is tried and tested as a regulator of conveyancing services, it has a steep learning curve to become a regulator of other services. It will need to develop its role accordingly, and the LSB will wish to satisfy itself that it can do so. As with IPS, there are potential solutions to this conundrum, and I review them in Part Two of the report.

4.5 Costs Lawyer Standards Board (CLSB)

Introduction

- 4.5.1 The Costs Lawyer Standards Board is the most recent of those regulatory arms created in the light of the 2007 Act. The Association of Law Costs Draftsmen, which was founded in 1977, set up the new Standards Board in 2010, and the first Chief Executive took up post at the end of September in that year. The Association changed its name at the start of 2011, and is now known as the Association of Costs Lawyers.
- 4.5.2 The primary role of a Costs Lawyer is to draw up bills of costs for solicitors and to defend those bills against challenges, or to challenge lawyers' bills on behalf of a client (perhaps an insurance company or other corporate body, for example, or a public authority such as a local council). In a very small minority of cases, they might work for a litigant in person. They qualify by passing a series of exams and the intention is to introduce a mandatory 12 months' probationary period of work. CPD is being developed and extended.
- 4.5.3 In 2007, Costs Lawyers were granted rights of audience and rights to undertake litigation. Many Costs Lawyers do not exercise these rights – 90% of the work is said to be devoted to bill preparation. There is no protection of title and, so long as a practitioner does not wish to exercise the reserved rights, anyone may practise as a 'costs draftsman. There is an unspecified (because unknown, but thought to be around 5,000) number of people in the market place acting as costs draftsman. The official membership of the Association, however, is just 410, 2% of whom are designated as 'retired'.
- 4.5.4 The regulator estimates that 34% of Costs Lawyers are employed as in-house draftsmen, with the remainder of the membership acting as independent practitioners. There is no information held on the size of the businesses in which they work.
- 4.5.5 On behalf of the CLSB, the ACL responded to the questionnaire I issued. In their response they stated that the Association and the Board do not have the resources to conduct any sort of risk analysis or segmentation, such as the types of services members provide, nor the breakdown between types of client. The Board is, however, working to develop a risk matrix and to capture the relevant data to enable its new Risk Management Policy to operate effectively. There were three service complaints and two conduct complaints considered by the predecessor to the CLSB in 2009-10. Complaints tend to be about a delay in preparing the bill, or an inaccuracy in the final bill. Costs Lawyers do not handle client money, and they are required to take out PII.
- 4.5.6 The new regulatory body operates on a very small scale. It has a full-time CEO, but no support staff. It has a virtual office in Manchester. The first phase of work has been to establish the new Board as a company, to appoint the members of the Board and to hold an inaugural meeting in February 2011. The second phase will involve drawing up a Code of Conduct and disciplinary procedures, and drawing up arrangements for a Conduct Committee (to investigate complaints) and an Appeals Committee, drawn from a pool of 12 members. Governance procedures will be designed, and a first Business Plan will be developed as a priority.

4.5.7 The key issues at this early stage include a desire for enough space and time to try to make the new arrangements work. The CEO is convinced that the Board can operate as a fully functional regulator, and wants to invest the time and resources to ensure that the new arrangements are a success. Establishing the new arrangements will cost money, of course, and practising fees have already gone up by £50 (from a base of £400) to cater for the demands of the LSB and the 2007 Act. A concern expressed by the CEO (and shared by other regulators) is that the LSB is applying processes and procedures more suited to the larger regulators, which will over-formalise what needs to be done by the smaller operators.

Assessment

- 4.5.8 The CLSB is very new and, accordingly, the CEO has not yet had time to give any sort of detailed consideration to whether the Association should seek to become a Licensing Authority. The issue is far from academic. Costs Lawyers can already practise in mixed partnerships. The Association itself will wish to consider entering the ABS field as a Licensing Authority. It sees its size and relatively low cost base as potentially very attractive to other legal practitioners seeking a flexible and cheap regulator. It should be noted, however, that the resource and skills implications of the ACL/CLSB entering this sphere could be quite daunting.
- 4.5.9 Costs Lawyers work primarily for solicitors, but also for government offices, insurance companies, local authorities and companies. Their clients are, accordingly, mainly 'sophisticated', and are not at the vulnerable end of the spectrum. As remarked above, services are also provided to litigants in person, who may well be more vulnerable consumers, but there is no specific breakdown of the consumer base in this respect (or more generally).
- 4.5.10 The Association is run on a voluntary basis by people who have full-time commitments elsewhere. The CLSB's CEO is keen to develop genuine two-way dialogue with the LSB, and would like to see something like an annual '360 degree feedback' from the smaller (and other) regulators to the LSB. She feels (and I agree) that this would be a useful tool for the LSB in identifying its own strengths and weaknesses, and monitoring its own performance.
- 4.5.11 Overall, this is a small, niche profession, offering services to other professionals. They represent a very low risk. Yet at the same time, the CLSB is lightly-resourced, based on the low risk level in this sector. It is likely to find it quite a challenge to provide the sort of risk analysis and data sufficiency which will be sought from the SARs by the LSB. Its complaints infrastructure will need to be developed and resourced. It will be a challenge more generally for such a small and tightly-resourced body to maintain the necessary relationship with the LSB in a fast-moving period of change and turbulence. This is not to question in any way the degree of commitment and the good intentions of the CEO, the Board or the Association.
- 4.5.12 The issues facing this regulator, which are similar to those facing IPREG, pose questions for the LSB about capacity, capability and sustainability (by 'capability', I should emphasise that I do not question, here or elsewhere in this report, the competence of any individual – I refer instead to the requirement for regulators to cover a broad range of skills and performance areas). In the next part of this report, I make some suggestions and recommendations about how the LSB may wish to respond to this type of challenge.

5 Part two: The analysis

Introduction

- 5.1.1 The 2007 Act, and the responsibilities of the LSB which flow from that legislation, will require the Approved Regulators to take a different approach to regulation from that which has hitherto characterised regulation in the legal services sector. The essential elements of this new approach include; a move away from regulating individuals to regulating entities, in which various different types of legal practitioner will be working alongside each other; a corresponding shift away from regulating standardised and unchanging inputs, such as entry standards (although these will continue to be important), towards outcomes, which will be flexible, variegated and responsive to changed market conditions; a more sophisticated system of regulation which adjusts its bite and its level of scrutiny according to the risk of different activities, different types of client and different types of practitioner and business entity; and, enforcement mechanisms which are adaptable, proportionate and capable of rapid deployment.
- 5.1.2 None of the SARs has much, if any, background in this style of regulation. Some SARs are so new that they have scarcely any background at all – the CLSB and IPREG, for example – while IPS are still relatively new. The CLC has a longer track record, and has some experience of managing by risk but, even for this body, the challenges are serious. Moreover, its desire to expand into new activities brings the CLC into virgin territory too. The Faculty Office has a venerable history, but its regulatory approach reflects a more historic legal environment, and will need to be adjusted to meet the requirements now emerging from the 2007 Act.

5.2 *Two options for managing the change*

- 5.2.1 Given this shifting landscape, and the inexperience of the SARs in regulating in the fashion which will be required in future, the LSB must now decide how it wishes to manage the regulatory environment to make it fit for purpose. There are, broadly speaking, two approaches which might inform the LSB's decision. On the one hand, it would be possible to accept the structures which the LSB has inherited, and which arose directly in many cases from the 2007 Act. The LSB could help to navigate the SARs through a process which began with the passing of the legislation, and which has not yet finished. In adopting this approach, the LSB would be 'managing the present', and ensuring a relatively stable transition to a new, post-Act landscape. How durable that landscape would then be is a moot point. It perhaps could be seen as no more than a staging post *en route* to a different, and more radical, transformation of legal services regulation. But it would have the advantage of a more orderly, less disruptive transition in the early stages and it would be less controversial and less painful for some or all of the players. Its disadvantages would include a missed opportunity to plan now for the future, and the almost certain risk of further change and disruption shortly after the current change programme concludes.
- 5.2.2 The second approach would be to 'manage the future'. In this scenario, the LSB would accept that the passage of the Act has, of itself, created an opportunity to look forward and try to anticipate where the legal services world will end up in 2-5 years time. Rather than manage the turbulence caused by the *immediate* consequences of the legislation – for example, the separation of regulatory and representative functions, the introduction of ABS – the LSB might step back and assess what things will look like when the immediate disruption has settled back down. In this approach, the LSB is likely to be facing a new and more liberalised market. New business entities will have arisen in which different types of practitioner work alongside each other, regardless of their qualifications and entry routes, and their membership of different legal bodies. Regulation will be focused on the business entity providing a multiplicity of legal services to one or more consumer sectors – commercial, specialist, high-street generalist, vulnerable people, those facing loss of liberty, and so on. Codes of conduct governing these services are likely to be set at a high level and to apply across the business. There will be less interest in the routes by which individual practitioners arrived in the business, and more interest in the services being delivered and the impact on the consumer. Discipline and complaints procedures are likely to be common across the sector. Financial controls will be important, as will fitness tests for those who seek to own and run businesses.

The future legal services market and the position of multiple regulators

- 5.2.3 In this future, the existence of multiple regulators focused on the differences between individual practitioners is no longer very relevant. One can readily see how a single, uniform approach to the regulation of legal services will emerge, applying across a variety of businesses which employ very different skill-sets and individuals, who have varying qualifications and arrived by various entry routes. Indeed, in this context, multiple regulators, each offering 'better' rules and regulations (i.e. lower standards), could create a positive harm to consumers. (It has been likened by one interviewee to a sports team choosing its own referee). A variety of professional bodies and trade associations may well continue to exist and to offer a diverse array

of entry points to the legal services world. But a clutch of competing regulators is unlikely to have a place in the legal services market of tomorrow.

- 5.2.4 This is not to say that there will necessarily be *one* legal services regulator – although that is both logical and plausible. There could be a regulator, for example, for areas of the law where there is a high public interest – criminal, public family law, immigration – and another regulator for commercial and high-street retail legal services, often on a commoditised basis – claims management, employment, housing and property, wills and trusts and so on. Alternatively, there could be a single regulator with different, specialised divisions.

Tactical or strategic?

- 5.2.5 The point of painting this picture of the future is to emphasise that the LSB has a choice. It can take a tactical approach, and manage the landscape it presently oversees until the transition is complete, and then think, ‘What next?’ Or it can anticipate the landscape which it will be faced with in a few years time, and take steps *now* designed to achieve a high possibility of success for the future. If the LSB is minded to adopt the second, more strategic approach, then it will sanction greater controversy and disruption now, in the short term, for a more settled solution in the medium term.
- 5.2.6 The two options presented below reflect the nature of this choice for the LSB. **Option one** is designed to meet the tactical needs of a less turbulent, more cautious approach. It minimises the risk of opposition from interest groups and interested parties; it reduces the chances of the LSB making a ‘wrong call’ and creating a future-based landscape for a future which never transpires; it allows the existing, often newly-created regulatory structures to continue to develop and to complete the journeys they have started; it avoids the accusation that a lot of recent work by the SARs will prove to be nugatory and it carries low risk of failure to implement.
- 5.2.7 This option, however, is very likely to be a temporary solution only; it misses the opportunity to start planning for the future of ABS, and thus has something of a ‘head in the sand’ feel; it allows structures to develop which will very probably have to be dismantled in a few years time; and, it avoids making difficult decisions in order to keep the lid on possible opposition.
- 5.2.8 **Option two** is designed to meet the strategic needs of a future-based policy which accepts the creation of turbulence and controversy now as a price for the introduction of change. It has the advantage of an orderly, well-planned advance towards a future which seems fairly predictable; it terminates much of the current planned work by the SARs which will likely prove to be unnecessary in the medium-term; and, it uses the opportunity of the ‘newness’ of the Act and of the LSB to introduce more radical change while the environment is more receptive to such an approach.
- 5.2.9 Against this, the strategic option, like all longer term plans, carries the risk that it will find more enemies than friends, at least in the early stages; it will be less certain of short-term success, as next year is less predictable than tomorrow or next week; it might be presented as a breach of faith by those bodies recently set up who have been working towards a different, more immediate and knowable outcome; and, it is, therefore, higher risk.
- 5.2.10 Both options have flexibility in how they are implemented, how quickly and how fully. There are half-way houses which can be tried on the way to full implementation, for

example, and there are opportunities to consider the practicalities of implementation more fully before a final decision is reached. Moreover, the two options present less of a dichotomy than might at first appear. Option one could easily elide into Option two with some prompting, guidance – and perhaps facilitation – on the part of the LSB. What this report seeks to offer is a road-map for the LSB, allowing it to decide where it wishes to go, and the route by which it wishes to travel.

- 5.2.11 One further word on the options facing the LSB and on the context in which decisions must now be considered. It would be wrong to see the legal services market as one in temporary flux, with a period of stability just around the corner. All the stakeholders must understand that the current changes are just the start of a significant period of readjustment and revision. Nothing which is agreed in 2011 is likely to be set in stone. Changes which the LSB contemplates today will not lead to another long period of tranquillity. Solutions which are fit for the next five or more years may well not be appropriate for the longer term. As such, even option two is likely to be a staging post towards a more radical redefinition of the legal services market – how it operates, who operates within it, and how it and they are regulated. But option two might take the players in the market beyond base camp, and prepare them more quickly for what lies ahead.
- 5.2.12 The issue for the LSB – and the SARs and other players – is simply how fast the pace of change should be delivered, not whether the changes are going to happen. The rest of this report describes the two options in more detail.

5.3 Option one: managing the present

- 5.3.1 There is a perfectly defensible case for allowing the current developments to continue and complete their course. As Part One of this report demonstrated, although there are various shortfalls in the capacity and capability of the SARs to meet the demands of the Act, there are also enough signs to promise a successful outcome. All of the representative bodies have established regulatory arms and delegated powers accordingly. The SARs are in regular contact with the LSB and seeking to comply with the requirements of the legislation.
- 5.3.2 As things currently stand, there are significant areas of the regulatory landscape in this sector which constitute a lower risk of consumer detriment. A large majority of clients in the field of law regulated by IPREG are sophisticated consumers who need little or no protection from provider power. Many of those practising as notaries under the supervision of the Faculty Office are 'double-wrapped' through the overlapping regulation of the SRA to which they are subject. Legal Executives, regulated by IPS, largely work under the supervision of solicitors, who themselves are responsible for the actions of Legal Executives and are regulated by the SRA for this purpose. Costs Lawyers, now regulated by the CLSB, work almost exclusively for sophisticated clients, often lawyers themselves, who again need little or no protection from the provider.
- 5.3.3 The risks in this environment have been set out in the first part of this report. For ease, they might be summarised as:-
- Significant gaps in the data collected and presented, resulting in significant shortfalls in how well the regulators understand and know their regulated communities and their clients
 - Gaps in the skills of the workforce
 - Resource constraints, sometimes serious in the very small regulators, and difficulties in raising practising fees to address these shortfalls
 - A regulatory culture which reflects an era when the legal professions were focused on membership interests more than consumer interests
 - Some risks of regulatory capture in some parts of the landscape
 - Huge challenges for those that wish to become Licensing Authorities, including aspirations to pursue significant expansions into wide-ranging new activities in some cases
- 5.3.4 Although these risks, when set down like that, look quite serious, there are mechanisms in place to help manage the risk. Every SAR has an ongoing programme of reform, in consultation with the LSB. The LSB retains the powers to approve or reject applications by regulators to extend their remits and, indeed, to change their regulatory approach in any respect. Accordingly, the process of adapting to the demands of the Act is not random, and is in fact carefully managed.
- 5.3.5 This analysis supports the implementation of option one, namely that the LSB should continue its stewardship of the SARs and allow them time to meet the

required standards. There is an inherent danger in this approach that some of the SARs might fail to reach those standards. There is even the risk that, faced with failure by one or more SARs, the LSB might be reluctant to take the 'nuclear option' and terminate their activities. A scenario could arise whereby the SARs (some or all of them) might continue to underperform for a protracted period.

- 5.3.6 Nevertheless, with assistance from the LSB, and management of the timetable to ensure a reasonable pace towards compliance, it should be possible to establish a multiple-regulator landscape within two years, at minimal risk to the consumer. Many of those who now work for the newly-created regulatory arms will be pleased if such an option is selected, allowing them to complete the work they have embarked upon, and to retain their positions. The SARs themselves, who have commissioned the work and invested their members' money in it, may also be content to allow the process to continue to its expected conclusion.
- 5.3.7 There are, however, some hidden risks in following this apparently low-risk option, based on the possibility of whole-system failure. By this I mean that, if the LSB were to continue to monitor and oversee the existing work programme, without radical change, it is assuming that the end result will be fit for purpose and sustainable. Should the SARs in the event find that they cannot cope with the pressures of modern regulation, there might be a widespread collapse of the smaller regulators. In this scenario, the LSB would have taken a 'low-risk' decision which had the unintended effect of facilitating the circumstances for a high-risk outcome. I return to this below.

The LSB: 'grandparent' or 'bouncer'?

- 5.3.8 Within this option, there is perhaps scope for two variants of approach. In a nutshell, the LSB could choose either *to facilitate the development of a multiple-regulator landscape*, as a 'good thing' in itself; or it could *set high standards for the aspiring SARs, designed to filter out all but the most robust*. The LSB must act in accordance with the statute, of course, but there is always room for interpretation in the execution of statutory duties.
- 5.3.9 The LSB could, therefore, 'grandfather' into the environment each and every one of the current SARs, offering assistance, mentoring and advice, extending deadlines, and being flexible about the thresholds which the SARs would have to cross. Equally, the LSB could signal to the SARs that it would take a sceptical and highly critical stance in considering the fitness of these bodies to practise in the new environment, and that there would be an expectation that many SARs would fail to satisfy the required standards.
- 5.3.10 If the LSB were to decide on the latter variant of option one, then it should be crystal clear about this at the outset – in other words, immediately. It might, in so doing, encourage some or all of the SARs to consider whether, in fact, option two below might be a more productive line for them to explore. Indeed, it should be noted that the current arrangements for regulation in this sector have not really been tested yet. There was no assessment at the time of the Act's passage as to whether the existing membership bodies' arrangements would be 'fit for purpose' once the changes allowed by the Act had come into being. What happened instead was that, understandably, the established organisations were passported into the new regulatory scheme, without additional examination, and given time to make the representative-regulatory split. As a result, the most recent assessments of the capabilities of the current legal services regulators were in 1990 (under the Courts and Legal Services Act) and, for the CLC, in addition 1985 under the Administration

of Justice Act. A more serious scrutiny of the fitness for purpose of the arrangements introduced by the 2007 Act is, thus, perhaps timely.

Implementing option one

- 5.3.11 Option one requires very little departure for the LSB from its existing relationship with the SARs. The process of working with the SARs is ongoing, the key personnel are in place, and the LSB is in dialogue with the different organisations. Issues will arise from time to time as the LSB develops its model of regulatory excellence, and considers applications from the SARs for new rights and for licensing powers. But there is nothing so serious about the state of play with any of the current SARs which suggests that any intervention by the LSB is critical at this stage.
- 5.3.12 Individual policy decisions to support this process will need to be made, including:-
- Should the Faculty Office lose its right to supervise notaries carrying out probate and conveyancing work, or be required to demonstrate more robust systems for overseeing this aspect of their members' work?
 - Should there be more control over who can practise as Patent Attorneys and Trade Mark Attorneys, to enable regulation in these areas to be more effective?
 - Should there be more control over who can practise as a Costs Lawyer, to enable regulation of bill preparation to be more effective?
 - Should the CLC and ILEX be permitted to extend their activities without further demonstration of the capacity and capability to regulate in these new areas?
 - What should be done to ensure the improvement of the SAR's data sets?
 - How should segmentation and risk management be improved?
- 5.3.13 Subject to consideration of these (and any other) issues, the LSB can decide to let the current process of change run its course. In so doing, however, the LSB is implicitly, if not explicitly, making an important assumption and sending out a signal to the SARs. If it were to choose option one, the LSB would be placing its own confidence in the durability of the current arrangements. The LSB would not be wilfully misleading, or complacent, in making its decision. Accordingly, the Board must have confidence if it chooses option one that the option is sustainable and stable. In so doing, the Board might wish to have regard to the following risks.
- 5.3.14 The burdens of regulation and its costs may drive away those practitioners whose presence in the regulated environment owes more to their loyalty to the membership organisations than to their wish to practise as regulated providers. Patent Attorneys, Trade Mark Attorneys and Costs Lawyers are the most obvious risk group here. They could, on the whole, carry on business as they do now, simply not offering reserved activity services, or offering to provide these through sub-contracted arrangements.
- 5.3.15 The position of the CLC and ILEX/IPS is predicated on expanding into wider rights and then ABS. Their strategies depend upon successful applications to the LSB for

extended rights, and in due course for Licensing Authority status. None of this is pre-ordained, however. This report highlights concerns about the readiness of both organisations to move into a significantly different and more challenging market, with new regulatory hurdles to negotiate. Either or both of these organisations might, in the event, not prove capable of satisfying the LSB's tests for new regulatory remits or for authority to undertake ABS licensing.

- 5.3.16 Underlying all this is the LSB's own agenda for continually raising the bar and pushing the regulators for more effective and proportionate regulation. The requirements on regulators will probably get more challenging. This is not to say that regulation will get more onerous – in many respects, achieving that is easier than achieving sophisticated, flexible, and tailored regulation. Understanding the market – the consumers, the practitioners, and the business models – will be a key determinant of the effectiveness of the modern legal services regulator. The LSB will not want to be constrained in its demands by a lack of capacity and capability on the part of the regulators themselves.
- 5.3.17 It is possible; therefore, that the SARs will fail in due course, even if invited to continue as they are. This process, it should be noted, will absorb considerable resources at the LSB itself. The result of option one could be that the SARs will need to combine to survive – in other words, that option one will lead in time to the same outcome as option two below. The LSB might choose to allow that to happen, to allow the SARs to find their own way to combination through a fairly painful process of trial and error. Alternatively, it might take the view that, if some form of combination seems more likely than not, it would be better to start the process sooner rather than later, and to help navigate the SARs in the right direction, rather than leave them to their fate.
- 5.3.18 Finally, I should add that, even were the LSB to choose option one, I am not sure that the Board would wish to prevent the SARs from exploring option two should they wish to do so without prompting by the LSB. In this respect, I would recommend that, were the Board to be attracted to option one, it might offer that as advice to the SARs, while inviting them to confirm that they too would not see advantage in combination.
- 5.3.19 In conclusion, option one will have some obvious limitations. It is unlikely that the SARs will fully achieve the level of sophisticated regulation now being sought by the LSB; a multiple-regulator landscape will certainly arise, however short-lived; and the regulation of legal services by entity will be that much more complicated. Nevertheless, I am firmly of the view that this option – managing the present – is pragmatic for the immediate term, low risk (with the caveat given above) and achievable. It is not, however, my preferred option.

5.4 *Option two: managing for the future*

5.4.1 Option two is to create a new, joint regulation body (perhaps called, for example, the Legal Professions Board) for the smaller regulators. This would see the winding-up of the current regulatory arms of the SARs, and the establishment of a new body which would combine the functions of some or all of IPS, CLC, IPREG, CLSB and the Faculty Office. The preceding phrase, 'some or all' is important: it might be that some of the SARs would choose to 'go it alone'; and it might be that some of the SARs would choose to delegate their regulatory functions to an existing, but different body, such as the SRA.

5.4.2 Before considering this option in more detail, a prior question has to be answered, namely: 'Why consider this option at all?' What are the benefits? What would suggest that the current work-in-progress should be strangled in its infancy, and a new course charted?

The emergence of the regulatory shopping mall

5.4.3 The result of the current work programme by the SARs is intended to be the creation of a multiple-regulator legal services landscape. The future consumer of legal services will thus be faced with a wide choice, not only of practitioners (many of whom will be capable of offering the same services), but of regulators of those practitioners (and, again, there will be considerable overlap in the regulatory functions of the different bodies). This somewhat confusing landscape is then set to be further complicated by the move towards regulating by business entity. Accordingly, a company set up by a high-street store offering conveyancing, probate and claims management might employ a mixture of solicitors, licensed conveyancers, legal executives and notaries. The company would then choose which of the regulatory bodies it wants for its regulator- in this case, choosing between the SRA, CLC, IPS and the Faculty Office (all of this is on the assumption that every regulator applies successfully to be a Licensing Authority, which may not, of course, be the case).

5.4.4 Similarly, a company might be set up by a group of solicitors and barristers to provide a full range of legal services, adding to the above package advocacy and litigation (criminal and civil), family work, immigration advice, employment advice. This company would add to its shopping list of regulators the BSB. It may employ costs lawyers to deal with some of its bills, offering the company the chance to choose the CLSB as its preferred regulator (indeed, once regulators extend their licensing rights, any organisation can choose any regulator which oversees the relevant rights, regardless of who the company might employ). Meanwhile, in both of these models, the various employees, partners and owners may or may not be separately regulated by their individual membership bodies, creating the opportunity for one business to have up to six regulators interested in its affairs.

5.4.5 There are various permutations of these models, including Patent Attorneys and Trade Mark Attorneys working alongside solicitors, barristers and legal executives.

5.4.6 This gives rise to the question of whether the 2007 Act was designed to create a regulatory shopping mall. That the Act *allows* such a scenario to grow up seems unequivocal; but whether this was intended is not so clear, nor is it obvious that such an outcome is desirable. (Some of those to whom I spoke while researching and

writing this report argued that there is no evidence that it was *not* the intention of Parliament to facilitate regulatory competition, which is, of course, equally true). For whose interests is the regulatory shopping mall designed? Surely not for consumers, who are likely to be baffled by the complexity (where they are aware of it and have understood it). Consumers certainly will enjoy the opportunities to choose their *supplier*, and the competition introduced by the Act will bring significant benefits in this respect. But will consumers want to – or be able to – choose their *regulator*?

- 5.4.7 In reality, this potential regulatory shopping mall will be of interest only to the practitioners and those setting up new businesses. There will be strong incentives for business owners and their employees to find the ‘regulator of least demand’. The regulators themselves will soon be competing to establish the lowest possible base from which they can operate as a Licensing Authority. The pressure will be to lower the operating costs of regulation and this, in turn, will lead to pressure to reduce standards of consumer protection. Issues around consumer engagement, diversity and access will be driven to the bottom of the priority pile and there will be a rush towards the lowest common denominator.
- 5.4.8 Some of this may be thought to be desirable. If competition, choice and price are the key or sole determinants for designing the new legal services market, regulatory competition could prove to be a powerful weapon. Very low cost regulation, and minimum consumer standards, might be the future. If consumer protection and the maintenance of higher standards are key outcomes desired by the LSB, then regulatory competition is a problem. Nevertheless, even under this analysis, a multiplicity of regulators is not a necessary condition for light touch regulation. A single regulator, charged with such an objective, could achieve the same outcome more quickly, more clearly and almost certainly at lower cost and with less turbulence.

The impact of the future on the decisions to be taken today

- 5.4.9 The logical, and possibly inevitable, conclusion to the current process of establishing multiple regulation, should influence the decisions to be taken now on the SARs (and indeed on the other two regulators). The LSB has an opportunity today to decide whether it wishes to encourage and facilitate the creation of regulatory competition between different regulators providing the same services. If it does, or if it has no view on the matter, then option one above seems a more viable choice. But if the LSB wishes to influence the way in which the regulatory landscape for the legal services market develops, then option one looks seriously flawed – and option two looks more desirable, if not essential.

The potential benefits of a combined regulator

- 5.4.10 Option two is not simply about forestalling regulatory competition (although it is a decisive factor if regulatory competition *has to be* avoided). The issue of combining regulatory bodies should be considered for a number of additional reasons.
- 5.4.11 First, given the future focus on *entity regulation*, it seems a far better fit to have a smaller number of regulators. The emphasis in future is going to be on the business and the services it provides, rather than on the specific backgrounds and affiliations of the different employees and partners in that business. This significantly weighs in favour of a single regulator for legal services businesses or, at least, a small number of regulators reflecting different service specialisms (public interest work such as

criminal advocacy, for instance, as distinct from 'retail' or 'corporate' legal services for the general public or big business).

- 5.4.12 Next, there is plenty to be said for simplifying the increasingly *complex and cluttered regulatory landscape* in this field. The Coalition Government is known to favour de-regulation and a reduction in the number of regulatory bodies. Creating five more regulators seems counter to the spirit of the times. With the Ministry of Justice set to review the workings of the 2007 Act next year (2012), there is a risk of establishing brand new structures which will have to be dismantled before their first set of Annual Reports has landed on LSB desks. Consumers will not welcome such a confusing landscape – and part of the purposes of the Act is to increase consumer engagement and awareness of legal services.
- 5.4.13 A third factor relates to *the capacity of the SARs* to deal with the demands of modern regulation. As seen in Part One of this report, and as summarised in the analysis of option one above, there are difficulties for the SARs in this respect. A number of the SARs are very sparsely resourced. They lack the critical mass to carry out as effectively as will be desired certain key functions:- data gathering and analysis; risk analysis and market segmentation; risk-based supervision; enforcement; consumer engagement; diversity; managing the demands of the LSB (a very real concern for a number of the SARs); and, maintaining a profile with stakeholders.
- 5.4.14 Most of the SARs will struggle to increase their individual resource base, as the costs of doing so will lead to unacceptable escalations in practising fees for their members. Fees have already risen, often well above the rate of inflation, to pay for the first onset of the new regulatory conditions. This is likely to get worse. In some areas – IPREG and CLSB for example – practitioners faced with excessive fee hikes will simply cease to provide reserved legal services and so will not require authorisation. This will drive out of the scope of regulation a number of practitioners – perhaps those who are most likely to service the more vulnerable members of society.
- 5.4.15 Combining forces could create a more sustainable resource base utilising economies of scale. As things currently stand, every one of the SARs is creating its own education and entry arrangements and CPD systems; every SAR is investing in disciplinary structures; and, every SAR maintains its own register; everyone has to manage complaints, create and maintain databases, conduct consumer surveys, respond separately to LSB consultation documents, and so on. There is clearly scope to reduce the overall cost of some or all of these functions by combining and running them as one, and thereby reducing the cost per head.
- 5.4.16 Another issue pointing perhaps towards fewer, bigger regulators relates to *consistency of standards*. It may well be useful for the consumer to be able to choose between different businesses, based on price, expertise, consumer focus and so on. But, arguably, consumers should not have to risk the *accidental* choice of a provider offering lower standards than other providers. The LSB may wish to mitigate this risk by specifying standards beneath which no provider can go, but it would be far more transparent and easier for consumers were there to be uniform standards governing such issues as complaints, transparency of pricing, ethics, and so on.
- 5.4.17 A final, more subtle, factor, relates to *the power imbalance* between the SARs and the two other regulators, the SRA and the BSB. It is difficult sometimes for the SARs, acting individually, to command the attention of the LSB and other

stakeholders such as the MoJ. Inevitably, the bigger players tend to dominate the agenda. By combining forces, the SARs might punch above their weight as a collective far more than they can do, every one acting on its own.

- 5.4.18 I perhaps should say at this point that I have taken as a given the continuing existence of the two large regulators. Consideration of how they might relate to what I am recommending here is explicitly outside my terms of reference. A direct parallel with, for example, the financial services world would suggest the combination of all the SARs into one super-regulator which would encompass as well the SRA and the BSB. While that may indeed happen in time, I have been asked to approach the position of the SARs as a self-contained group. While the SRA and BSB continue to exist in their current forms, therefore, I see strength in creating a third, counterweight to the dominance in the regulatory market of these two bigger beasts. Nonetheless, the creation of a third larger regulatory body would not put an end to the potential malady of regulatory competition as I have described above.

Comparative model for joint regulation: the HPC

- 5.4.19 Thus, there are a number of reasons why combination of regulators at this level should be considered as a serious option for the future. This approach to the regulation of smaller, but disparate professions has already been established in the health service. The Health Professions Council (subject itself to supervision by an over-arching body akin to the LSB, the Commission for Health Care Regulatory Excellence) regulates 15 medical professions, setting generic and high level standards of conduct, ethics, education and training, CPD, discipline and so on. Specific procedures and rules are then laid down by the individual professions, interpreting and applying the common standards drawn up by the HPC. The individual membership bodies persist, and indeed offer invaluable support and advice to their own members and to consumers. The HPC operates as a strategic council, with various committees working out the details for education and training, fitness to practise and so on. Registration fees are kept lower than would be the case if every profession had its own regulator – this is particularly useful for the smallest professions.
- 5.4.20 Combination in this way also helps these relatively small health professions lobby and influence stakeholders more effectively than would be possible if acting alone. The HPC offers centralised complaints and disciplinary procedures, with each sub-profession providing an expert member for hearings. Key to the success of the HPC is the retention of the individual identities of the different professional bodies, and their close involvement in all that the HPC does, through membership of committees and extensive consultation.

Weighing up option two

- 5.4.21 Should something similar be considered for the SARs? The position is balanced. Many of those working for the newly-established regulatory arms of the SARs will not take kindly to their current work programmes being disrupted so spectacularly – it is likely that, if horses are changed mid-course like this, then money will have been wasted, jobs created which will now be abolished (with the attendant traumas of redundancy and job losses for individuals), and further disruption introduced.
- 5.4.22 Yet this is no reason to rule out combination. It could actually be a bigger waste of time and money if the LSB were to allow the SARs to continue the current work towards full establishment, only for the goalposts to be moved in a couple of years

time if the LSB seeks a simplified regulatory structure to facilitate entity-based regulation. The sooner that the SARs are told that the path ahead is barred and they should turn back and start up another route, the better. Less energy and resource will have been wasted in the longer run, and people's investment in an illusory stability will be that much less. Moreover, although one should never be sanguine where people's livelihood is concerned, the number of staff employed in the new regulatory arms, whose jobs would be at high risk, is small. Some of these people may be absorbed into the SARs themselves, and others will be needed to plan and then run the new combined regulator.

- 5.4.23 A further objection might be raised, which is that nothing really unites these smaller organisations, other than their size relative to the SRA and BSB. Do Trade Mark Attorneys have anything in common, for example, with Licensed Conveyancers? Although there are reasons to bring together some of these disparate professions, because soon they will be working together in a single-regulated business, this is not true across the whole spectrum of the SARs.
- 5.4.24 This is a perfectly valid objection, but a similar lack of coherence between, say, physiotherapists and anaesthetists has not stopped the HPC from functioning effectively. Despite the differences between Costs Lawyers and Patent Attorneys, there might still be benefit in combining the regulation under one body, albeit with specialist divisions and tailored functionality – such as having a disciplinary tribunal constituted with a relevant professional for the particular case. Other differences may be more fundamental – for instance, I cannot see that education and training requirements will be the same across the spectrum. In this respect, it might be worth considering transferring back to the SARs themselves, rather than their delegated regulatory arms, the responsibility for education and qualifications. But the inherent differences between the activities of the SARs need not lead one to conclude that combination is either impossible or undesirable.
- 5.4.25 Another objection might come from the representative arms who are, in many cases, the Approved Regulator (ILEX, CIPA, ITMA and ACL). There must surely be a degree of comfort in these bodies that they currently have a close relationship with their own, dedicated regulatory arm, and can expect within reason to exert some influence and pressure on the independent regulatory body. The prospect of a combined regulator might cause some anxiety amongst the SARs that their influence would decline, and that their ability to represent their members' interests to the regulator would diminish.
- 5.4.26 There is some truth in this, of course. There would be a loss of control, or perceived control. The independence of the regulatory arm from the representative wing is fundamental to the separation of powers introduced by the 2007 Act, and option two certainly builds on that foundation. Yet this separation need not be all bad news for the membership bodies. As part of the maturing relations between the regulatory and representative arms, both are learning to exercise their newly defined roles with greater skill and confidence. Freedom from the regulatory role confers on the membership bodies greater powers to represent their members' views, and to lobby and influence without accusations of conflicts of interest and roles. The creation of a new, joint regulator for the smaller professions would take the sector a step further on its post-Act journey – rather than a threat, it might be seen as the natural progression towards a new settlement between the representative organisations and their regulator.

Variations on the theme

- 5.4.27 The theme of combination need not, however, be ‘one size fits all’. It may be that, if some or all of the current SARs are thought by the LSB (or by themselves) to be unsustainable, there are other options than combining with their fellow SARs. Some might wish to migrate towards the SRA, for example, leaving the remaining SARs to combine into a smaller joint Legal Professions Board. There are different ways in which the SARs may choose to combine. For example, those SARs which wish to become Licensing Authorities may have more in common with each other than those which do not. The Faculty Office has no present intention to license notaries to work in ABSs, and may prefer to plough its own furrow. It also, uniquely among the SARs, has history on its side should it wish to maintain a separate identity.
- 5.4.28 A second way of cutting the cake would reflect the different risks inherent in the different types of service provided. Arguably, the insurance and compensation costs required for those practising in businesses where client money is held should not be imposed on those who do not present this element of risk – Patent and Trade Mark Attorneys and Costs Lawyers. If these professionals were to combine with Licensed Conveyancers and Legal Executives, for instance, then the practising fees might rise unconscionably. In this scenario, one might look to encourage the members of ITMA, CIPA and the ACL to move under the supervision of another regulator such as the SRA, which could set up specialist divisions to deal with these practitioners. (Another solution would be for the joint regulatory body to investigate the insurance market more thoroughly).
- 5.4.29 So, the issue of sustainability of the SARs in the new regulatory environment has more than one potential solution. If combination is thought to be a useful outcome to explore, then it need not include every SAR, and it need not be confined to the option of creating a new joint regulatory body. There are choices here – and it is important to be clear about who will be exercising that choice.

Whose regulator is it anyway?

- 5.4.30 I do not believe that, even if option two is thought best, the LSB should seek to dictate that the SARs combine. The option of combination will be more powerful and more likely to endure if it comes from the SARs themselves ‘pulling,’ rather than the LSB ‘pushing’. Nevertheless, I also believe that the LSB has a legitimate interest in the development of discussions around this option, and that it should not be left to the SARs alone to determine whether or not the discussions happen and, if so, at what pace they should proceed.
- 5.4.31 The LSB need not seek to enforce combination. Indeed, such a heavy-handed intervention might well prove counter-productive. The LSB is, however, responsible for assuring Parliament, the public and other stakeholders that the system of regulation over which it presides is fit for purpose. Accordingly, I suggest that, at the very least, the LSB should expose the risks to the SARs of them choosing to ‘carry on as before’. The Board should also be very clear about the direction of travel which it is inaugurating, and what its future regulatory demands are likely to mean for the SARs (and indeed the other two regulators). In other words, the Board should set the boundaries, and define the outcomes it is seeking. The LSB can then offer guidance, support and perhaps even facilitation, to help the SARs navigate to a successful end-point.
- 5.4.32 In this sense, the apparent dichotomy between Options one and two is less than first meets the eye. Both are likely to end up in the same place, albeit at different speeds and, potentially, with more or less pain on the way. The Board can, and ought to, play an authoritative role in ensuring that the SARs understand the issues

they will shortly face, and the balance of risk in choosing whether to stay put or to explore alternatives. In the light of this advice and guidance, the SARs may be invited to choose how they want to respond, and how much support they would like from the LSB.

- 5.4.33 Accordingly, I would recommend that the LSB establishes and supports any structures which are deemed necessary and helpful to enable the SARs themselves to consider the proposition. The LSB may thus wish to dedicate some resource to supporting an examination of this issue. It might wish to appoint what one of the regulators referred to in discussion with me as an ‘honest broker’ from outside the individual professions (including that of solicitor or barrister), to bring the players together and ensure impartiality and fairness.
- 5.4.34 Should the LSB in the event decide, after discussion with the SARs, that some form of support and structure would be a useful measure, then a Review Group might be set up by the LSB, chaired by an independent person acting as ‘honest broker’. The SARs might be invited to nominate a representative to join the Group – they might choose to appoint someone from their regulatory arm, or they might prefer to send someone from the SAR itself. The Group would be tasked with answering a series of questions, including:-
- How might a joint regulator work? Would different disciplines continue to be recognised? Would it still be possible, for example for reserved activities to be exercised by some, but not all, members of the combined regulatory community?
 - Given this analysis, would it be a desirable outcome?
 - What would be lost under such an outcome?
 - What would be gained?
 - How would the costs look and how would they compare to the costs of every SAR going it alone?
- 5.4.35 There would be a number of other issues considered as part of these overarching questions, including the issue of responsibility for education and qualification (touched on above), the nomenclature, the composition of the governing board, the relationship with the LSB, and so forth. The early priority for the Group, however, would be to assess the practicality and desirability of the suggestion.
- 5.4.36 Although I recommend that the SARs themselves are given the responsibility for designing their own future, I further recommend that the LSB require the SARs to formulate a response to this report. The LSB might consider that the awarding of Licensing Authority status should be conditional on the SARs having carried out a satisfactory review of their (combined) current regulatory arrangements, to an agreed timetable. Equally, the commitment of the SARs to such a review might be reflected by the LSB in its assessment of the capacity and capability of the individual SARs to pass the required threshold to continue in business as an Approved Regulator.
- 5.4.37 There is, of course, an alternative to this more hands-on approach by the LSB. That would be to do no more than invite the SARs, individually, collectively or in whatever combination of forces they might agree among themselves, to consider option two, or variants of it, and respond to this report by an agreed deadline. If the SARs show

no appetite for reforming their own structures, or opt to do so in a way which seems less than optimal, it would then be for the LSB to determine whether it wished to intervene further, or whether the natural development of the market (including its supervision by the LSB) will ultimately ensure the 'survival of the fittest'.

'Combination-lite': sharing resources but retaining separate identities

- 5.4.38 There is an alternative to fully-fledged combination which may prove more attractive to the SARs. This is to sub-contract various regulatory or supporting functions to one or more of the other regulators. Given the constraints on staff numbers and skills which many of the SARs face, it would be a natural solution to contract out the more specialist or staff-intensive functions, and to share resources with other regulators. Scope to do this arises in various areas, including maintaining the register, establishing disciplinary infrastructures, conducting consumer surveys, raising consumer awareness, and so on.
- 5.4.39 IPS has been willing to receive any interest from the other SARs who might wish to explore the scope to do this - for example, IPS could offer to provide disciplinary panels. It has to be said that there has been little enthusiasm so far among the SARs to pursue this avenue, for whatever reasons, and it is not easy to see whether this approach will gain any traction. Of course, such an approach need not be confined to the SARs – it would be open to any organisation to approach the SRA or the BSB, for example, to provide regulatory services.
- 5.4.40 It may be that this report will, of itself, stimulate more interest in the option of shared resources. In the early stages of the implementation of the 2007 Act, it is understandable that every organisation's initial response is to go it alone – to demonstrate their individual capacity to rise to a challenge, and to retain ownership and control of developments. A certain territorialism is to be expected among professional institutions that pride themselves on their specific culture and membership ethos. As the realities of the requirements of regulatory excellence become clearer – and this report is part of that process – then a more exploratory and collaborative approach might emerge among the SARs.
- 5.4.41 I do not suggest that the LSB choose whether or not it wishes to promote this variant of combination. It may arise from the consideration by the SARs of the issues surrounding a joint regulatory body, and it may or may not prove to be a more satisfactory model. I accordingly recommend that the issue of contracting out services should be considered further by the Review Group discussed above (should the LSB decide to establish such a Group).

5.5 Conclusion

- 5.5.1 The options outlined above have focused on the SARs, as my terms of reference required me to do. Some of what I say in this report may have implications for the future organisation of the larger two regulators and, equally, some of what I say will stand to be effected by any changes introduced at that level. The LSB will, of course, be considering this report in the context of its wider responsibilities for the whole of the legal services market.
- 5.5.2 Whatever happens in the legal services world more generally, it is a fairly safe bet that the possible changes to the SARs contemplated in this report will not be the last word. Whether the current programme of establishing a multiple-regulator landscape is to continue, or whether some combination of regulatory structures occurs, all such change may be regarded as a staging post towards a significantly different environment in the not-too-distant future.

N J SMEDLEY

April, 2011

Appendix A: Original invitation for research tender

Smaller approved regulators – activities and capacity

July 2010

Purpose

1. The LSB is commissioning researchers to complete a project to study the legal services markets regulated by the smaller approved regulators (ARs) and the activities of the smaller ARs. The first aspect of the project will be to assess the services offered by those regulated by the smaller ARs, detail what the market looks like, how the smaller ARs regulate their members and the strengths and weaknesses of the smaller ARs. The second is to draw upon the findings of the first stage and assess whether the markets regulated by the smaller ARs are providing enough protection to consumers, and if not what activity should the LSB undertake to address any gaps. The research will be published in full externally and freely available to frontline regulators and other interested parties.

Background

2. One of the purposes of the Legal Services Act 2007 (the Act) was to end the 'regulatory maze' that existed in the legal services system. The Act designed a simpler structure in which the Legal Services Board (LSB) would oversee the activities of the front line regulators, now known as the approved regulators (ARs). The Act designated eight bodies as ARs, and a further two bodies have subsequently been designated as ARs by order.
3. The size and scope of activities each AR undertakes varies dramatically. For instance, the Law Society has 113,000 authorised persons and £130 million in revenue, compared to the Institute of Trademark Attorneys which has 800 authorised persons and only £1 million in revenue. It is not only the areas of size and resources in which the ARs differ; many regulate different reserved legal activities, face different issues, have different constitutions and regulate different professions. Yet the Act requires the LSB to act as the oversight regulator for all of the ARs. The LSB is required to ensure that all ARs activities, or lack of activity, are not having an adverse impact on one or a number of the regulatory objectives.
4. The overall success of the LSB agenda to improve the legal services market in the interests of consumers relies on ensuring that the LSB has a detailed understanding of the entire market, including the smaller ARs, and that the LSB takes the right policy approach towards all the ARs. The scope of these projects is to fill in the gaps of the LSB's knowledge about the smaller AR's activities and capacities, and make observations about how effectively consumers are protected in the current markets in which the smaller AR's members operate and assess whether this level of protection needs increasing.

Aims and Objectives

5. This project is part of a wider project looking at the landscape of the smaller ARs. This wider project has the following objectives;

- a. To understand more about the regulatory arrangements, capabilities and ambitions of the smaller ARs.
 - b. To devise a strategy of engagement and management for each smaller AR.
 - c. To provide support and information to other LSB work streams which impact the smaller ARs.
 - d. To prepare an outline assessment of risk of failure of all ARs and establish contingency plan for such event.
 - e. To ensure that the interests of consumers are protected by the smaller ARs.
6. This research project will primarily contribute to the first two objectives. However the findings from the research will feed into all of the objectives and should be borne in mind during the drafting of the work.
7. The first stage of the project will seek to explore the following issues:
- a. Who are the consumers of the legal services provided by individuals and entities regulated by the smaller ARs, and what is the risk of consumer detriment of these transactions?
 - b. What do the individuals and entities regulated by the smaller ARs look like; including their size, level of regulatory overlap, day to day activities and demographic issues? What risks / competitive pressures do they face?
 - c. What activities does the AR undertake to meet the regulatory objectives? How does it resource the regulation and how do they assess the risks posed by its regulatory community? How do they engage with consumers of the regulatory community's services?
 - d. What are each smaller AR's strengths and weaknesses? What are their opportunities and threats?
 - e. What are the future strategies of the smaller ARs and an assessment of the implications of the strategies for the issues identified in the answers to question (a), (b), (c) and (d)?
8. The second stage will draw upon the findings from above and answer the following questions:
- a. Given the current markets of the smaller AR's members and the operational arrangements of the smaller ARs, is the market providing the appropriate level of protection to consumers, and is it compatible with the regulatory objectives?
 - b. If the markets of the smaller ARs are not currently delivering appropriate protection for consumers or are acting in a manner incompatible with the regulatory objectives, what interventions or support could be undertaken by the LSB in order to address those areas that are not acceptable?

Issues and scope

9. We have defined the smaller ARs as all the ARs bar the Bar Council, the Law Society, ACCA and ICAS.⁴ It may also involve discussion with other relevant stakeholders and will definitely involve consideration of wider market issues. However, the outputs will only be focused on the smaller ARs as defined.
10. Researchers are welcome to tender for the first stage only, second stage only or the whole project.
11. We invite prospective researchers to make proposals about the most effective method of answering the research questions. However, given the nature of the question we envisage the LSB providing extensive support to the appointed researcher (between two to three days a week). This support will primarily be to assist in the collection of data and the provision of information held by the LSB. Additionally we would expect the research to include a number of face to face discussions with the smaller AR's and other relevant stakeholders. The research will also be expected to gather evidence from other pre-existing sources.

Tender Evaluation Criteria

12. All projects commissioned by the LSB are subject to our standard terms of contract. Tenders will be evaluated on best value for money and will be assessed on the basis of:
 - a. Overall cost, including appropriate breakdowns.
 - b. The extent to which tenders are clearly written and meet the specified objectives, present a sound methodology, identifying any potential problems, and proposing suitable solutions.
 - c. Address outputs and ensure these are in line with requirements and the required timing of the project.
 - d. Proposed team composition, expertise and management and the organisation's diversity policy
 - e. How diversity issues would be addressed in the research.

Deliverables

Output

14. The output of the project should be an executive summary and a report with supporting evidence that addresses the specification. The report should be suitable for publication, although any decision to publish will remain with the LSB. It is essential that the report and underlying research is sufficiently robust so that the LSB can use this in discussions with external stakeholders. The research should have clear conclusions that the LSB will consider in developing future policy proposals.
15. After each stage the researcher will be expected to conduct a workshop for LSB staff and other invited guests on the findings of the research. After stage one the

⁴ Smaller ARs for this research are therefore defined as the Association of Law Costs Draftsman (ALCD), the Chartered Institute of Patent Attorneys (CIPA), the Council of Licensed Conveyancers (CLC), the Faculty Office, Institute of Legal Executives (ILEX) and Institute of Trademark Attorneys (ITMA). It will also include the activities of each AR's respective regulatory arm where appropriate.

researcher will also be expected to present an oral report and private briefing to the LSB executive and Chairman, plus any other relevant individuals. After stage two the researchers will present the complete project to the LSB board. Additionally researchers may be asked to present the results of this analysis on a small number of occasions.

16. The LSB will retain ownership of the research, report and any underlying data.

Project plan

17. Tenders should include a project plan and time schedule for the work that identifies the main tasks and key milestones that will be used to monitor progress. The plan should be accompanied by a resource profile, giving a breakdown of the resources in person days allocated to each task.

Duration

18. We estimate that stage one will require up to 25 researcher days and stage two around 10 to 12 researcher days, although tenders with variations on this will be accepted. The research for stage one should start in September 2010. The researcher will be expect to produce an oral report and briefing to the LSB executive sometime after 22 October 2010 The research for stage two should commence in November 2010.
19. The first draft of the research project should be submitted to the LSB by 7 January 2011, with the finalised report due by 22 January 2011.
20. We will arrange interviews with all consultants who express an interest in tendering and submit a tender. These interviews will take place week commencing 23 August 2010.

Legal Services Board Contact Details

21. Tenders with any queries about the research specification should contact:
 - Policy team: James Meyrick 020 7271 0083, Research: Alex Roy 020 7271 0060
 - **Tenders must be submitted by 5pm on 20 August 2010**

Appendix B: List of individuals interviewed for the research project

The Approved Regulators and the Regulatory Bodies

Association of Costs Lawyers and Costs Lawyer Standards Board

Iain Stark, Victoria Hopkins and Lynn Plumbley

Council for Licensed Conveyancers

Victor Olowe and Anna Bradley

The Faculty Office of the Archbishop of Canterbury

Peter Beesley, Stephen Borton and Ian Blaney

ILEX and IPS

Diane Burleigh, David McGrady, Alan Kershaw and Ian Watson

CIPA, ITMA and IPREG

Michael Ralph, Alasdair Poore, Keven Bader, Maggie Ramage, Michael Heap and Ann Wright

Others

Commission for Health Care Regulatory Excellence

Kate Webb

Health Professions Council

Charlotte Urwin

Financial Services Authority and Legal Services Board

Andrew Whittaker

Legal Services Consumer Panel

Lady Dianne Hayter and Steve Brooker

Ministry of Justice

Elizabeth Gibby and Dawn Sanderson

Legal Services Board

Chris Kenny and Crispin Passmore

Appendix C: Smaller approved regulator research questionnaire

Below is a copy of the questionnaire sent to the regulatory arms of the smaller approved regulators within the scope of the project. The full questionnaire responses are available on request to the LSB.

Smaller Approved Regulators – Activities and Capacity

Research Questionnaire

This is a short questionnaire that will be used to assist the research project commissioned by the LSB into the markets regulated by the smaller Approved Regulators and the activities of the smaller ARs. The purpose of this questionnaire is to supplement the information already gathered by the researcher and to ensure accuracy of information that may appear in the final research report.

We would be grateful if you could complete the questionnaire by **18 February 2011**. Nick will be happy to discuss with you any issues arising from the questionnaire during his next round of interviews. Although I appreciate that some of you will still be in the process of preparing your answers by the time of your next meeting.

Completion

We hope the questions are clear and easy to answer. If you have any questions regarding the content of the questions, or would like some further information, please do not hesitate to contact James Meyrick (phone – 020 7271 0083, or email – james.meyrick@legalservicesboard.org.uk).

We do not require ARs to carry out additional work or analysis to complete this form, and we hope much of the data is already collected. So if you do not have hard data to reply to a question but have a view shaped by existing market knowledge or research then please use that information to inform the answer provided. We would then like you to use the column “Evidence / source of information” to note down how you have arrived at the information provided. This way we hope to gain a clearer picture of the market, and of your own understanding of that market, without compelling bodies to conduct additional work or analysis.

Details

| Question | Answer |
|---------------------|--------|
| Approved regulator? | |
| Completed by? | |
| Date completed? | |

Section 1: Market regulated

Authorised person profile

This section attempts to understand the profile of the authorised persons you regulate.

For the size of enterprise questions we have used the number of employees as a proxy. If you have in the past used a different proxy, for instance turnover or number of partners, we are happy for you to provide the information based on the method you use.

| Question | Answer | Evidence / source of information |
|--------------------------------------------------------------------|--------|----------------------------------|
| How many authorised persons do you regulate? | | |
| What proportion of your authorised persons were active in 2010? | | |
| How many unregulated people are providing services in your sector? | | |
| What percentage of authorised persons work in practice? | | |
| What percentage of authorised persons work in house? | | |
| What percentage of your authorised persons are sole traders? | | |

| | | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------|--|--|
| What percentage of your authorised persons are working as partners or owners in firms that are; | micro businesses (fewer than 10 employees)? | | |
| | small businesses (between 10 and 50 employees)? | | |
| | medium-sized businesses (between 50 and 250 employees)? | | |
| | large businesses (over 250 employees)? | | |
| What percentage of your authorised persons are working as employed practitioners in firms that are; | micro businesses (fewer than 10 employees)? | | |
| | small businesses (between 10 and 50 employees)? | | |
| | medium-sized businesses (between 50 and 250 employees)? | | |
| | large businesses (over 250 employees)? | | |
| What percentage of your authorised persons working in practice are employed in enterprises whose primary regulatory is another legal regulator (please note which other regulator is most prevalent)? | | | |

Entity profile – for CLC and IPREG only

This section attempts to understand the profile of the entities you regulate. For the size of enterprise questions we have used the number of employees as a proxy. If you have in the past used a different proxy, for instance turnover or number of partners, we are happy for you to provide the information based on the method you use.

| Question | Answer | Evidence / source of information |
|----------------------------------------------------|---------------------------------------------------------|----------------------------------|
| How many entities do you regulate? | | |
| Of the entities you regulate, what proportion are: | Micro businesses (fewer than 10 employees)? | |
| | Small businesses (between 10 and 50 employees)? | |
| | Medium-sized businesses (between 50 and 250 employees)? | |
| | Large businesses (over 250 employees)? | |
| Of the entities you regulate what proportion are: | Sole traders? | |
| | Partnerships? | |
| | Limited liability partnership? | |
| | Limited companies? | |
| | Listed companies? | |

Service information

| Question | Answer | Evidence / source of information |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|----------------------------------|
| What types of service do your regulated community (authorised persons and entities) provide? Please provide a breakdown showing the percentage of practitioners providing the different services? | | |

Consumer profile

| Question | Answer | Evidence / source of information |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|----------------------------------|
| What proportion of consumers of the services provided by those you regulate could be described as large businesses? | | |
| What proportion of consumers of the services provided by those you regulate could be described as Small and medium sized businesses (between 10 and 250 employees)? | | |
| What proportion of consumers of the services provided by those you regulate could be described as Micro businesses (fewer than 10 employees)? | | |
| What proportion of consumers of the services provided by those you regulate could be described as individual consumers? | | |

| | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|
| What proportion of consumers of the services provided by those you regulate are also authorised persons (i.e. they are regulated by an approved regulator)? | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|

Section 2: Activities of the approved regulator

The section attempts to understand your day to day activities and how you carry out and resource the regulation of your regulated community.

Resourcing

| Question | Answer | Evidence / source of information |
|-----------------------------------------------------------------------------------------------------------------------------------|--------|----------------------------------|
| How many members of staff of the AR are involved in the provision of the regulation of authorised persons (please answer as FTE)? | | |
| Briefly describe the staffing structures in place to regulate your authorised persons? | | |

Risk assessment and supervision

| Question | Answer | Evidence / source of information |
|----------------------------------------------------------------------------------------------------------------|--------|----------------------------------|
| What activities carried out by your regulatory community pose the greatest risks to the regulatory objectives? | | |
| Which groups of practitioners pose increased risks to the regulatory objectives and why? | | |
| What information do you collect to assess these risks? | | |
| How do you analyse and use this information to shape and differentiate your regulatory activity? | | |

Complaints, enforcement and discipline

| Question | Answer | Evidence / source of information |
|-------------------------------------------------------------------------------------------------------------------------------------------|--------|----------------------------------|
| How many complaints from consumers did you receive in the year prior to the launch of the Legal Ombudsman (October 2009 to October 2010)? | | |
| How many of these complaints related to service matters? | | |
| How many of these complaints related to conduct matters? | | |
| How many investigations into the conduct of practitioners did you undertake last year? | | |
| How many of these investigations led to disciplinary and enforcement activity? | | |

Section 3: Regulatory objectives

This section seeks information about how you as a regulator promote the regulatory objectives. The purpose of this is to gather a complete picture of all the work you undertake as a regulator and how each activity relates to the regulatory objectives. We recognise that a number of activities may well promote a number of different regulatory objectives. In these circumstances please indicate which other regulatory objectives you believe are relevant. We are also aware you may not carry out activities to support all of the regulatory objectives, or activities may be carried out by the representative arm of the AR, this is not a problem. In these circumstances please either leave the section blank or indicate that the representative arm carries out activities to support the regulatory objective.

| Regulatory objectives | Activities undertaken to promote the regulatory objectives | Further details |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------|-----------------|
| RO1: Protecting and promoting the public interest | | |
| RO2: Supporting the constitutional principle of the rule of law | | |
| RO3: Improving access to justice | | |
| RO4: Protecting and promoting the interests of consumers | | |
| RO5: Promoting competition in the provision of services in the legal sector | | |
| RO6: Encouraging an independent, strong, diverse and effective legal profession | | |
| RO7: Increasing public understanding of citizens legal rights and duties | | |
| RO8: Promoting and maintaining adherence to the professional principles of independence and integrity; proper standards of work; observing the best interests of the client and the duty to the court; and maintaining client confidentiality. | | |

Section 4: AR specific questions

Faculty Office

| Question | Answer | Evidence / source of information |
|-----------------------------------------------------------------------------------------------------------------------------------------|--------|----------------------------------|
| What percentage of your regulated community are also Solicitors? | | |
| What percentage of your authorised persons carry out conveyancing and probate work? Of this group, what percentage are also Solicitors? | | |

ILEX Professional Standards

| Question | Answer | Evidence / source of information |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|----------------------------------|
| What proportion of your authorised persons work outside the supervision of a solicitor, for some or all of their work? What work do they do? What business structures do they work in? | | |

IPREG

| Question | Answer | Evidence / source of information |
|----------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------|----------------------------------|
| If this information is not already clearly shown in the answers above, please provide a detailed breakdown of: | The total number of practitioners in each of your sectors? | |
| | The proportion that are regulated by you in each sector? | |
| | The proportion of Patent Agents who are not regulated by you but are registered as European Patent Agents? | |

Costs Lawyer Standards Board

| Question | Answer | Evidence / source of information |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|-----------------------------------------|
| If not shown already, please provide a percentage breakdown of the types of clients for whom your regulated community provide services – e.g. solicitors, insurance companies, local authorities, central government or other private sector organisations? | | |
| What percentage of practitioners in your sector are not regulated by you? | | |