COMPECON - COMPETITION ECONOMICS.

An Economic Analysis of the Government's Proposed Regulatory Regime for the Legal Profession in Ireland.

Final Report

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Prepared for the Bar Council

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EXECUTIVE SUMMARY.

This report has been prepared by Compecon for the Bar Council of Ireland and sets out a detailed economic analysis of the proposed new regulatory regime for the legal profession in Ireland which is contained in the Legal Services Regulation Bill, 2011. The Bill, which was published on 12th October 2011, proposes to introduce a new regulator for the legal profession in Ireland to be known as the Legal Services Regulatory Authority (LSRA). Under the terms of the Bill, the LSRA would assume responsibility for regulating the two branches of the profession and would replace the existing regime under which professional bodies representing barristers and solicitors are each responsible for regulating their respective professions.

The Legal Services Regulation Bill also includes proposals that would change various existing rules and regulations that apply to the legal profession but such changes are outside the scope of this report, e.g. the proposal to allow direct access to barristers. This report only analyses the impact of the proposed new regulatory regime.

The Bar Council is responsible for regulating barristers and the Law Society is responsible for regulating solicitors. Following an investigation of the profession, the Competition Authority argued that self-regulation would inevitably result in the introduction of restrictions on competition. For that reason it recommended that a new State agency should be established to oversee the regulation of the profession by the two professional bodies.[1] The Memorandum of Understanding (MOU) between the Government and the ECB/EU/IMF Troika included a commitment by the Government to implement any outstanding recommendations contained in the Authority's report. The Minister for Justice and Equality published the Legal Services Bill on 12th October, 2011. The Bill provides *inter alia* provides for the establishment of the LSRA which would be responsible for the regulation of the legal profession. The Bill, however, provides that the LSRA would have direct responsibility for regulation of both branches of the profession rather than have an oversight role as recommended by the Competition Authority and as provided for in the Legal Services Ombudsman Act 2009.

[1] Competition Authority, *Competition in Professional Services Solicitors and Barristers*, December 2006.

The economic literature indicates that, although regulation may be justified as being in the public interest, it is frequently designed to favour a particular group at the expense of the wider population. It also indicates that, even where they may be a legitimate case for regulation, it may not be possible to design a regulatory intervention that would effectively address the particular problem and any intervention might actually make matters worse. Therefore it is necessary in every case to establish that there is a legitimate justification for regulation and, if so, that the proposed regulation will actually lead to a better outcome than doing nothing.

Economists recognise that there may be legitimate reasons for permitting self-regulation of professional services. This is because self-regulation reduces the cost of regulation by lowering the cost to the regulator of acquiring necessary information. Low cost regulation benefits society although it is recognised that self-regulation may lead to abuses and may be operated in the interests of the profession rather than the public interest.

Government policy indicates that all proposals for new regulation are supposed to be subject to a regulatory impact assessment (RIA). Although it has regularly urged other State agencies to conduct a RIA of any proposed new regulations, the Competition Authority did not carry out any RIA of its proposals for a new regulatory regime for the legal profession. Similarly the Department of Justice and Equality failed to carry out a RIA on the Legal Services Regulation Bill, 2011, before it was approved by the Cabinet and published.

The Authority's recommendations and the Bill both fail to satisfy a number of the principles of good regulation set out in the Better Regulation White Paper. The basis for the Authority's recommendation was that self-regulation would inevitably be abused. It is clear that both economic theory and experience in other jurisdictions demonstrate that there are ways of addressing the potential for abuse of self-regulation. Such measures allow society to benefit from the lower regulatory costs arising from self-regulation, while protecting it against abuses. Ultimately the Authority recommended the establishment of an oversight regulator a mechanism which retains many of the benefits of self-regulation while providing some protection against potential abuses. The Legal Services Regulation Bill, however, involves a rather complex regulatory regime which goes well beyond the recommendations of the Competition Authority, a

fact acknowledged by the Competition Authority Chairperson.[2] In particular it proposes that the LSRA would regulate the legal profession directly. No evidence has been produced to show that such a far reaching reform of the regulatory regime is necessary.

The proposal also fails to satisfy the effectiveness and proportionate principles set out in Better Regulation. There is no evidence that establishing a new regulatory regime would lower prices nor is there any evidence that it would yield benefits that would outweigh the costs involved. We estimate that the proposal is likely to increase the cost of regulating the legal profession and will increase the cost of legal services rather than reduce them.

The failure to conduct a RIA and to properly analyse the potential costs of the proposed new regulatory regime before the Bill was approved by the Cabinet and published is all the more surprising, given the Government's stated objective of reducing the number of State agencies.

The Law Society has 47 current staff engaged in regulatory activities which it estimates will transfer to the proposed LSRA under the terms of the Legal Services Regulation Bill, 2011. Assuming a small number of additional staff would be required to deal with the regulation barristers we estimate that the LSRA would require 53 front-line regulatory staff. Allowing for administrative and support staff along with a CEO suggests a total staffing requirement for the agency of 80.[3] The Bill also provides for a part-time board of 11 members and for a Complaints Committee and a Legal Practitioners Disciplinary Tribunal (LPDT) which would each have 16 members. The Board, Complaints Committee and LPDT would all require administrative support and this is reflected in our estimate of the overall number of staff that would be required.

The Law Society has indicated that the cost of its regulatory activities in 2011 amounted to €11.6m which includes €4.3m in costs associated with the Solicitors' Compensation Fund. There were 8,575 practising solicitors in 2011 so this works out at €1,353 per practising solicitor. The regulatory costs of the Bar Council are a fraction of those of the Law Society. The combined cost of the Bar Council Professional Conduct Tribunal (PCT) and Professional Conduct Tribunal Appeals Board (PCTAB) in 2010/11 amounted to less than €130,000. There were 2,213 practising barristers so the total cost of regulating the bar works out at just €58 per barrister. The

[2] I. Goggin, *Competition and the Legal Profession,* presentation to "Regulating the Legal Profession" Conference, UCD, 25.11.2011.
[3] This figure includes provision for support staff for the proposed Legal Practitioners Disciplinary Tribunal.

low cost of regulating barristers reflects the much lower level of complaints involving barristers – around 30 per annum compared with around 1,800 in the case of solicitors. The low level of complaints is probably at least partly due to the fact that barristers do not handle clients' money but also reflects the more specialised nature of services provided by barristers. In the case of the Bar many regulatory issues are dealt with by members who provide their time on a voluntary basis and this is also an important factor in keeping down the cost of the existing scheme for regulating barristers.

We estimate that the proposed LSRA would have annual operating costs of between €12.7m and €16m.[4] Under the new regime it is estimated that the Law Society would continue to incur costs of €4.3m per annum on regulatory activities associated with the operation of the Solicitors' Compensation Fund. Thus the total cost of the new regulatory regime would come to between €17 and €20m. This represents an increase of €5.3m-€8.6m compared with the costs of the current regime which are estimated at €11.7m for 2011.[5] The figures are summarised in Table 1.

Table 1: Estimated Direct Cost of LSRA.

€M

	Scenario A	Scenario B
LSRA (incl LPDT)	12.7	16.0
Law Society Compensation Fund	4.3	4.3
Total Direct Costs	17.0	20.3
Existing Cost of Self-Regulation (incl Complaints Fund)	11.6	11.6
Increase in Direct Regulatory Cost due to LSRA	5.3	8.6

Note: Scenario A assumes average payroll cost of €74,452 per person in line with 2010 figure for the CER while scenario B assumes average payroll cost of €94,706 per person in line with ComReg 2009 figure.

The proposed LSRA would significantly increase the costs of regulation for legal practitioners as Table 2 illustrates. In the case of solicitors it is estimated that the increased cost of regulation would add 18-32% to the cost of a practising certificate. The current regulatory regime for barristers averages out at €58 per barrister. The average cost per barrister of the new regime is

[4] Payroll costs constitute a major element in estimating the likely cost of the LSRA. We have estimated costs on the basis of average payroll costs in two existing regulatory agencies the CER and ComReg.

[5] It could be argued that the Compensation Fund costs should not be included as a cost of regulation. If such costs are excluded then the cost of the existing system for solicitors and barristers is €7.4m while the proposed new regime would cost €12.7m-€16m. The extra cost of the new system still comes to €5.3m-€8.6m.

estimated at €830-1,041 which is 14 to 18 times greater than the present regime. This would increase barristers' average annual subscription fees by 20-25%.[6] The Bill would result in a disproportionate share of the cost of regulation being borne by barristers as the number of complaints against barristers is far lower than against solicitors. There were over 1,600 complaints made against solicitors in the first seven months of 2011 compared with around 40 complaints against barristers for the entire year. The fact that the proposed regime would place a greater cost burden on barristers than solicitors was recognised in a speech given by the Competition Authority Chairperson, Isolde Goggin.

> "Barristers in particular may feel the brunt of any excessive cost as they do not deal with clients' money, are far fewer in number, have less direct interaction with the public, and thus also have far fewer complaints against them."[7]

Table 2: Average Cost Per Legal Practitioner of the LSRA Proposal.

	Barristers		Solicitors	
	Scenario A	Scenario B	Scenario A	Scenario B
Non-Complaints Activities	295	370	295	370
Each Profession pays 10% of Complaints Costs.	432	541	111	140
Balance of Complaints Costs	104	130	864	1,084
Cost of LSRA and LPDT	830	1,041	1,271	1,594
Solicitors' Compensation Fund			501	501
Total Cost	830	1,041	1,772	2,095
Existing Regime	58	58	1,353	1,353
Net Increase	772	983	419	743

Note: Scenario A assumes average payroll cost of €74,452 per person in line with 2010 figure for the CER while scenario B assumes average payroll cost of €94,706 per person in line with ComReg 2009 figure.

In addition it is estimated that the new regime may involve once-off transition costs in the region of €5-7m. This is made up of run-off costs to the Law Society of its existing regulatory activities and redundancy costs for Law Society staff currently engaged in regulatory activities along with

[6] The differences in the cost to the two professions arise from the provisions in the Bill in respect of the funding of the LSRA.
[7] Goggin at note 2.

provisions for a new IT system for the LSRA, fit out of offices, etc. The LSRA is also likely to increase compliance costs. It is difficult to estimate likely compliance costs in advance although the evidence indicates that compliance costs are likely to exceed the direct cost of regulation.

Our estimate of the likely operating costs of the LSRA are probably on the low side. For example, in 2010 the Medical Council had 49 staff and operating costs of €10.3m. In that year it received 361 complaints. It concluded that there was no *prima facie* case to answer in 264 cases. 54 complaints were referred to the Fitness to Practice Committee and 43 inquires were completed in 2010 with 2.18 days being the average duration of an inquiry. The Law Society Annual Report for 2009 indicates that it had 1,754 admissible complaints in that year. In 2010 it made 117 applications to the Solicitors' Disciplinary Tribunal (SDT). The SDT dealt with a further 65 complaints made by members of the public. It sat for a total of 182 days which is double the number of sitting days of the Medical Council Fitness to Practice Committee. The High Court made 253 orders under the Solicitors' Acts. Thus the LSRA and the proposed LPDT are likely to have to deal with a far higher volume of complaints than the Medical Council with consequent cost implications.[8]

The proposed LSRA goes well beyond what was recommended by the Competition Authority. It proposed that a new regulatory agency would be established to oversee self-regulation by the existing professional bodies. The Authority made no attempt to quantify the likely cost of this proposal. We estimate that such an agency would increase the cost of regulating the legal profession by €2.4m-€3m per annum which is equivalent to €223-€279 for every legal practitioner. We therefore estimate that the Competition Authority proposal would cost €2.9m-€5.6m per annum less than the LSRA proposal.[9] Once-off transition costs would also be far lower under the Competition Authority proposal as there would be no run-off or redundancy costs. Such a model is also likely to entail lower compliance costs. While not insignificant, the increase in average fees under the Authority's proposals would be significantly lower than for the LSRA proposal, particularly in the case of barristers.

[8] If the LSRA had a staff level of 100, then the total cost of the new regulatory regime would come to €20m-24m which is essentially double the cost of the current regime.
[9] The Irish Auditing and Accounting Supervisory Body is an example of such an oversight regulator. In 2010 it had 13 staff and operating costs of €1.9m.

We estimate that the LSRA as proposed in the Legal Services Regulation Bill, 2011, would add somewhere between €5.3m to €8.6m to the annual cost of regulating the legal profession compared with the current system. In addition we estimate once-off transition costs amounting to approximately €5-7m in the first year of the new regime. The new regime is also likely to result in a significant increase in compliance costs. The Legal Services Regulation Bill, 2011, provides that the cost of the new regulatory regime will be borne by the legal profession. In reality the additional costs are likely to be passed on to clients in higher legal fees. The State is likely to be able to resist pressure for higher legal fees given its considerable buyer power. Thus, any increase in costs will be borne by private sector clients.

There are indications in recent years that a growing number of barristers have left the Bar due to financial pressures. The increase in costs arising from the new regulatory regime is therefore likely to force more barristers to exit the market. Thus if the regulatory proposals contained in the Legal Service Regulation Bill are implemented in their current form, they are likely to result in a decline in the number of practitioners, particularly in the case of barristers which will also lead to higher legal fees, particularly for private sector customers.

It is also relevant that several aspects of the proposed new regulatory regime would limit the independence of the LSRA and allow the Minister to exercise significant control over the regulatory process.[10] Such provisions would have adverse implications for the independence of the legal profession. The question of independence of the legal profession raises some fundamental issues that are beyond the scope of this report. It seems clear, however, that provisions which undermine the independence of the regulator and of the legal system are inconsistent with good regulatory principles. It is not possible to quantify the cost of such measures. It would seem reasonable to conclude, however, that such provisions are unlikely to yield any benefit which might possibly justify the cost of such restrictions.

[10] See, for example, Goggin at note 2 on this point.

1: INTRODUCTION.

1.1: Background to the Report.

This report has been prepared by Compecon for the Bar Council. The report sets out a detailed economic analysis of the proposal to establish a new regulatory regime for the legal profession which is contained in the Legal Services Regulation Bill, 2011. The report only analyses the impact of the new regulatory regime and does not consider various other proposals contained in the Bill which would alter the way the profession operates, e.g. proposals regarding direct access to barristers.

The Competition Authority in a report which was published in 2006 recommended that a new State agency should be established to oversee the regulation of the legal profession, while day to day responsibility for regulation would remain with the existing self-regulatory bodies.[11] The report also contained a number of specific recommendations regarding existing regulations. Many of the Authority's recommendations have been adopted by the legal profession since the report's publication. The Memorandum of Understanding between the Government and the ECB/EU Commission/IMF Troika provided *inter alia* that the Government would introduce legislation to give effect to any of the Competition Authority's recommendations which had not been implemented. The Minister for Justice published the Legal Services Regulation Bill, 2011, on 12th October 2011.[12] The Bill proposes to introduce wide ranging changes in the structure and operation of the legal profession in Ireland. Of particular reference to the present report, the Bill includes proposals for the creation of a new regulatory regime for the profession, which goes well beyond the Competition Authority's recommendations.

1.2: Structure of the Report.

The balance of the report is structured as follows. Section 2 briefly describes the main features of the legal profession in Ireland and summarises the main elements of the Competition Authority

[11] Competition Authority, 2006 at note 1.
[12] Minister Shatter publishes Legal Services Regulation Bill and Explanatory Memorandum, Department of Justice and Equality, Press Release, 12th October 2011.

report and the Legal Services Regulation Bill, 2011. The economic case for regulating the legal profession is set out in Section 3. Section 4 contains an economic assessment of the likely impact of the new regulatory regime proposed in the Legal Services Regulation Bill, 2011. Some conclusions are outlined in Section 5.

1.3: Disclaimer.

This report is the sole responsibility of Compecon Limited and is solely for the use of the client. Except where otherwise stated, the report is based on factual material provided by the parties concerned. The report's conclusions are therefore conditional on the accuracy of the information supplied to Compecon by the parties.[13] Compecon will not, by virtue of having prepared this report, or otherwise in connection with this assignment, assume any responsibility in contract, tort (including without limitation negligence) or otherwise in relation to this assignment and shall have no liability to third parties. Nothing in this report constitutes legal advice or opinion on the Legal Services Regulation Bill, 2011, or any other matter.

[13] We are grateful to the Law Society for providing estimates of the current cost of regulating solicitors which are included in the report. The inclusion of such material in this report should not be construed as indicating that the Law Society accepts the report's conclusions.

2: BACKGROUND TO THE LEGAL SERVICES REGULATION BILL, 2011.

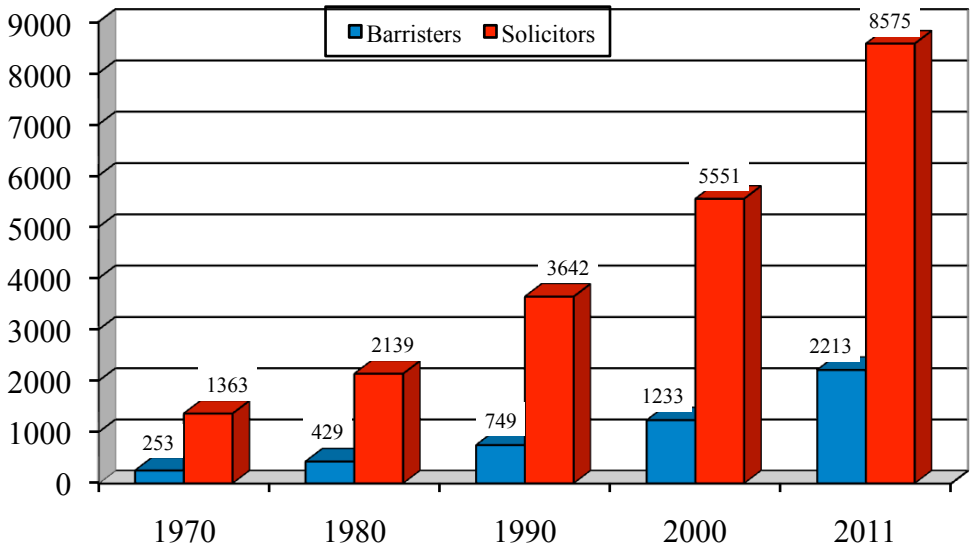
2.1: The Legal Profession in Ireland.

The legal profession in Ireland is divided into two branches: barristers and solicitors. Solicitors deal directly with clients at first instance, providing legal advice, engaging a barrister on their client's behalf if necessary and making practical preparations for litigation. Solicitors also have rights of audience before the courts. Barristers act primarily as advocates before the courts, representing litigants and pleading their cases. Barristers are required by their professional rules to operate as sole traders. A member of the public cannot engage a barrister directly, but must go through the intermediary of a solicitor who will instruct a barrister on the client's behalf. In the case of barristers a distinction is made between junior and senior counsel.

Each branch of the legal profession has its own regulatory body. The Bar Council is responsible for regulating barristers, while the Law Society of Ireland is responsible for regulating the solicitors' profession. Both bodies are also engaged in representing their respective professions, provide for education for those wishing to enter the profession and operate disciplinary arrangements in respect of their members.

Fig.2.1 provides information on how the number of legal practitioners has evolved in recent decades. The chart shows that the number of solicitors has increased from 1,363 in 1970 to 8,575 in 2011. Similarly the number of practising barristers increased from 253 in 1970 to 2,213 in 2011.

Fig.2.1: Legal Practitioner Numbers



Source: Competition Authority (2005), Bar Council and Law Society Annual Report 2010.

The numbers joining the bar in the years up to 2008/09 were equivalent to around 8-9% of the existing membership. There has been some decline in the number of new entrants over the past 2-3 years which is probably a reflection of the general decline in the economy.[14] The Bar Council estimates that 15% of new barristers leave the bar within five years of qualifying. There is evidence that the numbers leaving the Bar have risen in recent years. Bar Council figures indicate that 118 members left the Bar in 2010/11 compared with 47 in 2008/09. It would appear that the increase in the numbers leaving is due at least in part to financial difficulties. In 2011 69 members were excluded for non-payment of fees and a further 23 for non-payment of professional indemnity insurance. This compares with a total of 16 members who were excluded for non-payment of fees in 2008. Currently there are a further 127 members who have had services suspended for non-payment of arrears.

While the level of entry and exit was lower for solicitors' firms, the Competition Authority nevertheless reported that over the decade to 2005 an average of around 70 new solicitor firms were established per annum while around 20 closed.[15] The number of solicitors' firms continued to increase up to 2008 before falling slightly in 2009. On the face of it these figures suggest a fair

[14] Bar Council figures indicate that there were 149 new entrants in 2010/11 compared with 195 in 2008/09.
[15] Competition Authority, 2006 at note 1.

degree of entry and exit in both branches of the profession. We also understand that at present there are over 1,000 unemployed solicitors.

2.2: Complaints Procedures.

There are separate complaints and disciplinary arrangements for each branch of the profession.

2.2.1: Solicitors

The Law Society is responsible for investigating complaints against solicitors. The Law Society's Complaints Scheme can deal with three broad categories of complaints:

- inadequate service;
- excessive fees; and
- misconduct.

Complaints about solicitors may be made either to the Law Society or the Solicitors' Disciplinary Tribunal (SDT), or to both. The SDT has the power to investigate allegations of misconduct against a solicitor either made directly by members of the public or on referral by the Law Society. Complainants who are dissatisfied with the manner in which the Law Society has handled a complaint may refer the matter to the Independent Adjudicator, a position filled by an individual unconnected with the legal profession. The Independent Adjudicator is appointed by the Minister on the recommendation of the Law Society.

The Law Society reported that it received over 1,700 complaints in respect of solicitors in 2009. The number of complaints against solicitors has risen significantly in recent years and this has been reflected in an increase in the number of disciplinary actions. The total number of complaints in the first seven months of 2011 was up 28% on the corresponding period in 2010. The Law Society made 117 applications to the SDT in 2010 compared with 92 in the previous year. In addition the SDT dealt with 65 complaints from members of the public. The High Court made a total of 253 orders under the Solicitors' Acts in 2010 compared with 214 the previous year.[16]

[16] Law Society, *Annual Report 2010.*

The Law Society also operates a compensation fund to compensate clients of solicitors who have misappropriated their clients' money.

2.2.2: Barristers

Complaints of misconduct against barristers are investigated and adjudicated upon by the Barristers' Professional Conduct Tribunal (BPCT). The BPCT is funded by, but is completely independent of, the Bar Council. The BPCT is responsible for upholding the Bar Council's Code of Conduct.

The BPCT is made up of nine members (four of whom are practicing barristers and five of whom are non-lawyers) nominated by IBEC, ICTU and the Bar Council. There must be at least three members at each meeting and hearing of the Tribunal, of which two must be non-lawyers and one lawyer. This means that there is a lay majority in all complaints cases. Decisions in respect of complaints are made on the basis of a simple majority**.**

Whilst the Bar Council's Code of Conduct and Disciplinary Code are legal documents, the Bar states that care is taken to ensure that the complaint forms are simple to fill out. An explanatory leaflet in plain English is available from every court in the state. The process and procedure is fully explained on the Bar Council website.

Figures provided by the Bar Council indicate that there were 144 complaints made to the BPCT over the last five years. This represents an average of just under 29 per year, although the number has risen in recent years. The most frequent causes of complaint have been (in descending order):

1. Undue pressure to settle;
2. Delay in dealing with paperwork;
3. Rudeness;
4. Manner of cross-examination;
5. Knowingly misleading the court;
6. Conflict of interest;
7. Not following instructions; and
8. Dishonesty

Some complaints were made in respect of the opposing barrister in a case, e.g. manner of cross-examination and misleading the court.

Over the five year period the BPCT disciplined a total of ten barristers, imposed fines of €32,000 and ordered that fees be repaid in two cases. The BPCT also suspended three barristers and recommended that one barrister should be disbarred.

Decisions of the BPCT may be appealed to the Professional Conduct Appeals Tribunal (PCAT). The PCAT has three members, one of whom is a retired High Court judge and the other two are lay members. Thus the PCAT also has a lay majority.

2.3: Cost of Existing Arrangements.

Table 2.1 gives details of the income and expenditure of the Law Society over the period from 2007 to 2010.

Table 2.1: Law Society Income and Expenditure €

Income	2007	2008	2009	2010
Fees and Subscriptions	10,892,014	11,691,756	12,727,402	11,934,666
Education Activities	12,421,317	13,040,022	11,037,044	9,697,644
Publications	1,105,332	946,324	446,703	356,407
Four Courts Rooms	680,569	681,802	751,385	778,137
Company Formations	269,241	200,996	98,360	
Interest & Investment Income	190,542	201,910	211,120	260,845
Other Income	743,284	741,514	546,276	428,479
Sundry Income		43,760	2,165	2,900
Total	**26,302,299**	**27,548,084**	**25,820,455**	**23,459,078**
Expenditure				
Operating Charges				
General Activities	10,031,739	10,374,063	10,661,620	10,235,799
Education Activities	10,042,057	10,806,040	9,467,598	8,410,585
Gain/Loss on Investments		627,388	828,365	-197,325
Financing Costs	316,846	291,238	287,528	287,528
Other Expenditure	1,592,637	1,619,385	1,352,633	1,253,905
Redundancy Costs			115,998	233,483
Total	**21,983,279**	**23,718,114**	**22,713,742**	**20,223,975**
Surplus before Taxation	**4,319,020**	**3,829,970**	**3,106,713**	**3,235,103**

Source: Law Society of Ireland, *Annual Reports*, various years.

The table shows that total income increased significantly from €17.3m in 2004 to €27.5m in 2008 before falling back to €23.5m in 2010. Expenditure increased from €14.8m in 2004 to €23.7m in 2008 but dropped back to €20.2m in 2010.

Fees and subscriptions amounted to €11.9m equivalent to 51% of total income in 2010. Education activities accounted for 41% of 2010 income with the balance of 8% being due to various other sources. On the expenditure side, general activities accounted for 51% of total costs and education for a further 41%.

The Law Society Consolidated Accounts include some of the costs of its regulatory activities. Details are given in Table 2.2.

Table 2.2: Law Society Expenditure on Regulatory Activities.

	2007	2008	2009	2010	% Change
Expenditure €	1,642,968	2,073,743	3,075,762	3,399,061	+308.6
As % Total Expenditure	7.5	8.7	13.5	16.8	

Source: Law Society, *Annual Reports,* various years.

Expenditure on regulatory activities recorded in the Law Society's Consolidated Accounts has more than doubled since 2007 from €1.6m to €3.4m. As a proportion of the Society's total operating costs it increased from 7.5% to almost 17% over this period.

In addition there are further regulatory costs arising due to the operation of the Solicitors' Compensation Fund. The Fund accounts are not consolidated into the Law Society's overall accounts. Details of income and expenditure of the Compensation Fund are shown in Table 2.3.

Total expenditure of the Fund in 2010 amounted to €9.8m. Combining this figure with the regulatory costs that are included in the Law Society's consolidated accounts gives a total cost for regulation in 2010 of €13.2m. The Law Society has estimated that regulatory costs in 2011 amounted to €11.6m. The decline is largely accounted for by a drop in the Compensation Fund's claims provisions from €4.4m to €1.75m. Compensation fund claims represent one significant variable in the Law Society regulation costs.

Table 2.3: Solicitors Compensation Fund Accounts €.

Income	2007	2008	2009	2010
Contributions Receivable	3,050,689	3,207,436	5,278,034	5,328,222
Income and Returns on Investment	708,814	777,334	522,210	319,177
Recoveries from Defaulting Solicitors	1,004,577	4,408,975	2,135,975	329,875
Disciplinary Fines & Investigation Levies	157,410	293,155	380,950	311,000
Litigation Settlement	300,000	325,000	150,000	
Insurance Recovery			1,489,029	2,232,638
Total	**5,221,490**	**9,011,900**	**9,956,198**	**8,520,912**
Expenditure				
Provision for Claims	4,199,917	14,047,163	3,551,703	4,411,519
Insurance	288,267	290,232	995,406	1,113,130
Costs Allocated from the Law Society of Ireland	948,828	1,183,355	1,294,039	1,240,856
Investigation and Support Staff Salaries and Expenses	1,305,715	1,697,909	2,224,930	2,213,230
Practice Closure Expenses	337,800	608,514	494,935	553,487
Legal & Professional Fees	1,014,319	1,225,512	582,654	192,989
Misc Expenses	29,089	53,442	46,966	30,379
Reversal of Impairment of Investments		547,163	-547,163	
Portfolio Management Fee				
Total	**8,123,935**	**19,653,290**	**8,643,470**	**9,755,590**
Surplus/Deficit before Tax	**-2,902,445**	**-10,641,390**	**1,312,728**	**-1,234,678**

Source: Law Society Annual Reports, various years.

Table 2.4 gives details of the Bar Council's Income and Expenditure for the period 2007/8 to 2010/11. Total income (net of bad debt provisions) in 2010/11 was €9.6m compared with €9m in 2007/8. The bulk of the Bar's income comes from members' subscriptions. Subscriptions from junior and senior council amounted to €9.1m in 2010/11 of which €6.5m came from junior counsel and €2.5m from senior counsel. This reflects the fact that there are far more juniors, almost 1,900 compared with just 321 senior counsel. Fee rates range from €1,560 per annum for a junior counsel in their first year to €6,000 after 12 years.[17] The full subscription fee for a senior counsel is €9,000 per annum. Bad debt provisions have risen from €125,000 in 2005/6 to almost €695,000 in 2010/11 due to a significant increase in subscription arrears reflecting the fact that a significant number of practitioners are in financial difficulty due to the economic downturn.

[17] The fee of €1,560 does not include a seat in the Law Library while the €6,000 maximum on the junior fee scale includes a seat.

Total expenditure in 2010/11 amounted to €9.1m virtually unchanged on the 2007/8 figure. Membership services (both direct and indirect) accounted for 67% of total expenditure with premises and administration 18% and 47% respectively. Expenditure in 2010/11 was down by 11% on the previous year resulting in a surplus of €415,000 compared with a deficit of €783,000 in the previous year.

Table 2.4: Bar Council Income and Expenditure €.

	2007/08	2008/09	2009/10	2010/11
Income				
Senior Subscriptions	2,134,704	2,358,736	2,419,910	2,521,292
Junior Subscriptions	5,388,246	5,978,343	6,449,633	6,549,072
External Subscriptions	20,300	21,000	20,120	19,950
LOA Subscriptions	31,717	33,230	37,715	58,180
Entry Fees	274,600	283,500	207,000	220,500
Application Fees	4,202	1,350	1,997	3,000
Other Member Services - Income	1,254,006	1,388,424	972,928	877,585
Total Subscription Income	**9,107,775**	**10,064,583**	**10,109,303**	**10,249,579**
Provision for Bad Debts	155,526	251,739	668,380	694,907
	8,952,249	**9,812,844**	**9,440,923**	**9,554,672**
Expenditure				
Direct Member Services	5,001,309	5,547,288	5,473,096	4,929,882
Premises Expenses	1,003,617	1,050,615	1,655,539	1,668,278
Administration Expenses	1,685,616	1,812,411	1,615,453	1,324,207
Other Member Services Expenditure	1,422,313	1,645,286	1,480,207	1,217,732
Total Expenditure	**9,112,855**	**10,055,600**	**10,224,295**	**9,140,099**
Net Surplus	**(160,606)**	**(242,756)**	**(783,372)**	**414,573**

Source: Bar Council.

The Bar Council accounts include information on the costs of operating its Professional Conduct Tribunal (PCT) and the Professional Conduct Tribunal Appeals Board (PCTAB). In 2010/11 the combined cost of the two bodies was just under €124,000. This compares with a figure of €132,000 in the previous year. Regulatory costs accounted for just 1.5% of total Bar Council expenditure in 2010/11 and amounted to just €58 per barrister. Bar Council expenses in 2010/11 amounted to less than €88,000. Even if all this expenditure was attributable to regulatory

activities, total regulatory costs would only have amounted to €220,000. Many regulatory issues are dealt with by members who provide their time on a voluntary basis and this is an important factor in keeping down the cost of regulation.

Table 2.5 provides further information on the regulatory and non-regulatory costs of the two branches of the legal profession for the past two years by combining data from Tables 2.1-2.4. It should be noted that the professional bodies have different financial year ends. Nevertheless, combining the data for the two serves to provide a reasonable indication of the cost of the existing self-regulatory regime.

Table 2.5: Regulatory and Non-Regulatory Costs of Law Society and Bar Council €.

Regulatory Costs	2009/10	2010/11
Law Society Consolidated Accounts	3,075,762	3,399,061
Solicitors Compensation Fund	8,643,470	9,755,590
Law Society Total	11,719,232	13,154,651
Bar Council PCT and PCTAB	132,000	124,000
Total Regulatory Expenditure	**11,851,232**	**13,278,651**
Other Expenditure		
Law Society	19,637,980	16,824,914
Bar Council	10,224,295	9,140,099
Other Expenditure Total	**29,862.275**	**25,965,013**

Total regulatory costs in 2010, including the expenditure of the Solicitor's Compensation Fund, amounted to €13.3m. As pointed out, the Law Society estimate that regulatory costs are likely to be lower for 2011 due to a fall in the cost of claims on the Solicitors' Compensation Fund. Consequently the combined cost of regulation by the Law Society and Bar Council in 2011 is expected to amount to approximately €11.5m. The regulatory costs of the Bar Council are a fraction of those of the Law Society. This reflects the much lower level of complaints involving barristers – around 30 per annum. The low level of complaints is probably at least partly due to the fact that barristers do not handle clients' money but also reflects the more specialist nature of barristers' work.

Non-regulatory costs of the two professional bodies, namely services to members, educational activities, premises and administration and overheads amounted to almost €26m in 2010. Both

professional bodies have reduced their non-regulatory costs in recent years so there is unlikely to be much scope to reduce such costs further. Transferring regulatory functions to a new regulatory agency is likely to have little or no impact on the non-regulatory expenditure of the Bar Council and the Law Society and may in fact result in loss of the benefit of shared overhead and economies of scale.

2.4: The Competition Authority Report.

The Competition Authority announced in 2002 its intention to conduct a review of various professions including the legal profession. The Authority's announcement followed the publication of a report on regulatory reform in Ireland prepared by the OECD which noted that "Ireland has already implemented substantial reform in the legal professions."[18] The Authority published its Preliminary Report on the legal profession in 2005[19] and subsequently published its final report in December 2006.[20]

The Competition Authority's conclusions may be summarised as follows:

- In the Authority's opinion, legal practitioners in Ireland enjoyed relatively high incomes which were due to monopoly rents resulting from restrictions on competition.
- These restrictions on competition were primarily the result of regulatory restrictions imposed by the relevant professional bodies, which had the effect of limiting entry to the legal profession.

A number of the Authority's conclusions are inconsistent with the evidence.

In contrast to the Authority's claim that legal practitioners enjoyed very high incomes, the OECD found that "there is little reason for concern that barristers fees are above the competitive level, at least on average". It also concluded that the relatively high exit rate amongst barristers indicated that barristers' incomes, at the lower end were not high by comparison with alternative occupations open to such individuals.[21]

[18] OECD, *Regulatory Reform in Ireland Review of Regulatory Reform,* 2001, p.80.
[19] Competition Authority, *Study of Competition in Legal Services Preliminary Report*, February 2005.
[20] Competition Authority, 2006 at note 1.
[21] The OECD found that there were more reasons for concern regarding competition among solicitors. OECD, 2001 at note 18.

Similarly, although the Authority claimed that the professional bodies' control over education and training restricted entry to the profession, this is not supported by the evidence on numbers entering the profession. Another study of the legal professions in Ireland and the UK concluded that the "figures do not suggest that the numbers entering the profession have been tightly controlled by the professional bodies."[22] It also found that the number of legal practitioners per head of population was broadly similar in England and Wales, Scotland, Northern Ireland and the Republic of Ireland, while the Authority argued that the figure for the State was lower than in those jurisdictions. A report prepared on behalf of the Authority as part of its review of the profession found no "evidence that the educational and training requirements are used to restrict or damage competition on the market."[23] The latter report also found no evidence the Law Society's disciplinary procedures operated in an anti-competitive manner. These points are relevant to the issue of the necessity of the proposed new regulatory regime, which is considered in section 4 of this report.

The Authority found that, most, if not all, of the restrictions on competition derived from the rules of the professional bodies which regulate each branch of the profession. The Authority, however, went on to argue in its Preliminary Report that it was not sufficient to simply remove those rules and arrangements which it believed restricted competition. Rather it argued that self-regulation would inevitably result in restrictions on competition and advocated that the profession should be regulated by a State regulatory agency. Thus the Executive Summary of the Authority's Preliminary Report stated:

> "The removal or amendment of all disproportionate restrictions on competition will not, in the Authority's view, be sufficient to safeguard competition on an ongoing basis."[24]

The Preliminary Report further argued that:

> "It [Chapter 3] concludes that reforming or removing all the individual restrictions on competition identified in this Report will not of itself ensure that future regulation will be effective, pro-competitive and in the interest of clients or the general public. Leaving the existing self-regulatory framework unreformed would allow the future development of other

[22] F. Stephen and C. Burns, *Liberalisation of Legal Services,* University of Manchester Institute for Law, Economy and Global Governance, p.28.
[23] Indecon, *Indecon's Assessment of Restrictions on the Supply of Professional* Services, Report prepared for the Competition Authority, March 2003.The report, nevertheless, recommended that the professional bodies' monopoly on education should be removed.
[24] Competition Authority, 2005, at note 19, p.(ii).

rules and practices that would limit competition, hinder the efficient and innovative supply of services and harm buyers."[25]

The Preliminary Report went on to suggest that leaving the existing system of self-regulation intact would inevitably result in the introduction of new anti-competitive restrictions.

"As long as self-regulatory bodies retain such extensive discretion over the creation and enforcement of rules and regulations governing the supply of the service, there will continue to be a conflict between the interests of buyers and sellers of legal services, in which the suppliers will be inclined to restrict competition as they have done in the past."[26]

The Authority's Final Report expressed similar views.

"The fundamental point is that if self-regulating professions are left to their own devices there is little incentive for them to encourage competition in the market."[27]

Thus in effect the Authority concluded that the issue was not whether or not self-regulation had been abused, but rather that self-regulation was unacceptable *per se*.

Economists generally recognise that the analysis of whether or not particular practices are anti-competitive should follow an effects rather than a form based approach.[28] For example, when considering vertical restraints, economists have long argued that it is wrong to evaluate arrangements by focusing on the wording of contractual arrangements but rather that it is necessary to consider the economic effects of such provisions. The Authority in recommending that the existing system of self-regulation of the legal profession should be abolished adopted a form based approach. In contrast a review of the legal profession in Northern Ireland carried out at around the same time as the Competition Authority's review of the profession in the Republic, while recognising the potential for self-regulation to be abused, concluded that such abuse had not occurred.[29] The Authority's approach is at odds with that contained in Section 5 of the Competition Act, 2002, and Article 102EC. Those provisions prohibit the abuse of a dominant position by one or more undertakings not the dominant position itself, although arguably a dominant firm has a clear incentive to abuse such a position.

[25] *Ibid.* para 3.1.
[26] *Ibid*. para 3.52.
[27] Competition Authority, 2006, at note 1 para 3.71.
[28] P. Massey, Reform of EC Competition Law: Substance, Procedures and Institutions in *International Antitrust Law and Policy,* New York, Juris Publications, 1997 reproduced in B. Hawk (ed.) *EC Competition Law Reform,* New York, Juris Publications, 2002 and P. Gorecki, Form-Versus Effects-Based Approaches to the Abuse of a Dominant Position: The Case of Ticketmaster Ireland, *Journal of Competition Law & Economics*, 2(3), 2006.
[29] Legal Services Review Group, *Legal Services in Northern Ireland: Complaints, Regulation, Competition*, 2006, "Bain Report".

The Authority recommended that that a new independent State regulatory body, to be known as the Legal Services Commission (LSC), should be established to regulate the legal profession. In its Preliminary Report, the Authority proposed two alternatives models for this new regulatory agency.

- The first option proposed that all regulatory functions would be removed from the two professional bodies and would be assigned to the proposed new regulator.
- The second option involved a two tier system with the existing professional bodies continuing to regulate the respective professions subject to the oversight and approval of the new regulator which would have the power to introduce regulations on its own initiative. Under this option, the professional bodies could not act as both regulators and representative bodies.

Thus both options would involve separating regulatory functions from representative activities. Significantly in the Executive Summary of its Preliminary Report, the Authority stated that the second option was "based on the premise that self-regulation has certain advantages in terms of knowledge of the market."[30]

The Competition Authority, in its Final Report, recommended the second option.

> "The Competition Authority recommends the establishment of an independent Legal Services Commission with overall responsibility for regulating the legal profession and the market for legal services. The Legal Services Commission (subject to its oversight) will delegate day-to-day regulation of the legal profession to the existing front line regulators, the Law Society and the Bar Council. The Legal Services Commission, in turn, should be given explicit powers to veto any proposed professional rules and also be given powers to repeal (or to require the repeal of) existing professional rules."[31]

2.5: The Legal Services Regulation Bill, 2011.

The MOU between the Government and the ECB/EU/IMF Troika included a commitment by the Government to implement any outstanding recommendations contained in the Competition Authority's report. On 12th October 2011, the Minister for Justice and Equality published the Legal Services Regulation Bill, 2011. The key feature of the Bill, at least as far the present report is concerned, is the proposal to establish an agency, to be known as the Legal Services

[30] Competition Authority, 2005, at note 19 p.iii.
[31] Competition Authority, 2006, at note 1, para 3.4.

Regulatory Authority (LSRA), which would assume responsibility for regulating the legal profession. The LSRA would have 11 members of whom a majority would be lay members with the Law Society and Bar Council each allowed to nominate two members. The Chairperson must be a lay member. Members would serve on a part-time basis. Section 9(1) states:

> "Subject to this Act, the Authority shall regulate the provision of legal services by legal practitioners and shall ensure the maintenance and improvement of standards in the provision of such services in the State."

Under section 18, the LSRA may and, at the request of the Minister, shall prepare and publish a code of practice for the provision of a legal service that is the subject of a provision of an Act or regulation made under it, or, approve a professional code prepared by a professional body in relation to the provision of legal services, following an application to it by the body concerned. In effect this provision implies that the LSRA would have primary responsibility for drawing up professional codes of practice. It is thus closer to the option A model contained in the Competition Authority report and gives the LSRA more direct authority over the profession than was recommended by the Authority.[32]

The Bill also provides for the LSRA to investigate complaints against solicitors and barristers and for the establishment of both a Complaints Committee and a Legal Practitioners Disciplinary Tribunal (LPDT) which would deal with cases referred by the LSRA.

The Bill provides that the LSRA would be funded by a levy on the Bar Council and the Law Society. It proposes that this levy would be paid to the Minister rather than directly to the regulator and would be determined on the following basis:

1. The levy would be based on the regulator's total expenditure in the previous year with a distinction made between costs incurred in investigating complaints and the regulator's other operating costs.
2. The operating expenses of the regulator, other than those associated with complaints, would be paid by the two professional bodies in proportion to the numbers in each branch of the profession. In other words if, for example, there were 2,000 barristers and 4,000 solicitors, then the Bar Council would pay one third and the Law Society two thirds of the costs.

[32] See, for example, Goggin, 2011, at note 2.

3. In respect of costs incurred by the regulator in respect of complaints, the Bar Council and Law Society would each pay 10% of the cost and the remaining 80% would be paid *pro rata* on the basis of the proportion of the costs relating to complaints involving barristers and solicitors.
4. The costs of the Disciplinary Tribunal would be funded in the same way as the cost of complaints made to the regulator.

The 2011 Bill assigns a number of other tasks to the proposed LSRA which are worth noting as they are likely to have potential cost implications.

The Bill would give the LSRA regulatory functions in relation to the accounts of legal practitioners authorised to hold clients' money.[33] Section 38 of the Bill provides that all legal practitioners entitled to hold money on behalf of clients would have to provide the Authority with an accountant's certificate on an annual basis confirming that the accountant had examined the practitioner's accounts and confirming that they were in compliance with the Act. Copies must be supplied in duplicate and the Authority is then required to forward one copy to the relevant professional body.[34]

Section 9 provides that the LSRA must keep under review:

(i) The admission requirements of the Law Society and Bar Council in relation to their respective professions.
(ii) The availability and quality of
a. The education and training for both professions including how and by whom such education is provided; and
b. The education and training of students in university law schools.
(iii) The admission policies of both professional bodies including arrangements for the accreditation of foreign practitioners and movement between the two professions.
(iv) Professional codes.
(v) The organisation of the provision of legal services in the State.

[33] At present only solicitors hold money on behalf of clients. Barristers do not handle clients' money.
[34] Where a person holds both solicitor and barrister titles, which is something that would be permitted by the Bill, copies of the certificate must be supplied in triplicate and the Authority would be required to send one copy to each professional body.

Under the Bill the LSRA would be required to disseminate information in respect of the education and accreditation requirements and the other items listed above. In addition the section provides that the LSRA would have to:

- Specify the nature and minimum levels of professional indemnity requirements for legal practitioners.
- Establish and administer a system for (a) supervising the accounts of legal practitioners who hold clients' money and (b) inspecting legal practitioners for the purposes stated in the Bill.
- Promote public awareness and disseminate information to the public in respect of legal services including the cost of such services.
- Keep the Minister informed of developments in respect of the provision of legal services and assist the Minister in co-ordinating and developing policy in that regard
- Undertake, commission or assist in research or other activities that in its opinion may promote an improvement in standards of provision of services and public awareness.

Section 29 provides that within four months of the end of each financial year the LSRA would prepare and submit a report to the Minister specifying the number of persons admitted to each profession and

"containing an assessment as to whether or not, having regard to the demand for the services of practising barristers and solicitors and the need to ensure an adequate standard of education and training for persons admitted to practise, the number of persons admitted to practise as barristers and solicitors in that year is consistent with the public interest in ensuring the availability of such services at a reasonable cost."

Section 30 would require the Authority to produce a report within one year of its establishment reviewing the existing arrangements for education and training of barristers and solicitors and making recommendations for the putting in place of arrangements for the future provision of education and training including the accreditation of bodies to provide such training. Section 30 would also require the Authority to produce a report on the possible unification of the professions of barrister and solicitor within two years of its establishment. The section also provides that the Authority should produce a report on the creation of a new profession of conveyancer and reports on such other matters as the Minister may request from time to time within a period to be specified in writing by the Minister.

2.6: Conclusions.

The legal profession in Ireland is divided between solicitors and barristers. Currently each branch of the profession is regulated by its own professional body. Following an investigation of the profession, the Competition Authority argued that self-regulation would inevitably result in the introduction of restrictions on competition. For that reason it recommended that a new State agency should be established which would oversee the regulation of the profession by the Bar Council and Law Society. The MOU between the Government and the ECB/EU/IMF Troika included a commitment by the Government to implement any outstanding recommendations contained in the Authority's report. The Minister for Justice and Equality published the Legal Services Bill on 12th October, 2011, which *inter alia* provides for the establishment of the LSRA which would be responsible for the regulation of the legal profession. The 2011 Bill provides for a very different regulatory regime to that recommended by the Competition Authority. Rather than exercise an oversight role the LSRA would carry out virtually all regulatory functions itself, although significantly the Bill gives the Minister the ultimate say in respect of professional codes of conduct.

3: THE ECONOMICS OF REGULATING LEGAL SERVICES.

3.1: Introduction.

There is an extensive literature on the economics of regulation which provides a useful framework against which to assess the Government's proposed regulatory regime for the Irish legal profession. This literature has significantly influenced public policy in many jurisdictions including Ireland. It is reflected in the Government's "Better Regulation" initiative and the introduction of Regulatory Impact Assessments (RIAs) which are designed to provide an *ex ante* evaluation of all proposals for regulatory change.

Government regulatory intervention is widespread in all modern economies. Regulation is almost always portrayed as being in the public interest. Close scrutiny, however, can often reveal that specific regulatory interventions are more likely to serve the interests of specific groups, including the regulated parties, rather than the wider public interest. Even in cases where there may be a genuine public interest argument for regulation, the actual regulatory regime may go beyond what is necessary and serve the interests of those being regulated rather than the wider public. Indeed the Competition Authority in its report on the legal profession argued that, while in many instances, some form of regulatory intervention might be justified, many of the existing regulations were disproportionate.

Economists generally believe that regulation may be justified in cases of market failure. Market failure can arise for a number of reasons. In the case of professional services the most common source of market failure is the existence of information asymmetries between customers and service providers. The past two decades have also seen a growing recognition of the limits of regulatory intervention. It is now widely recognised that regulatory intervention may not always be capable of remedying the problem of market failure. It is also recognised that regulatory intervention may actually make matters worse. Consequently, in some cases of market failure, the appropriate policy response may be to do nothing. The economic literature, while recognising that regulation may be justified in particular circumstances, indicates that it is necessary to establish in each case:

(a) Whether there is a legitimate justification for regulation; and, if there is,
(b) Whether regulation is capable of addressing the problem and improving the situation.

The literature emphasises that information is crucial to effective regulation. Successful regulation requires that regulators have detailed information about the regulated industry. Regulation is also subject to information asymmetries, however, because market participants will have more information about the industry than the regulator. Generally a regulator will have to incur significant costs in order to acquire the necessary information to discharge its functions effectively.

3.2: The Economic Case for Regulating the Legal Profession.

Information asymmetries arise in legal services because the customer is not as well informed as service providers and does not have the technical or expert knowledge required to make judgments about the quality of service that is being offered to them or in some cases whether what they are being offered will satisfy their requirements. The consumer of a professional service needs the professional's services precisely because s/he does not have the specialist knowledge of the professional. Information asymmetries can result in adverse selection and moral hazard.

Adverse selection affects the client's choice of professional. Information asymmetries make it difficult for clients to distinguish between high quality and low quality service providers. Consequently, the price they are willing to pay for the service will be lower than what they would be willing to pay to a high quality provider if they could identify such a provider. If it costs more to provide a high quality service, the price consumers may be prepared to pay may be insufficient to keep high quality providers in the market. Consequently, high quality providers will exit the market reducing the average quality of suppliers in the market. This will lead to consumers revising downwards the price they are willing to pay and may ultimately result in a race to the bottom or a 'lemons market'. The typical solution to this problem historically involved conferring monopoly rights over the provision of legal services to members of a professional body with specific qualifications and professional training.

Moral hazard arises after a client has selected a supplier. As discussed above, the client is often not in a position to judge whether the service being provided by the professional is necessary or adequate. This may give rise to 'supplier-induced demand' and a level of professional services which is above the optimal (or efficient) level.

Traditionally in many jurisdictions regulation of the legal profession involved self-regulation by the profession itself. A valid economic case can be made to the effect that self regulation may reduce the cost to the regulator of acquiring information and make adjustments to regulations easier.[35] At the same time there is an obvious risk that self-regulation may operate in ways that restrict competition and put the interests of the regulated profession ahead of the interests of consumers. Thus the benefits of self-regulation need to be weighed against the potential costs of restrictions on competition. A more philosophical approach is to view the right to professional self-regulation as implying a social contract between society and the profession.[36] However, the terms of the social contract may need to be reviewed from time to time to ensure that self-regulation operates in the public interest. Self-regulation thus involves a trade-off from society's perspective. It is likely to reduce the cost of regulation but the cost of the service to society may be higher than necessary if self-regulation powers are abused.

3.3: Regulatory Impact Assessments (RIAs).

Following a review by the OECD, the Government launched a programme of regulatory reform in 2001. In January 2004 the Government published a White Paper entitled "Regulating Better." The White Paper set out six core principles of good regulation:

- Necessity – is the regulation necessary? Can we reduce red tape in this area? Are the rules and structures that govern this area still valid?
- Effectiveness – is the regulation properly targeted? Is it going to be properly complied with and enforced?
- Proportionality – are we satisfied that the advantages outweigh the disadvantages of the regulation? Is there a smarter way of achieving the same goal?
- Transparency – have we consulted with stakeholders prior to regulating? Is the regulation in this area clear and accessible to all? Is there good back-up explanatory material?

[35] A. Ogus, Rethinking Self-Regulation, *Oxford Journal of Legal Studies*, 15, 1995.
[36] R. Dingwell and P. Fenn, A Respectable Profession: Sociological and Economic Perspective on the Regulation of Professional Services, *International Review of Law and Economics*, 7, 1987.

- Accountability – is it clear under the regulation precisely who is responsible to whom and for what? Is there an effective appeals process?
- Consistency – will the regulation give rise to anomalies and inconsistencies given the other regulations that are already in place in this area? Are we applying best practice developed in one area when regulating other areas?[37]

The White Paper stated that Government would make better use of evidence-based policy-making which would entail making better use of research and analysis in both policy-making and policy implementation. With this in mind the White Paper introduced RIAs as a means of evaluating proposed regulation. The White Paper described RIAs as "an evidence based approach that allows for the systematic consideration of the benefits and costs of a regulatory proposal to the economy and society."[38]

Following a review of RIA procedures, the Department of the Taoiseach published revised guidelines for the conduct of RIAs in June 2009.[39] The Guidelines state:

> "One of the fundamental goals of the RIA process is to reduce the unnecessary use of regulation through an examination of the possible use of alternatives. This means that **RIA should be conducted at an early stage and before a decision to regulate has been taken. Ideally, RIA should be used as the basis for consultation.** In this way, it is possible to consider the use of alternatives to regulation (e.g. information campaigns) or lighter forms of regulation (e.g. self-regulation) as required by the RIA model, even if they are not necessarily considered to be the most appropriate approach in the long run."[40]

The Guidelines also provide that where a group is established to review existing regulatory regimes, the group should conduct a RIA of any proposals for new regulation.

> "Regulations are sometimes initiated in response to the recommendations of a particular Policy Review Group. When these Groups have reported, the expectation tends to be that their recommendations will be accepted and this means that subsequent scope for the use of alternatives is limited. Therefore, when any Policy Review Group is formed, its terms of reference must include a requirement to take account of the principles of Better Regulation (see Regulating Better, Department of the Taoiseach, 2004 for further details). In particular,

[37] Department of the Taoiseach, *Regulating Better,* 2001.
[38] *Ibid.*, p.2.
[39] Department of the Taoiseach, *Revised RIA Guidelines How To Conduct a Regulatory Impact Analysis,* June 2009
[40] *Ibid.* para 2.1. Emphasis in original. It is worth noting that the RIA Guidelines specifically identify self-regulation as a possible option.

its terms of reference must specify that consideration be given to the potential for the use of alternatives to regulations prior to recommending regulatory solutions. Any Reports or Reviews produced by the Group should then indicate how it took account of the Better Regulation principles in conducting its work. Where primary legislation or significant regulatory change is being proposed, a RIA should be produced as part of the work of the Review Group. The Group's final Report would then include a RIA, if appropriate."[41]

3.4: RIA of the Legal Services Regulation Bill, 2011.

It is important to note that no RIA was completed on the Legal Services Regulation Bill, 2011, before it was approved by the Cabinet and published. This is despite the fact that the Bill proposes to introduce a completely new regulatory regime for the legal profession and involves major changes.

The Competition Authority did not conduct any RIA before proposing that the existing system of self regulation of the legal profession should be replaced by a new State regulatory agency. The failure to conduct a RIA before recommending such major changes is inconsistent with good regulatory practice. As previously noted, the current RIA Guidelines state that policy review groups should conduct a RIA where "primary legislation or significant regulatory change is being proposed". Although the Guidelines post date the Authority's report, the Authority has regularly advocated that other State agencies should conduct RIAs before recommending any changes in regulation.

The Authority's 2004 report on the engineers' profession, for example, stated:

"If the Minister for the Environment, Heritage and Local Government is to consider imposing further regulation on engineers, the Authority recommends that he should first undertake a Regulatory Impact Assessment (RIA) as outlined in the Government's White Paper 'Regulating Better'".[42]

In a December 2004 submission to the Department of Finance in relation to financial services regulation, the Authority stated:

[41] *Ibid.* para 2.18.
[42] Competition Authority, *Competition in Professional Services Engineers,* December 2004, para xvi.

> "Any changes to the current system which the Minister may consider in the light of this consultation exercise should therefore be subject to RIA in advance of implementation."[43]

In a subsequent submission to the Commission on Taxi Regulation (CTR) the Authority stated:

> "In preparing a code of regulations, the Commission will have to assess the merits of various alternative policy tools (including non-intervention). This process should be guided by the Government's policy on better regulation, which aims at ensuring that any regulatory intervention is *necessary, transparent, accountable, proportionate, consistent* and *effective*. This is done by completing "regulatory impact assessments" (or RIA's): evaluations of the relative costs and benefits of the different policy interventions in order to identify the policy that works best."[44]

The Authority in a further submission to the CTR stated:

> "We strongly recommend the Commission to carry out a Regulatory Impact Assessment (RIA) of the proposed measures."[45]

The Authority's failure to conduct any RIA of its own proposals for major change in the regulation of the legal profession is totally inconsistent with such views. Little consideration was given to the likely costs of its recommendation for the creation of a new regulator for the legal profession. For example, in its Preliminary Report the Authority dismissed arguments advanced by the legal profession that self regulation was likely to be superior to an independent regulatory body asserting:

> "Such a regulatory body, provided that its reforms are based on the principles of good regulation, would retain the strengths of the current structure while avoiding its weaknesses."[46]

In the real world the choice is not between imperfect self regulation and a perfect State regulator, as the Authority seems to suggest. The Report went on to state:

> "A Legal Services Commission **would not necessarily be more costly** than the present system. Having a single regulator would eliminate the duplication of the current structure. Funding currently channelled into self-regulatory bodies from solicitors and barristers could be re-directed to the new regulator. Even **if there were higher costs**, **they would likely be**

[43] Competition Authority, *Submission to the Department of Finance Financial Services Legislation Consultation on Consolidation and Simplification Bill*, December 2004, para 14.
[44] Competition Authority, *Submission to the Commission for Taxi Regulation - National Review of Taxi, Hackney and Limousine Services and Vehicles Standards*, March 2005, para 5.
[45] Competition Authority, *Submission to the Commission for Taxi Regulation on the National Review and Roadmap*, September 2005, para 1.2.
[46] Competition Authority, 2005, at note 19 para 3.35.

> **associated with a higher degree of transparency and accountability, with attendant benefits**."[47]

In other words, the Authority argued that its proposed regime might not be more expensive than the current system but if it was, it would produce benefits that would justify such extra costs. It made no attempt to quantify the potential costs and benefits in support of this assertion. This is despite the admission in the Executive Summary of the Report that "self-regulation has certain advantages in terms of knowledge of the market."[48] The Authority also cited the fact that the Clementi Report on the legal profession in England and Wales had "indicated that the move to an independent regulator responsible for all regulatory functions in the UK would cost approximately the same as the status quo."[49] Beyond that the Authority's Preliminary Report contained no analysis of the likely costs and benefits of the proposal to establish a new legal services regulator.

The Authority's Final Report contained no analysis of the impact of its recommendation that a new regulatory agency should be established to oversee the Bar Council and the Law Society. In response to claims by both professional bodies that self-regulation might be a more effective option; the Authority restated the arguments advanced in its Preliminary Report stating:

> "Regulation that is both effective and informed can be achieved by the inclusion of a large minority of legal practitioners within a regulatory body. Such a regulatory body, provided that its reforms are based on the principles of good regulation, would retain the strengths of the current structure while avoiding its weaknesses."[50]

The Competition Authority's claims that the proposed new regulatory regime would cost no more than the existing system also ignored the fact that one of the arguments advanced by the Authority in favour of change was that the proposed new regulator would do more than the existing self-regulatory bodies in a number of areas. It is difficult to understand how the Authority could suggest that the regulator would carry out a number of additional tasks while incurring no additional cost. Two examples help to illustrate this point.

[47] *Ibid.*, para 3.53 emphasis added.
[48] *Ibid.*, p.iii.
[49] *Ibid.* para 3.53.
[50] Competition Authority, 2006, at note 1 para 3.52.

The Authority expressed strong criticism of the two professional bodies for their failure, in its view, to provide sufficient information to consumers.

> "Another failing of the current self-regulatory structure is the complete lack of any proactive consumer awareness initiatives. Unlike other sectoral regulators, such as the Financial Regulator, which invest considerable resources in consumer education, the Law Society and Bar Council make no comparable commitment and offer little in the area of consumer guides to purchasing legal services."[51]

The Authority was correct in pointing out that the Financial Regulator invested considerable resources in consumer education. In 2007 its consumer protection functions cost €16.2m and employed 98 staff.[52] It is somewhat disingenuous to draw comparisons with the consumer information provided by the Financial Regulator without alluding to the costs and resources involved. Admittedly the Authority in its recommendations set somewhat more modest targets, recommending that the Bar Council and Law Society should provide consumer information on their respective websites having consulted with the National Consumer Agency regarding the content of such material. Nevertheless, such additional functions are likely to have cost implications. The 2011 Bill actually imposes more onerous consumer information obligations on the proposed LSRA.

The second example relates to the complaints/disciplinary process. In its Preliminary Report the Authority argued that the existing complaints procedures might be seen by consumers as biased in favour of legal practitioners. It argued that an effective complaints system "must be seen to be independent of the profession."[53] The Authority stated in its Final Report:

> "Contacts with the Competition Authority from members of the public after the publication of the Preliminary Report suggested that clients are wary of complaining to the Law Society, as they feel that, given its representative role, it may safeguard the interests of the solicitor over those of the client."[54]

If, as the Authority suggested, it was necessary to change the complaints process because individuals were wary of making complaints under the existing regime, then one might reasonably expect the number of complaints to increase with consequent cost implications. Obviously a system that discourages legitimate complaints is unsatisfactory. If the Authority's

[51] *Ibid.,* para 3.13.
[52] IFSRA *Annual Report, 2007.*
[53] Competition Authority, 2005, at note 19, para 3.32.
[54] Competition Authority, 2006, at note 1, para 2.48.

claims are correct, then the additional costs incurred in addressing such inadequacies would arguably be justified. The point is, however, that, if the Authority is correct and legitimate complaints were discouraged by the existing system, then it is unrealistic to claim that the proposed change would not involve some additional cost.

It is unclear that the ECB/EU/IMF Troika was aware of the fact that the Authority had not carried out any RIA of its proposals for reform of the legal profession.

The Minister for Justice and Equality in a written reply to a parliamentary question on 1st December 2011 confirmed that his Department had not carried out a RIA on the Legal Services Regulation Bill.

> "While a preliminary regulatory impact assessment had been in preparation it did not prove possible to complete it for publication at the same time as the Bill due to the exceptionally demanding EU/IMF deadline that applied. However, I am happy to say that work on a regulatory impact assessment for the Bill is near completion and that it will be made available in the near future."[55]

The Second Stage Debate on the Bill resumed in the Dail on 24th January 2012, although the Department has not yet produced any RIA. The Taoiseach, in response to questions from Deputy Catherine Murphy, stated:

> "If the regulatory impact assessment becomes available the Minister will circulate it for debate."[56]

The failure to carry out a full RIA on the proposals raises serious question marks. It is five years since the publication of the Competition Authority report. The Minister's claim that there was insufficient time to carry out a RIA because of the tight time frame imposed by the Troika confirms that the proposed Bill and its introduction is not based on principles of good regulation. Conducting the RIA after the publication of the Bill, much less after the second stage debate, is wholly unsatisfactory and raises the possibility that any such exercise would simply amount to an *ex post* justification rather than an objective analysis of the proposed legislation.

The failure to conduct a detailed analysis of the likely costs of a new regulatory body is all the more striking in light of the present Government's stated objective of reducing the number of

[55] *Dail Debates*, 1st December 2011, Vol.748(4), p.177.
[56] *Dail Debates, 24th January 2012,*

State regulatory agencies. A considerable time has elapsed since the Authority completed its report and many of its recommendations have been implemented in the interim. In those circumstances it is even more important that a RIA should have been carried out in order to ascertain if there was still a valid case for further changes prior to any decision to introduce legislation.

3.5: Conclusions.

The economic literature indicates that, although regulation may be justified as being in the public interest, it is frequently designed to favour a particular group at the expense of the wider population. It also indicates that even where they may be a legitimate case for regulation, it may not be possible to design a regulatory intervention that would effectively address the particular problem and any intervention might actually make matters worse. Therefore it is necessary in every case to establish that there is a legitimate justification for regulation and, if so, that the proposed regulation will actually lead to a better outcome than doing nothing.

As part of the Government's Better Regulation initiative RIAs have been introduced for evaluating proposed new regulation. All proposals for new regulation are supposed to be subject to a RIA. Although it has regularly urged other State agencies to conduct a RIA of any proposed new regulations, the Competition Authority did not carry out an RIA of its proposals for a new regulatory regime for the legal profession. Similarly the Department of Justice and Equality failed to carry out a RIA on the Legal Services Regulation Bill, 2011, before it was approved by Cabinet and published.

4: ANALYSIS OF THE PROPOSED REGULATORY REGIME.

4.1: Introduction.

This section of the report considers the potential costs of the proposal to replace the existing self-regulatory regime for the legal profession with a new State regulatory agency as provided for in the Legal Services Regulation Bill, 2011. As pointed out in the previous section, no proper evaluation of the potential costs and benefits of the proposal has been undertaken to date. In particular the proposal has not been subject to any RIA. This is despite the fact that the proposal involves major changes in the regulation of the legal profession in Ireland.

The Competition Authority in its Preliminary Report argued that its proposal for a new regulatory body would not involve any additional regulation.

> "The creation of this body would not involve any net new regulation, but would replace the current complex and opaque maze of regulation with a simpler, more transparent model that is accountable to buyers of legal services."[57]

Contrary to the Authority's claims the Legal Services Bill contains 123 sections and runs to 109 pages. The Taoiseach stated in the Dail:

> "The Legal Services Regulation Bill is enormous and it makes very great changes to the provision of legal services."[58]

As pointed out in section 3 of this report, the Competition Authority claimed that its proposals would not involve any additional cost but it failed to provide any evidence to support this assertion. Subsequent comments by the new Authority Chairperson on the costs of the proposed regime have been more qualified.

> "It is vital that the costs of the new regime are kept at a reasonable level. The amount of the levy on legal practitioners will depend on whether the new body manages complaints against legal practitioners and inspections of legal practitioners in a cost-effective way. Barristers in particular may feel the brunt of any excessive cost as they do not deal with clients' money, are far fewer in number, have less direct interaction with the public, and thus also have far fewer

[57] Competition Authority, 2005, at note 14, p.(iii).
[58] *Dail Debates, 24th January 2012.*

complaints against them. Solicitors could actually save on regulation fees if the legislation and the Regulatory Authority do a better job than the existing systems."[59]

Any regulatory regime involves direct costs, i.e. the cost of the regulatory agency. However, it is widely recognised that direct regulatory costs represent only a fraction of the true cost of any regulatory regime. The main cost of any regulation is accounted for by compliance costs. Compliance costs generally fall on regulated firms and in most cases are never even measured. It is clear, therefore, that any evaluation of a proposed new regulatory regime needs to take such compliance costs into account. In effect regulation suffers from a form of negative externality because the direct costs of the regulatory agency are considerably less than the cost to society of any regulatory regime. This is likely to result in an excessive level of regulation from society's point of view.

4.2: Impact of the Proposed LSRA.

As noted in the previous section of this report, the Government's Better Regulation White Paper set out six principles for evaluating new regulatory proposals, namely:

- Necessity
- Effectiveness
- Proportionality
- Transparency
- Accountability
- Consistency.

The Legal Services Regulation Bill, 2011, fails to satisfy a number of these requirements.

The Competition Authority argued that a new State regulator for the legal profession was required because powers of self-regulation would inevitably be abused and result in the imposition of restrictions on competition. The argument that a new regulatory regime is necessary therefore rests on the proposition that self-regulation will not work properly in the public interest. Economic theory and evidence from other jurisdictions do not support this conclusion.

[59] Goggin at note 2.

Section 3 of this report noted that there was a sound economic argument in favour of self-regulation of the legal profession. Self-regulation is likely to reduce the cost of regulation because it reduces the cost to the regulator of acquiring information. The economic literature recognised that self-regulation could be abused. It would appear, however, that there are ways of preventing such abuses without having to scrap self-regulation, thereby allowing society to benefit from the lower cost of such a regulatory regime. It is not necessary to abolish self-regulation. Doing so amounts to a case of the proverbial "throwing out the baby with the bathwater".

The Bain Report on Legal Services in Northern Ireland concluded that self-regulation of the legal profession there had worked effectively. The report acknowledged that self-regulation had been abused in England and Wales but concluded that such abuses had not occurred in the case of Northern Ireland.[60] While the Report advocated greater lay participation, particularly on committees dealing with education and discipline, it rejected the view that committees responsible for rules and codes of conduct should have a lay majority or lay chairpersons, precisely because it considered that representatives of the profession were better informed about such matters.

> "We recognise that professional persons are generally better equipped to provide the necessary expertise on such matters as professional rules and codes of conduct, and hence we do not recommend lay majorities or lay chairs for committees dealing with these matters."[61]

Self-regulation was also found to be the best option for the Scottish legal profession following a review by the Justice 1 Committee of the Scottish Parliament.[62] Thus overseas experience indicates that self-regulation can work effectively and in a way that does not result in restrictions on competition, contrary to the claims made by the Authority.

The Competition Authority's report argued that a changed regulatory regime would result in increased competition and result in cheaper and higher quality services to consumers. Its report provides no evidence for this beyond the simple assertion that its recommendations will increase competition and that greater competition will drive down prices. While in general this proposition holds true, legal services may be somewhat more complex. For example, there is

[60] Bain, 2006, at note 29.
[61] *Ibid*. para 3.32.
[62] *Ibid.* The reviews of the legal professions in both Scotland and Northern Ireland found that some reforms were required but nevertheless concluded that self-regulation should be retained subject to oversight.

evidence that increasing lawyer numbers led to increased legal fees in a number of countries, a phenomenon explained by the fact that increased supply of legal practitioners tends to increase the demand for legal services.[63]

> "There is no easy solution to the problem of legal charges, owing to the fact that the provision of legal services is a credence good. This means that it is often difficult to know what will be involved in a case at its outset. There are numerous potential options for reform, none of which represent a panacea."[64]

Neither the Authority nor the Minister has put forward a case to show why changing the regulatory structure of the legal profession would lower prices. It is thus not clear that the proposal for a new regulator is properly targeted. In other words the proposal arguably fails the effectiveness as well as the necessity principle of good regulation.

The Authority failed to show that its proposed regulatory regime would yield benefits that would outweigh any additional costs. On that basis the Authority's proposal does not satisfy the proportionality requirement. However, the Legal Services Bill provides for an even more complex regulatory regime than that recommended by the Competition Authority. Thus the Bill's proposals are even more disproportionate than the Authority's recommendations.

A recent study of regulatory reform in various OECD countries further supports the view that any benefits of the proposal to introduce a new State legal regulator would probably be outweighed by the additional costs involved.[65] The study looked at the impact of reforms in service industries on the competitiveness of manufacturing firms in the various countries analysed. While it found that reform of the legal profession had a significant positive impact on competitiveness, most of this effect resulted from abolishing restrictions on price competition between legal practitioners. It is not necessary to abolish the existing regulatory regime in order to eliminate such restrictions.

4.3: Direct Cost of the New Regime.

[63] On this point, see, for example, O. Shy, *The Economics of Network Industries,* Cambridge University Press, 2001, Chapter 11.
[64] Stephen and Burns, at note 22, p.15.
[65] G. Barone and F. Cinzano, Service Regulation and Growth: Evidence from OECD Countries, *Economic Journal,* 121, 2011.

The direct cost of the proposed LSRA is equivalent to the operating cost of the agency. As pointed out in section 2 of this report, the combined cost of the regulatory activities of the two professional bodies amounted to €13.3m in 2010, with virtually all of this accounted for by the cost of regulating solicitors. The figure for 2011 was estimated by the Law Society to amount to €11.6m due to lower claims costs incurred by the Solicitors' Compensation fund. Consequently, this is the maximum amount available if the new agency is to involve no additional costs. In fact its budget would need to be lower than this figure if the total cost of regulation is to remain unchanged as there are some regulatory type functions that would remain with the professions. For example, section 76 of the Bill provides that the Bar Council would be responsible for establishing and maintaining a roll of practising barristers on which all practising barristers would be required to have their name entered.

In order to obtain some indication of the likely cost and staffing requirements of the LSRA we looked at a number of existing regulatory agencies. Table 4.1 provides information on costs and staffing of various existing regulatory agencies. In most cases the data relates to 2010, although in the case of ComReg it relates to the 12 months ending on 30th June 2009.

Table 4.1: Summary Details of Staffing and Costs of Various Regulatory Bodies.

	Staff Numbers	Payroll Cost €m	Total Cost €m
CAR (2010)	20	1.78	2.77
Competition Authority (2010)	42	n.a.	3.90
Medical Council (December 2010)	49	4.05	10.33
CER (December 2010)	66	4.9	9.9
ComReg (June 2009)	119	11.27	23.22

Notes: The CAR reported that its staff numbers had fallen from 22 to 18 in the course of 2010, while the Competition Authority reported that staff numbers had declined from 44 to 40 during 2000. We have taken a simple average of the start and end year figures as the average staffing level for the year. In all other cases the staff figures are the average number employed during the year as stated in the Annual Report. The figure for operating costs in the case of the Competition Authority was an estimate as its accounts had not been finalised prior to the publication of its Annual Report. No figure was available for payroll costs in the case of the Competition Authority.
Source: Annual Reports of the agencies concerned.

There is considerable variation between the bodies included in the table in terms of both staff numbers and costs. The Commission for Aviation Regulation (CAR) is the smallest of the agencies with approximately 20 staff and total operating costs in 2010 of €2.8m. At the opposite

end of the spectrum ComReg had 119 staff and operating costs of €23.2m in the year ending June 2009. The Medical Council is sometimes portrayed as having a similar role and functions to the proposed LSRA. In 2010 it had 49 staff, total payroll costs of €4.1m and total operating costs of €10.3m.

The obvious question is whether an agency similar in size to the Medical Council would be sufficient to discharge the various duties and functions proposed for the LSRA. Compared with agencies like ComReg and CER, 50 staff is a relatively modest figure.

The Law Society has indicated that it currently has 59.3 staff engaged in regulatory activities. It estimates that the work carried out by 47 of these would be transferred to the LSRA. This suggests that the LSRA would require 47 staff just to carry out the regulatory functions which are being transferred to it from the Law Society. It would require some additional staff to regulate barristers. Therefore it would require in excess of 50 front-line regulatory staff, say 53 which is assuming only six people are involved in regulating barristers. In addition, the LSRA would require administrative and support staff. These would be required to support not only the regulatory staff but also the LSRA Board which would have 11 part-time members and the proposed Complaints Committee (CC) and LPDT each of which would have 16 members. A conservative estimate would that a minimum of 27 administrative and support staff would be required along with the proposed CEO.[66] This suggests a minimum staffing requirement of approximately 80 full-time staff, comprising 50+ front-line staff with the balance being accounted for by administrative and support staff. To put this estimate in context, in 2011 there were 10,788 legal practitioners (8,575 solicitors and 2,213 barristers). A total of 80 staff in the LSRA would mean that the regulator would have one person for every 135 legal practitioners.

Table 4.2 provides some further analysis of payroll costs in the various regulatory agencies included in Table 4.1.

Average payroll cost per person employed in the four regulatory agencies examined in Table 4.2 ranged from €74,452 in the CER to €94,706 in ComReg. If we assume average payroll costs for the LSRA were on par with the CER, which had the lowest payroll cost per head, the total payroll costs for a staff of 80 would amount to €6m. On the other hand if average payroll cost

[66] This figure includes provision for support staff for the proposed LPDT.

was the same as in ComReg the wage bill would come to €7.6m. The ratio of payroll to total costs of the four agencies in Table 4.2 varied quite considerably from 39% to 64%.[67] As a rough rule of thumb we assume payroll costs in the LSRA would be equivalent to 50% of total costs.

Table 4.2: Further Details on Payroll Costs of Various Regulatory Bodies.

	Average Payroll Cost per Staff Member	Payroll as % Total Costs
CAR (2010)	89,000	64.3
Medical Council (December 2010)	82,733	39.3
CER (December 2010)	74,452	49.5
ComReg (June 2009)	94,706	48.5

Source: As Table 4.1.

The Legal Services Regulation Bill, 2011, proposes that the LSRA would have a board of 11 part-time members and provides that they may be paid remuneration and allowances for expenses at rates to be determined by the Minister. The National Transport Authority (NTA) has a board of 11 members of whom 9 are part-time non-executive members who receive payment of €12,500 each.[68] If members of the LSRA board were paid a comparable rate then this would amount to €137,500. Allowing for employer's PRSI contributions and possible expenses would suggest that a figure of approximately €200,000 would represent a conservative estimate of the likely direct cost for the 11 board members. The Medical Council's Annual Report for 2010 indicates that council and meeting expenses for that year amounted to €434,425. This is despite the fact that fees paid to Council members amounted to just €43,875 while a further €16,512 was paid to council members in respect of travel and subsistence expenses giving a total of €60,000.[69]

Section 50 provides for the appointment of a Complaints Committee which may comprise up to 16 members, the majority of whom must be lay members. The Bill proposed LPDT may also

[67] The Medical Council incurred legal costs of €2.9m arising from investigations. If we exclude legal costs from the total then payroll and non-payroll costs accounted for 55% and 45% of the Medical Council's total costs which is not greatly out of line with the other agencies included in the table.
[68] The NTA's Annual Accounts were not available on its website at the time of writing
[69] Fees of €8,775 each were paid to just five members of the Medical Council in 2010. If the LSRA board members were paid the lower €8,775 rate paid to certain members of the Medical council then the cost of remuneration for LSRA board members would be approximately €96,500.

have up to 16 members, the majority of whom would be lay persons.[70] While not specifically mentioned in the Bill, presumably individual members of both Committees would receive a payment and expenses for any work they do. Average payments of €10,000 for the 32 members of the two bodies amounts to a further €320,000.[71] A further €100,000 would seem to constitute a reasonable estimate for employer's PRSI, travel expenses etc. In addition we have included a figure of €200,000 for miscellaneous expenses including public information campaigns which seems a relatively modest amount.

Table 4.3 summarises our estimates of the likely costs of the LSRA (including the LPDT) as set out above. The table sets out two scenarios based on average payroll costs in the CER and ComReg.

Table 4.3: Estimated Operating Costs of LSRA

	Scenario A	Scenario B
Payroll Costs	5,956,160	7,576,480
Non-Payroll Costs	5,956,160	7,576,480
Board Member Fees & Expenses	200,000	200,000
Disciplinary Committees Fees & Expenses	420,000	420,000
Misc. Expenses	200,000	200,000
Total	12,732,320	15,972,960

Note: Scenario A assumes average payroll cost of €74,452 per person in line with 2010 CER figure while scenario B assumes average payroll cost of €94,706 per person in line with ComReg 2009 figure.

Our calculations suggest that total operating costs for the proposed LSRA would be between €12.7m and €16m depending on the figure used for average payroll cost per head. In our view such estimates are likely to be on the conservative side with the agency likely to require higher levels of staffing. Our assumption of a 50/50 split between payroll and non-payroll costs may also prove conservative. The LSRA is likely to incur substantial legal costs, for example,

[70] The Law Society and Bar Council would be each entitled to nominate three members to each committee. The persons nominated must have practised respectively as solicitors or barristers for at least ten years.
[71] Average fees of €10,000 are likely to be on the low side given that the Solicitor's Disciplinary Tribunal sat for 182 days in 2010.

although we have made no provision for these. The Medical Council, for example, had legal expenses of €2.9m in 2010, mostly associated with investigations.[72]

There are good grounds for believing that the proposed LSRA would have far greater costs than the Medical Council. The Medical Council, for example, received 361 complaints in respect of doctors in 2010. The Council's Preliminary Proceedings Committee concluded in 264 cases that there was no *prima facie* case to answer. 54 cases were referred to the Fitness to Practice Committee for a full inquiry. 43 inquiries were completed in 2010 and the average duration of inquiries was 2.18 days. The Law Society Annual Report for 2009 indicates that its complaints section investigated 1,754 admissible complaints in that year. Although subsequent annual reports do not include figures for the total number of complaints, they indicate that the number has risen over the past two years.[73] In 2010, the Law Society made 117 applications to the SDT. The SDT dealt with a further 65 complaints from members of the public. In total the SDT sat for 182 days in 2010, twice the number of sitting days of the Medical Council Fitness to Practice Committee. In addition the High Court made 253 orders under the Solicitors' Acts. Such figures suggest that the LSRA's two disciplinary committees will be required to deal with a much greater volume of work than the Medical Council which has significant implications for costs.

The complaints procedure proposed in the Legal Services Bill is somewhat complex and appears to follow the existing Law Society model.

> "The Bill proposes a rather elaborate process for dealing with complaints about the behaviour of legal practitioners – an initial Complaints Committee and a subsequent Legal Disciplinary Tribunal to deal with professional misconduct. This process is based on the current complaints processes regarding solicitors. This process must be sufficiently flexible and results-driven to provide effective complaints resolution in an efficient manner. Risk-based enforcement regarding client account and other regulations (including inspections of client accounts) will also be essential to an effective but low cost enforcement regime."[74]

[72] The CAR has regularly the fact that legal challenges to its decisions have resulted in substantial legal costs. If we assume a 45/55 split for payroll/non-payroll costs, this would add a further cost of €1.4m-€1.7mm depending on whether we use the low or high figure for average payroll cost per head.
[73] According to the 2010/11 Annual Report, the Society received 1,609 complaints in the first seven months of 2011.
[74] Goggin at note 2.

The wide range of functions specified for the LSRA under the Act again suggests that the agency is likely to require more resources than the Medical Council. It will be required to keep under review:

- the admission policies of the professions;
- the availability and quality of education and training of barristers and solicitors;
- the education and training of students in university law schools;
- professional codes; and
- the organisation of the provision of legal services in the State.

There are over 2,200 solicitors firms of which over 1,000 involve sole practitioners. The LSRA will be required to put in place arrangements for the supervision of client accounts in all those firms. There are overt 2,200 practising barristers in the State. At present barristers do not hold any money on behalf of clients. Under the Bill, barristers would be permitted to hold clients' money. Thus the number of entities whose accounts would have to be supervised by the LSRA could, in theory, be double the present level. If barristers become involved in handling clients' money in any significant numbers regulatory costs are likely to rise considerably from their current level.

The LSRA will be required to put in place arrangements for the inspection of all legal practitioners. Section 27 of the Bill provides for the appointment of inspectors who would have powers to carry out an inspection of a legal practitioner in various circumstances. There are almost 8,575 practising solicitors and over 2,200 practising barristers giving a combined total of approximately 10,800 practitioners.

The Legal Services Bill also provides that employed barristers may represent their employers before the Courts. Our understanding of the existing arrangements is that employed barristers are precluded from practising at the Bar. As a consequence they are not regulated by the Bar. Permitting employed barristers to represent their employers in court would seem to require that such individuals would have to be subject to regulation by the LSRA in the future. Would the LSRA have to regulate all employed barristers? It seems unlikely that such individuals could operate outside the scrutiny of the LSRA unless and until they appeared before the courts. In any event, if this significantly adds to the number of practitioners that are to be regulated by the LSRA, it will further increase the total cost of regulation.

The requirement to promote public awareness and disseminate information to the public in respect of legal services, including the cost of such services potentially involves a substantial amount of work. Any form of public information campaign is likely to involve significant costs. Solicitors' firms are heterogeneous multi-product firms. They include a large number of sole practitioners providing general legal advice and services as well as large corporate law firms located mainly in Dublin. Prices are likely to vary between different parts of the country. Similarly barristers are currently categorised as juniors or seniors and many specialise in particular areas of law. Providing comprehensive information on the cost of services that is accurate, meaningful and reliable in a timely fashion would be a major task.

Under section 30 of the Bill, the LSRA will also be required to produce an annual report within four months of the end of each financial year specifying the number of persons admitted as barristers and solicitors and "containing an assessment as to whether or not, having regard to the demand for the services of practising barristers and solicitors and the need to ensure an adequate standard of education and training for persons admitted to practice, the number of persons admitted to practise as barristers and solicitors in that year is consistent with the public interest in ensuring the availability of such services at a reasonable cost."

Preparing such a report on an annual basis would constitute a major exercise. What would constitute a reasonable cost for legal services? Similar questions arise as to how demand is to be measured. The level of demand is not fixed and will obviously be greater the lower the price. Essentially the regulator is being asked to assess whether the number of persons being admitted to practise law each year is the "correct" number. From an economics perspective this constitutes a meaningless exercise. It is likely, however, to be a relatively costly one.

It is likely that the LSRA will have to hire in consultants to assist in preparing a number of the reports described above at considerable cost. Our estimates make no allowance for such costs.

Taking all of these factors into account, it seems reasonable to conclude that our estimate of the likely running costs of the LSRA are likely to be on the conservative side. In addition to the operating costs of the LSRA it is also necessary to consider the costs of regulatory activities that

would remain with the professional bodies in order to arrive at the overall direct cost of the new regulatory regime.

Information provided by the Law Society indicates that they currently have 59.3 staff engaged in regulatory activities. They estimate that the work of 47 of these would be transferred to the LSRA. The Law Society estimates that of its current regulatory costs of €11.6m, it will continue to incur costs of €4.3m in connection with the operation of the Solicitors' Compensation Fund. This figure must be added to the estimated cost of the LSRA to arrive at a figure for the total cost of the new regime which is directly comparable to the €11.7m cost of the current regime.

Table 4.4: Total Direct Regulatory Cost of LSRA Regime

	Scenario A	Scenario B
LSRA (including LPDT)	12.7	16.0
Law Society	4.3	4.3
Total Direct Costs	17.0	20.3
Existing Cost of Self-Regulation (including Solicitors' Compensation Fund).	11.7	11.7
Increase in Direct Regulatory Cost due to LSRA	5.3	8.6

Note: Scenario A assumes average payroll cost of €74,452 per person in line with 2010 CER figure while scenario B assumes average payroll cost of €94,706 per person in line with ComReg 2009 figure.

Our estimates indicate that the total direct cost of the new regulatory regime would amount to between €17m and €20.3m. This would entail a net increase in direct regulatory costs of €5.3m-€8.6m per annum which represents an increase of between 46% and 73% compared with the current regime.

Our estimates of the likely cost assume that the new LSRA including LPDT would have a total staff of 80. If the LSRA were to have 100 staff then the cost of the new regulatory regime would come to €20m-€24m or around twice the cost of the current system. Details are set out in Table 4.5.

Table 4.5: Total Direct Regulatory Cost of LSRA (€M)

(Assuming 100 Staff)

	Scenario A	Scenario B
Payroll Costs	7.5	9.5
Non-Payroll Costs	7.5	9.5
Board Member Fees & Expenses	0.2	0.2
Complaints Committee & LPDT Fees & Expenses	0.4	0.4
Misc. Expenses	0.2	0.2
Total Cost of LSRA and LPDT	15.7	19.8
Solicitors Compensation Fund	4.3	4.3
Total Direct Cost	**20.0**	**24.1**

Note: Scenario A assumes average payroll cost of €74,452 per person in line with 2010 CER figure while scenario B assumes average payroll cost of €94,706 per person in line with ComReg 2009 figure.

In addition to recurring costs, there are also likely to be some once-off transition costs involved in moving to the new regime. For example, it may not be possible to simply switch seamlessly from one regime to the other. It is likely that there will be a number of run-off issues arising from the existing regulatory regime. If one assumes that an estimated one third of the staff whose role is expected to switch from the Law Society to the LSRA would be required to manage run-off activities for the Law Society for up to 12 months after the LSRA was fully operational. This would entail a once off cost of €2.4m.[75] In addition unless the relevant regulatory staff in the Law Society simply move over to the LSRA, the Law Society is likely to incur redundancy costs for the 47 staff whose functions are expected to transfer to the LSRA. Assuming 16 would be required for one year to manage run-off activities this would entail 31 redundancies in year one and 16 in year two of the new regime. We obviously do not have information on the staffing profile of the Law Society and what their statutory redundancy entitlements would amount to but such costs are likely to be significant.[76] There would be other once-off start-up costs associated with the LSRA such as the setting up of a new IT system. We assume that these could cost in the region of €2m. Total once-off costs are estimated at €5m-€7m.

[75] This is based on Law Society estimates that the total cost of regulatory activities to be transferred to the LSRA amounted to €7.3m in 2011.

[76] In 2009 and 2010, the Law Society had aggregate redundancy costs of approximately €350,000, although the number of staff leaving was lower than is expected in this instance.

4.4: Indirect Costs of New Legal Regulator.

The additional indirect costs of the proposed new regulatory regime mainly involve compliance costs. As previously pointed out compliance costs are generally far greater than the actual direct costs of regulation. To the extent that the regulatory regime imposes additional obligations on legal practitioners it will result in increased compliance costs. It is obviously very difficult to arrive at an *ex ante* estimate of the likely total of such costs. It is possible, however, to identify certain provisions in the Bill which are likely to raise compliance costs and to attempt to quantify the effect of those specific measures.

Section 38 of the Bill provides that all legal practitioners that handle clients' money must provide an accountant's certificate stating that the accountant has examined the practitioner's accounts and certifying that they are in compliance with the requirements of the Bill and, in the case of solicitors with the requirements of the Solicitors' Acts 1954 to 2011. It is our understanding that the Law Society already imposes similar requirements on solicitors. Such arrangements should not therefore have any implications for compliance costs in respect of solicitors. Barristers do not currently handle clients' money but the Bill would permit them to do so. Those who choose to do so will therefore become subject to the provisions in Section 38 of the Bill. If all practising barristers were to become involved in handling clients' money, and assuming that accounts' fees came to €500 per barrister this would add €1.1m in compliance costs.

Section 43 provides that the LSRA may, with the consent of the Minister, make regulations requiring legal practitioners to maintain professional indemnity insurance. The regulator may specify the classes of risks for which such insurance is to be maintained and specify the minimum level of such insurance cover. Of course the regulator may deem that existing arrangements in relation to professional indemnity insurance in the legal profession are perfectly adequate. Any decision by the regulator to impose higher requirements would have cost implications. There is an incentive for the regulator to impose higher standards as doing so involves no cost for the regulator and such measures could be portrayed as providing greater protection to consumers. Increasing professional indemnity insurance costs by just €100 per legal

practitioner increases the total cost to the profession by approximately €1m.[77] It should be noted that the Law Society reported that professional indemnity insurance costs for law firms increased by 56% on average in 2010.[78]

4.5: Cost of Competition Authority Proposal.

The Competition Authority proposal involved the creation of a new regulatory agency which would have an oversight role while the two professional bodies would retain responsibility for day to day regulation of the respective professions. Such a model would entail some increase in regulatory costs but would be a less expensive option than the Minister's proposal. Unfortunately, as has been noted, the Authority made no attempt to quantify the likely cost of its proposals. Thus, in order to estimate the likely cost, we need to make a number of assumptions.

It seems reasonable to assume that under this proposal there would be no change in the existing cost of regulatory activities of the two professional bodies. At best there might be some minor savings but for the purposes of this exercise we discount these. Thus the costs of the proposed oversight regulator would involve a net additional cost compared with the present regime. Our estimate of the potential cost of such a body is set out in Table 4.6. We assume a full-time staffing requirement of 15 with a part-time board of five members.

Table 4.6: Estimated Costs of Competition Authority Proposal.

	Scenario A	Scenario B
Payroll Costs	1,116,780	1,420,590
Non-Payroll Costs	1,116,780	1,420,590
Board Member Fees & Expenses	100,000	100,000
Misc. Expenses	70,000	70,000
Total	**2,403,560**	**3,011,180**

Note: Scenario A assumes average payroll cost of €74,452 per person in line with 2009 CER figure while scenario B assumes average payroll cost of €94,706 per person in line with ComReg 2009 figure.

[77] This figure is given for illustrative purposes. The point is that every €100 increase on practitioners' professional indemnity insurance costs amounts to an extra €1m in compliance costs.
[78] Law Society *Annual Report, 2010.*

The estimated cost for such an agency would amount to €2.4m-€3m. This is a net additional cost compared to the current system as the regulatory costs of the two professional bodies would remain unchanged. Thus the annual operating costs of the Competition Authority model would be €2.9m-€5.6m lower per annum that the Minister's LSRA proposal. The once-off transition costs due to run-off activities and redundancies involved in the LSRA proposal would not arise in this instance, although there would be some once-off costs for a new IT system for the new regulatory agency. Thus the Authority proposal is assumed to involve once-off costs of around €1.5m compared with €5m-€7m for the LSRA option. It is also very likely that this option would result in considerable savings on legal costs compared with the LSRA option. An example of a comparable oversight regulator is the Irish Auditing and Accounting Supervisory Body which in 2010 had 13 staff and operating costs of €1.9m.

Such a regime, which retains a degree of self-regulation, is far more likely to take compliance costs into account when drawing up regulations. Thus the indirect costs of such a model are likely to be significantly lower than those associated with the LSRA proposal.

4.6: Impact of the LSRA Proposal

We estimate that the LSRA as proposed in the Legal Services Regulation Bill, 2011, would add somewhere between €5.3m to €8.6m to the annual cost of regulating the legal profession compared with the current system. In addition we estimate once-off transition costs amounting to approximately €5m-€7m in the first year of the new regime. The new regime is also likely to result in a significant increase in compliance costs. The Legal Services Regulation Bill, 2011, provides that the cost of the new regulatory regime will be borne by the legal profession. In reality the additional costs are likely to be passed on to clients in higher legal fees. Thus the immediate impact of the proposals is a likely increase in legal fees.

As was previously pointed out, there is evidence that some barristers at least are having difficulty in paying their membership fees. This number is likely to increase as a result of the increase in regulatory costs arising from the Legal Services Bill and will ultimately result in increased numbers leaving the profession. A reduction in supply will also tend to lead to higher fees.

Analysing the likely impact of the new regime in detail is greatly complicated due to the proposed funding mechanism contained in the Legal Services Regulation Bill, 2011. The Bill, as stated, provides that the cost of non-complaints activities would be met by a levy on the Bar Council and Law Society in proportion to the numbers in each profession. The Bill provides that the Bar Council and Law Society would each pay 10% of the cost of the proposed new complaints scheme with the other 80% to be paid by the two bodies *pro rata* on the basis of the proportion of total costs involving complaints against members of each profession. It is assumed that the two bodies will pass such costs on to their members. The proposed formula for allocating the Bar Council and Law Society shares of the cost of the new regime is extremely bureaucratic and will require detailed recording of all the costs involved in investigating every single complaint.

As previously noted, the Law Society estimated that the cost of its regulatory activities in 2011 amounted to €11.6m. There were 8,575 practising solicitors in 2011 so this works out at €1,353 per practising solicitor. In contrast there were 2,213 barristers in 2011 and the cost of regulation was less than €130,000 which works out at just €58 per barrister.

In order to quantify the impact of the new regime, we have to make some assumptions as to the likely split in the LSRA's estimated operating costs between disciplinary and other activities. We previously estimated that the LSRA's operating costs were likely to be between €12.7m and €16m. If we assume that complaints account for 75% of the total then this gives a figure of €3.2m-€4m for non-complaints activities to be divided between 10,788 legal practitioners. This averages out at €295-€370 for every barrister and solicitor. The Bill provides that the Law Society and the Bar Council would each pay 10% of the cost of the complaints regime. Given our assumptions this would amount to €1m-€1.2m for each organisation. In the case of solicitors this would work out at €111-€140 per head on average. In contrast because there are far fewer barristers, the average cost per barrister comes to €432-€541. Given that there are around 30-40 complaints per annum against barristers and over 1,800 against solicitors, this provision would appear to impose a disproportionate share of the cost of complaints on barristers. Based on these figures we have assumed that complaints against barristers will account for 3% of the total cost of investigations going forward. Given our assumptions, the balance of disciplinary costs would amount to €7.6m-€9.6m of which 97% is due to solicitors and 3% due to barristers. This gives a further average cost per solicitor of €864-€1,084. In the case of barristers the remaining cost

would average out at €104-€130 per head. In addition the Law Society's cost of regulation in 2011 included €4.3m in respect of the Solicitors' Compensation Fund. This figure needs to be included in order to make a like for like comparison between the proposed new regime and the existing system. The Law Society would remain responsible for the Compensation Fund and the cost of this will have to be borne by its members which works out at an average of €501 per practising solicitor.

The average impact on solicitors and barristers is summarised in Table 4.7.

Table 4.7: Average Cost Per Legal Practitioner of the LSRA Proposal.

	Barristers		Solicitors	
	Scenario A	Scenario B	Scenario A	Scenario B
Non-Complaints Activities	295	370	295	370
Each Profession pays 10% of Complaints Costs.	432	541	111	140
Balance of Complaints Costs	104	130	864	1,084
Cost of LSRA and LPDT	830	1,041	1,271	1,594
Solicitors' Compensation Fund			501	501
Total Cost	830	1,041	1,772	2,095
Existing Regime	58	58	1,353	1,353
Net Increase	772	983	419	743

Note: Scenario A assumes average payroll cost of €74,452 per person in line with 2009 CER figure while scenario B assumes average payroll cost of €94,706 per person in line with ComReg 2009 figure.

Based on our assumptions the average additional cost per practitioner of the proposed regime works out at €772-€983 per barrister and €419-743 per solicitor. Again this illustrates that a disproportionate share of the additional cost of the new regime would fall on barristers. We estimated once-off transition costs of €5m-7m. Based on the lower figure the average once-off cost would average out at €185 per barrister and €535 per practising solicitor.[79]

[79] A large proportion of the once-off costs would be borne by the Law Society hence the difference in average cost between practitioners.

Obviously it could be argued that the assumptions underlying such figures are incorrect. In our view our overall estimate for the cost of the proposed LSRA regime seems quite reasonable. It could be argued that the assumed breakdown between complaints and other costs is inaccurate. That would affect the split of costs as between barristers and solicitors. If, for example, complaints costs amounted to less than 75% of the total costs of the regime then the average cost per barrister would be higher and that for solicitors lower than our estimates and vice versa, although it seems unlikely in our view that complaints activities would account for more than 75% of the total. Nor does this affect the overall conclusion that the proposal will result in a significant increase in fees for legal practitioners. If members of one branch pay less than we estimate above, then this is because the members of the other branch will pay more.

In the case of barristers total subscription fees for junior and senior counsel amounted to just over €9m in 2010/11 which averages out at €4,201 per head. Thus the additional direct cost would represent 18-23% of the average 2010/11 Bar subscription fee.[80]

Inevitably any increase in legal practioners' costs as a result of the LSRA are likely to be passed on to consumers in higher legal fees. The Government is likely to use its considerable buyer power to resist any price increase which would mean that the extra cost would have to be borne entirely by private sector clients. As previously pointed out, there is evidence that financial pressures are forcing a growing number of barristers to leave the Bar. Such an increase in costs is likely to add further to the numbers leaving. Such departures will reduce competition which will also lead to higher prices for consumers of legal services. Thus, rather than reduce legal costs, the proposed LSRA is likely to result in higher legal fees to the private sector.

We estimate that the net additional cost of the Competition Authority proposal for an oversight regulator would amount to €2.4-€3m per annum. Assuming in this case that the additional cost was simply divided on a per capita basis between all legal practitioners, this would add €222-€279 to the average fee for all legal practitioners. While not insignificant, the increase in average fees in this case is significantly lower than for the LSRA proposal, particularly in the case of barristers.

[80] We noted earlier that barrister's subscription rates varied widely. Nevertheless, if the additional cost is equivalent to 25% of the average fee, then if it is assigned on a pro rata basis this means all fees would have to go up by 25%. If on the other hand the extra cost is simply applied uniformly then the percentage increase would be higher for those at the lower end of the fee scale.

4.7: Independence of the Legal Profession.

The Competition Authority, in its report, advocated the establishment of an independent legal regulator by which it meant a regulatory agency that was independent of the profession and of Government. The recently appointed Chairperson of the Competition Authority has pointed out that the provisions in the Bill regarding the LSRA "certainly raises questions about its independence".[81] She went on to point out that the Bill provides for a much higher level of Ministerial involvement in the operations of the regulator than in other regulatory agencies where the case for independence of the profession is less important. Such provisions are likely to adversely affect the independence of the legal profession.

The independence of the legal profession raises some very important issues which are beyond the scope of the present report. It seems clear, however, that provisions which limit the independence of the regulator and the profession are inconsistent with the principles of good regulation. While it is not possible to quantify the cost of such provisions, it can safely be said that they are unlikely to yield any benefit to society that could possibly justify such provisions.

4.8: Conclusions.

To date there has been no proper evaluation of the likely cost of the proposed new LSRA nor has there been any RIA carried out on the proposal. The Competition Authority simply argued that the new agency would involve no additional cost even though its proposals involved a regulator which would perform a significantly wider range of functions than the two existing regulatory bodies do at present e.g. in providing consumer information. It is clear that the Legal Services Regulation Bill, 2011 involves a rather complex regulatory regime which goes well beyond that recommended by the Authority.

The Authority's recommendations and the Bill both fail to satisfy a number of the principles of good regulation set out in the Government's Better Regulation White Paper. In particular, the proposal to introduce a new State regulatory agency fails to satisfy the necessity principle. The basis for the Authority's recommendation was that self-regulation would inevitably be abused. It

[81] Goggin, 2011, at note 2, p.16.

is clear that both economic theory and experience in other jurisdictions demonstrate that there are ways of addressing the potential for abuse of self-regulation. Such measures allow society to benefit from a lower cost regulatory regime, while preventing abuses.

The proposal also fails to satisfy the effectiveness and proportionate principles set out in Better Regulation. There is no evidence that establishing a new regulatory regime would lower the cost of legal services nor is there any evidence that it would yield benefits that would outweigh the costs involved.

We estimate that the proposed LSRA would require 80 full-time staff. This is based on the Law Society estimates that it currently has 47 staff whose duties would be transferred to the LSRA. We assume a further six staff would be required to oversee the regulation of the Bar and that the agency would require a further 26 support and administrative staff along with a chief executive.[82] We assume the Law Society will retain responsibility for the Solicitors' Compensation Fund which accounts for €4.3m of its current regulatory costs of €11.6m. This gives a total cost for the new regulatory regime of between €17m and €20.3m per annum which amounts to an increase of between €5.3m and €8.6m compared with the current system. In addition the proposal would entail once off transition costs which we estimate could amount to a further €5m-7m in its first year. It is also likely that the new regime would incur substantially higher legal costs than the present system. It is not possible to quantify the likely increase in legal costs.

The Competition Authority proposed that a new regulatory agency for the legal profession would exercise an oversight role over the existing self-regulatory bodies. Such an option would involve lower costs than the model proposed in the Legal Services Regulation Bill, 2011. On the basis of figures for a number of other regulatory agencies, an agency with a smaller number of part-time members than proposed in the Legal Services Bill and a staff of around 15 would probably cost an additional €2.4-3m per annum. Separating the representative and regulatory roles of the two professional bodies might involve some loss in scale economies, Nevertheless the Competition Authority's proposal is estimated to cost between €2.9m and €5.6m less than the Minister's LSRA proposal. This option is also likely to face lower legal costs than the LSRA proposal while it is unlikely to involve any once-off transition costs. Such a regime is also likely to involve significantly lower compliance costs

[82] This includes provision for support staff for the LPDT.

Several provisions in the Legal Services Regulation Bill, 2011, limit the independence from Government of the proposed regulator and by extension of the legal profession itself. Such provisions are obviously inconsistent with the principles of good regulation and are unlikely to yield any benefit to society that could possibly justify such provisions.

5: CONCLUSIONS.

Following an investigation which was completed in 2006, the Competition Authority recommended that self-regulation of the legal profession should be abolished and that a new State agency should be established to regulate the profession. The MOU between the Government and the ECB/EU/IMF Troika included a commitment by the Government to implement any outstanding recommendations contained in the Authority's report. The Legal Services Bill 2011 provides *inter alia* for the establishment of a new State agency which would be responsible for the regulation of the legal profession. The Bill's proposals go much further than the Competition Authority's recommendations.

The economic literature indicates that regulation may be necessary to deal with cases of market failure. It also recognises, however, that regulatory intervention is often not justified and may also be prone to failure. For this reason it indicates that it is necessary in every case to establish that there is a legitimate justification for regulation and, if so, that the proposed regulation will actually lead to a better outcome than doing nothing.

Legal services are prone to market failure because of the existence of information asymmetries and regulation is generally considered necessary to address this. It is also recognised that self-regulation of professional services may benefit society because it reduces the cost of regulation although there is clearly a risk that self-regulation may lead to abuses and may be operated in ways that put the interests of the profession ahead of the wider public interest.

As part of the Government's Better Regulation initiative all proposals for new regulation are supposed to be subject to a RIA. The Competition Authority failed to carry out a RIA on its proposal for a new regulatory agency for the legal profession, while the Minister for Justice and Equality has confirmed to the Dail that no RIA was carried out prior to the Legal Services Regulation Bill, 2011, which goes beyond the Authority's recommendations, being approved by the Cabinet and published. Thus there has been no proper evaluation of the likely cost of the proposed LSRA to date.

The Competition Authority's recommendations and the Bill both fail to satisfy a number of the principles of good regulation set out in the Government's Better Regulation White Paper. In particular, the LSRA as proposed by the Legal Services Regulation Bill fails to satisfy the necessity principle. The Authority's recommendation was based on the premise that self-regulation would inevitably be abused. It is clear that both economic theory and experience in other jurisdictions demonstrate that there are ways of addressing the potential for abuse of self-regulation. Such measures allow society to benefit from a lower cost regulatory regime, while preventing abuses. An oversight regulator as proposed by the Authority is sufficient to meet this objective.

The LSRA proposal also fails to satisfy the effectiveness and proportionate principles set out in Better Regulation. There is no evidence that establishing a new regulatory regime would lower the cost of legal services nor is there any evidence that it would yield benefits that would outweigh the costs involved. In fact it is likely to increase costs to consumers as it involves higher regulatory costs than the current system.

The LSRA proposed in the Legal Services Regulation Bill, 2011, would have a wide range of functions and responsibilities and would ultimately be responsible for regulating approximately 10,800 legal practitioners divided into almost 4,400 business entities at present. The figure could be far higher depending on the number of employed barristers who might decide to act for their employers. We estimate that the LSRA would require a staff of 80. This is based on an analysis of a number of other regulatory agencies and on the fact that the Law Society estimates that it currently has 47 staff engaged in regulatory activities which would transfer to the LSRA. We estimate that the LSRA would increase direct regulatory costs by between €5.3m and €8.6m per annum at a minimum compared with the present system. The LSRA is also likely to incur significant extra legal costs. It is also likely to entail once-off transition costs, which we estimate at €5m-7m as well as higher compliance costs than the current system.

The net effect is likely to be higher rather than lower costs for consumers of legal services. In addition the increase in subscription costs are likely to result in increased exit from the profession particularly in the case of barristers. This is partly because the provisions in relation

to the allocation of costs of the proposed LSRA will cause barristers costs to increase by more than those of solicitors.

The Competition Authority proposed the retention of the existing self-regulatory scheme with a new regulatory agency which would exercise an oversight role. A more modest budget of €2.4m-3m would appear sufficient for such an agency. Separating regulatory and representative functions, as recommended by the Competition Authority might result in some additional cost but the direct cost of this option would be €2.9m-€5.6m per annum less than for the LSRA. The Authority model is also likely to involve significantly lower compliance costs than the Government's current proposals, while it would also have much lower once off transition costs than the LSRA option.

Several provisions in the Legal Services Regulation Bill, 2011, limit the independence from Government of the proposed regulator and by extension of the legal profession itself. Such provisions are obviously inconsistent with the principles of good regulation and are unlikely to yield any benefit to society that could possibly justify such provisions.