LAWYERS, LEGAL EXECUTIVES AND COMPETING CLAIMS FOR PROFESSIONAL JURISDICTION: A STUDY OF PROFESSIONAL ORGANISATIONS AND OCCUPATIONAL ROLES WITHIN A LEGAL MARKETPLACE IN TRANSITION

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This thesis is dedicated to my grandparents:

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Abstract

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This thesis considers the relationship that solicitors maintain with their auxiliary profession - legal executives, and the strategies the professional associations seek to invoke to enable them to keep abreast of a changing legal marketplace. Recent years have seen considerable changes in the way that legal services are delivered and who delivers them. These shifts have taken place because of pressure from two powerful forces; the state and the market. Socio-legal research in the past has tended to focus on the traditional legal profession (and in particular solicitors), however external changes within any professional jurisdiction (such as legal service delivery) can prompt shifts in that system of professions. This changed situation within contemporary legal practice has presented legal executives with significant opportunities to further their, freshly energised, professional project. This thesis will examine how far ILEX has been able to take advantage of these opportunities and exploit them.

The changes in legal services that have occurred, represent considerable challenges to the vision of a lead profession with strong homogeneity, powerful autonomy over its jurisdiction, a settled and independent relationship with the state and exclusive rights to use its knowledge base. The way in which the Law Society and ILEX respond to these challenges will be important in helping us understand the role of a professional association within an increasingly fluid legal marketplace. Furthermore, the thesis is seeking to address the relevance of the ‘power theories’ to explain the position of a legal profession stripped of many of the traditional strategies available to classic professions.
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Chapter One: Introduction

The legal professions in England and Wales have experienced significant change in recent years. The jurisdictional settlements between the various branches of the legal profession that have given the legal services landscape its familiar shape are in the process of re-negotiation. Old assumptions about professionalism no longer hold true either in legal practice or the rest of society. One key driver behind change in legal services is the government. Another is the market which is placing the traditional professional model under greater pressure than ever before. Behind these drivers is also the falling regard with which the public hold the legal and other professions.

This thesis will explore the way in which two key legal ‘professions’ - solicitors and legal executives - are responding to these changes in legal services. It focuses upon the professional associations, because professional associations have traditionally been accorded a central role in driving forward the collective projects of classic professions such as the law (Larson: 1977: 69-77). The traditional view of the legal profession is that ‘there are effectively only two branches of the profession, solicitors and barristers’ (Benson, 1979: 411). However, another class of workers within legal practice - legal executives - has an increasingly strong claim to be the third branch of the legal profession.

It is necessary to comment on, and clarify the terminology that will be used throughout this thesis. ILEX is the professional body which oversees the education of prospective legal executives and represents their interests. Only Fellows of ILEX are entitled to call themselves legal executives. Fellowship is attained after passing two sets of examinations, and a qualifying period of employment (see further chapter 4). Throughout this thesis, ‘legal executive’ will refer only to Fellows of the Institute. However, the reality is that many non-qualified fee-earners within solicitors’ firms describe themselves as legal executives, thereby denigrating the achievement and professional status of legal executives. This has been a recurrent problem for ILEX, and is compounded by similar inexactitude from the Benson Commission (1979), Sidaway and Punt (1997) and Lord Irvine (1999) among others. The drive to secure
statutory protection for the title ‘legal executive’, has been an ongoing feature of the professional project of legal executives.

The term ‘paralegal’, therefore, refers only to the increasing myriad of unqualified legal workers, who may perform a mixture of some fee-earning and some administrative work. ‘Paralegal’ necessarily covers a wide range of legal workers, including LPC graduates, law graduates, legal secretaries and ‘outdoor clerks’. It is, unsurprisingly, a class viewed with some antipathy amongst the ranks of legal executives. ‘Solicitor’, is in contrast, considerably easier to identify by virtue of its statutory definition within the Solicitors Act 1974.

The focus of this thesis is upon the Institute of Legal Executives (ILEX). The thesis, therefore, is a significant contribution to knowledge about the jurisdictional competition between solicitors and legal executives. Legal executives have been a neglected area of academic study, although Johnstone and Hopson (1967: 399-412) and Abel (1988: 207-210) consider the position of legal executives within more general works on the legal profession. Johnstone and Flood (1982), provide an in-depth study of legal executives and conclude that following successive failures in applications for Royal Charter, ILEX decided to refocus on an essentially commercial project of ‘raising paraprofessional competence’ (1982: 187). Recent years have seen a resurgence of the professional project of legal executives and it is therefore important to understand the reasons for this resurgence and its impact on the provision of legal services. The thesis draws on the analysis of historical records, in-depth interviews with council members and staff of ILEX and the Law Society, supported by analysis of contemporary reports from the professional associations and trade press.

1 It is accepted that the commercial/professional distinction is not unproblematic, indeed the power theorists were keen to stress that the professional project was as much about material gain as it was status gain. However I would argue that the trading companies established by ILEX in this period owed far to commercial imperatives than broader professional aspirations. ILEX secured a stable financial basis for itself as a limited company while it was far less successful in securing professional status. See further the tension between the professional association and the commercial companies in chapter 7.
An assessment of the professional project of legal executives in 2000 is particularly timely because the conditions which Abel identified as leading to a decline of the solicitors' profession (1989), have intensified since his research. The solicitors' profession (as a homogenous class) has lost many of the strategies which the power theorists accorded to a classic profession, following increased pressure from the market and a fractured relationship with the state. This changed situation within contemporary legal practice has presented legal executives with new opportunities to further their freshly energised professional project. This thesis will show how far ILEX has been able to take advantage of these opportunities and exploit them.

Hanlon (1997 and 1999) and Glasser (1990) review some of the changes that Abel (1989) predicts and argue that the extent of occupational fragmentation that has already occurred, calls into question the traditional model of a homogeneous solicitors' profession. Hanlon asks whether it is possible for the Law Society to 'control the disparate groups within the profession' (1997: 822), and this thesis will attempt to assess the extent to which it is able to do just that. Professional associations were central to the development of a collective mobility project (Larson, 1977: 69-77). This thesis will consider the roles that the two professional associations can and do play, and the strategies the professions may invoke, asserting competing claims for professional jurisdiction during a period of great fluidity within the legal marketplace. ILEX and the Law Society are both faced with a number of strategic choices in deciding how as professional associations they should respond to this fluidity. ILEX faces a tension in re-asserting the professional project over the previous commercially driven dynamic within the organisation. Meanwhile, the Law Society has placed a consultation document before the profession and is attempting to reform aspects of its role, particularly its regulatory functions (The Law Society, 2000d). There is considerable doubt over the quality of the relationship that both professional associations have with their membership.

A major theme within the professions literature, is the work of the power theorists (such as Larson, 1977 and Freidson, 1970), which chart the professions' collective
project of market and status gain. Abel (1988) explores the history of the legal profession in England and Wales using Larson’s ‘market control’ model and provides an account of the legal profession in strong control of its market, enjoying high status and good relationships with government. He argues that many of the traditional strategies will soon no longer be available to the legal professions (1989). Clearly Abel’s historical model no longer accurately describes the current strategies of the legal professions (indeed much of the work that has followed offers important insights which confirm many of Abel’s predictions). Surprisingly little has been written to further develop the model in order to understand the contemporary legal professions. Although Paterson (1996) argues that recent changes in legal services suggest that an evolution in legal professionalism is taking place, his work is essentially an alternative vision of the past rather than an explanation of the present. This thesis will, building on its empirical findings, offer some signposts towards a development of a post-power theory of the professions.

While this thesis is concerned with the legal professions, it omits what was historically identified as the ‘senior’ branch of the legal profession - the Bar, and concentrate on the ‘junior’ branch - the solicitors’ profession and the emerging branch - legal executives. This emphasis reflects the changes in the market for legal services that are occurring and the increase in size and influence of the solicitors’ firms as by far the largest productive unit of legal services. The thesis seeks to explore competing claims for professional jurisdiction and it is within solicitors’ firms that many of these claims are being fought out. Whether or not increasing numbers of barristers will join the competition within solicitors’ firms is another story in itself and will be addressed only briefly within this thesis.

Chapters 2 and 3 provide the theoretical framework for this thesis. Chapter 2 considers the professions literature, and draws particular theoretical impetus from the work of Larson (1977) and Abbott (1988). Chapter 3 develops these ideas and looks at the approaches that theorists exploring the legal profession have taken, looking at Abel (1988), but additionally drawing on insights from the work of other writers who
consider the centrality of the professional associations, the exclusivity of lawyers’ knowledge base and jurisdictional competition with other professions. Chapter 4 provides a framework for the discussion in the later chapters, setting out the history and organisational structure of the Law Society and ILEX, before explaining the methodological approach that has been followed.

Chapter 5 discusses in detail the nature of the contemporary changes within legal services. It considers the labour market for legal services, the standardisation of legal knowledge, and the competitive and legislative pressures facing the legal profession. Chapter 6 draws upon archive sources, in the form of minutes of ILEX and Law Society councils together with trade press, to explore the relationship between the two professional associations throughout the history, thereby providing a historical context (and underlying explanation) for the relationship of the two organisations today. The contemporary aspect of the relationship is explored in detail in Chapters 7 and 8, both of which draw on a series of in-depth interviews with ILEX and Law Society council members and staff. The research material is reviewed in Chapter 9, before the conclusions are developed with the construction of some signposts towards a ‘post-power’ theory of the legal professions.
Chapter 2: Theories of the Professions

Introduction

This thesis is concerned with the ‘professional projects’ (Larson, 1977) of solicitors and legal executives, and their different roles in providing legal services. It focuses upon the associations of the two occupations, associations having long being regarded as a key trait of any profession (Millerson, 1964) and central in marshalling the professional project (Larson, 1977). I draw upon wide-ranging theories of the professions ranging from early functionalism to Marxist, Weberian and post-modern interpretations. The thesis as a whole will derive a great deal of theoretical impetus from Magali Larson’s *Rise of the Professionalism* and its later application by Abel (1988) as a tool for analysing the legal profession. Although Abbott emphasises the originality and theoretically distinct nature of his analysis, I do not believe that his framework for analysis is too far removed from those he criticises (such as Larson) and therefore I believe his important insights are compatible with Larson’s work.

Most theorists of the professions, while frequently expending a great deal of energy on searching for analytically tight definitions of ‘professionalism’, are in broad agreement about what they are studying. I will, therefore, follow Abbott and rely on broad definition of what ‘profession’ means (1988: 318). Before doing that however, I will pause briefly to consider some of the other attempts at a definition of profession.

The perennial problem of definition

‘Profession’ and related terms are employed frequently in everyday usage as well as in academic circles. Freidson recognises that the term is a ‘socially valued label’ and consequently many occupational groups strive to attach this label to themselves (1994:19). A key criticism of the earliest theorists of the professions was their prescriptive approach to defining ‘professions’ in terms of specific traits (Johnson, 1972: 23). However, Freidson points out that the difficulty in defining profession:
... is created by attempting to treat profession as if it were a generic rather than a changing historical concept, with particular roots in an industrial nation strongly influenced by Anglo-American institutions. (1994: 16)

The difficulty in ascribing a generic definition to historically specific phenomena is not one that Freidson believes should preclude the search for a definition: ‘We cannot develop theory if we are not certain what we are talking about.’ (1994: 15). He maintains the need for a definition to ensure ‘clarity and precision of a body of literature whose status has been vague and chaotic for too long’ (1994: 28). He offers the following definition of profession in his 1994 collection of essays:

an occupation that controls its own work,¹ organised by a special set of institutions sustained in part by a particular ideology of expertise and service.

(1994: 10)

Despite Freidson’s charge that the literature on the professions has been vague and chaotic without a clear definition, his definition is still strikingly similar to that of many other writers. Perkin, in charting the rise of professional society, describes the professions as occupations which require ‘specialised training and claim expertise beyond the sense of the layman’ (1990: 3). Similarly, Larson recognises that although there are considerable variations among ideal type definitions of professions:

there is substantial agreement about its general dimensions. The cognitive dimension is centred on the body of knowledge and techniques which the professionals apply in their work, and on the training necessary to master such knowledge and skills; the normative dimension covers the service orientation of professionals, and their distinctive ethics, which justify the privilege of self-regulation granted them by society; the evaluative dimension implicitly compares professions to other occupations, underscoring the professions’ singular characteristics of autonomy and prestige. The distinctiveness of the professions appears to be founded on the combination of these general dimensions. These uncommon occupations tend to become ‘real’ communities,

¹ For Freidson it is the autonomy that professions hold over their work that distinguishes them from other occupations (1970: 82).
whose members share a relatively permanent affiliation, an identity, personal commitment, specific interests and general loyalties. (1977: x)

Abbott believes that 'a firm definition of profession is both unnecessary and dangerous; one needs only a definition strong enough to support one's theoretical machinery' and argues that his 'loose definition - professions are somewhat exclusive groups of individuals applying somewhat abstract knowledge to particular cases - works well enough' (1988: 318). Accordingly, I will be using profession as a 'kind of shorthand, not as a closely defined technical term' (McDonald, 1995: 1). Abbott's emphasis upon abstract knowledge, rather than exclusive control, is particularly salient within legal services. It allows us to take account of occupational groups, such as legal executives who do not (as yet) hold exclusive control over their area of abstract knowledge. Larson also focuses, not on the end product of 'professionalism' but on the process of professionalisation: 'how... professions organized themselves to attain market power' (1977: xvi). In trying to understand the relationship between the occupations within the jurisdiction of legal services we need to move the analysis beyond simply the group controlling that jurisdiction. It is the behaviour and nature of these occupations - the process of professionalisation - which is of primary concern.

The trait theories
Although functionalist and structuralist theories differ in emphasis, both can be dealt with for our purposes under the broader heading of 'the trait theories' (McDonald, 1995: 2-4). These theories are well summarised by Johnson (1972: chapter 2). The earliest sociological writing on the professions concerned itself with establishing what was a profession, or as Johnson put it, a 'largely sterile attempt to define what the special "attributes" of a profession are' (1972: 10).

In an attempt to develop an academic framework for this discussion they set out the particular traits that an occupation had to display before it could be categorised as a profession. A good example of this methodology is provided by the work of Carr-Saunders and Wilson (1933). They begin the introduction to their book by reflecting
that although there has recently been an upsurge in interest concerning the professions, there is a lack of ‘informed guidance’ when the professions are discussed (1933: 1). In an attempt to ‘be in a position to examine and evaluate all that is characteristic of professionalism’ (1933: 3, my emphasis), they embark on a survey of, what they term, a variety of ‘vocations’ which are commonly accorded the title of a profession. This survey takes the form of a review of the memoranda and rules of conduct of professional associations, government reports and conversations with unnamed contacts at professional associations.

Following their review of a variety of ‘vocations’ including law, medicine and journalism they conclude that ‘profession’ ‘clearly stands for something’ and ‘that something is a complex set of characteristics’ (1933: 284). These characteristics, displayed to greater and lesser extents by the ‘vocations’ they study, include specialised intellectual training, a sense of responsibility to the client and a professional association guarding against incompetence.

Millerson (1964a) reviews the trait approach to professionalism. After examining the sociological literature of works such as Carr-Saunders and Wilson, he drew out 23 elements of professionalism from a variety of authors. What was particularly noteworthy was the divergence of the definitions that he discovered. Some of the most frequently identified traits were:

- skills based on theoretical knowledge
- the provision of education and training
- professional organisation
- testing the competence of members
- adherence to a professional code of conduct
- altruistic service (that is a public service ideal)

Although Millerson’s treatment of the earlier trait based theories acknowledges the weaknesses of this approach, given the wide diversity of traits it produces, he still constructs a definition of a profession which draws heavily on these theories, albeit employing broader, less exclusive, structural traits of a profession.
It is not only the diversity of the characteristics that emerge from the trait theorists that weakens their claim to provide a sociological account of the professions, but their almost uncritical acceptance of the professions’ own definitions of themselves. As Johnson notes in his critical review of these theories:

There are many similarities between the core elements as perceived by sociologists and the preambles to and contents of professional codes. (1972: 25)

There are some particularly striking examples of this acceptance of professional rhetoric by Carr-Saunders and Wilson:

The attitude of the professional man to his client or to his employer is painstaking and is characterised by an admirable sense of responsibility; it is one of pride in service given rather than of interest in opportunity for personal profit. (1933: 471)

And while they later criticise the professions over their dealings with government over matters of public policy, arguing that there should be more open channels of communication ‘between Knowledge and Power’ (1933: 489), this mild rebuke is tempered by the following:

if this section from now onwards, is more concerned to point out weaknesses than to bestow praise, it should be remembered that nothing that will be said is intended to detract from the [complimentary] judgement already passed. (1933: 489)

This uncritical acceptance of the professional rhetoric is explained by the high regard in which these early theorists held the professions. They saw the professions as forces of stability and for the good:

They engender modes of life, habits of thought and standards of judgement which render them centres of resistance to crude forces which threaten steady and peaceful evolution. But the service which they render in so doing is not sufficiently appreciated… The family, the church, the universities and certain associations of great intellectuals and above all the great professions, stand like
rocks against which the waves raised by these forces beat in vain. (Carr-Saunders and Wilson, 1933: 497)²

Another writer in this tradition quoted in Johnson’s review echoes the high praise of Carr-Saunders and Wilson:

Our professional institutions are... an important stabilizing factor in our whole society and through their international associations they provide an important channel of communication with the intellectual leaders of other countries, thereby helping to maintain world order. (Lynn, 1963: 653)

The trait theorists’ approach led only to the categorisation of professions, including some occupations and excluding others from their analysis, on the basis of them being more or less professional (Goode, 1957). Carr-Saunders and Wilson (1933) conceptualised an image of ‘vocations’ with the ‘acknowledged professions... at the centre’ with other groups who did not display all the characteristics of a profession standing around them. In another example Etzioni (1969) sets out to classify occupations as either professions or ‘semi-professions’. These approaches offer no real analysis of the professions, for that we have to look at later theorists, who all heavily criticised the early trait approaches.

Johnson, professionalism and occupational control

The fresh insight that Johnson (1972) brings to the sociology of the professions is established in his opening chapters in which he heavily criticises the previous work in the field. His discussion of professionalism and professionalisation is, as seen above, particularly critical of the contribution from the trait theorists, for “‘trait theory’ because of its atheoretical character, too easily falls into the error of accepting the professionals’ own definition of themselves’ (1972: 25). Following this penetrating criticism, he develops a fresh approach to the study of ‘those occupations conventionally regarded as professions’ (1972: 45). His central thesis is that ‘a

² Carr-Saunders and Wilson (1933: 497-8) were particularly concerned about the ‘delicate mechanisms’ of the ‘newer civilisation of America’ and the success of ‘crude dogmatic formula’ in Russia, which apparently only succeeded because of the absence of ‘those stable elements’ - ‘the great professions’.
profession is not, then, an occupation, but a means of controlling an occupation’ (1972: 45).

He argues that in any society where specialised occupational skills have emerged, paradoxically this creates both social and economic dependence between the producer and consumer of the goods and services and social distance. The creation of social distance between the producer (with the specialised occupational skills) and the consumer (without the specialised occupational skills) creates a structure of uncertainty between them, which produces the tension in the relationship (1972: 41). This uncertainty was described by Jamous and Peloille as ‘indeterminancy’ - that aspect of a profession’s work ‘that is difficult to evaluate in terms of unanimously accepted measurable and objective criteria’ (1970: 113). The ‘social distance’ is also reinforced by the ‘tacit knowledge’ employed by professions which is ‘relatively inaccessible...less subject to direct criticism’ and gives professions ‘an aura of mystery’ (Wilensky, 1964: 149). Johnson argues that ‘power relationships will determine whether the uncertainty is reduced at the expense of producer and consumer’ (1972: 41). A far cry from ‘an admirable sense of responsibility’ and ‘pride in service...rather than... personal profit’ (Carr-Saunders and Wilson, 1933: 471).

Johnson argues that those occupations with particularly acute tensions have given rise to a number of institutional forms of control, professionalism being but one of these forms of institutional control. Therefore:

> Professionalism, then becomes redefined as a peculiar type of occupational control, rather than an expression of the inherent nature of particular occupations. (1972: 45)

Johnson sets out what he describes as a typology of occupational control: *Collegiate* (or in fact professionalism revisited), *Patronage* and *Mediation*. Although there are some similarities between the forms of occupational control he discusses, his treatment of Collegiate occupational control is revealing in that he builds upon his criticisms of the trait theorists and focuses upon the controlling power that the producer holds over the consumer. Johnson’s work, therefore, takes a central and
pioneering place within the tradition of the power theorists (McDonald, 1995: 4 and Hall, 1983: 11).

Under Collegiate control (of which he identifies two varieties: Professionalism and Guild control) it is the producer who defines the needs of the consumer and the manner in which they are catered for - it is a form of institutional control based upon occupational authority (Johnson, 1972: 51). Johnson argues that these forms of control only arise in certain circumstances, thereby giving rise to common characteristics in organisations and practice when those circumstances are present. Some of these common circumstances and characteristics are a heterogeneous client group, a fiduciary one-to-one producer-client relationship and a homogenous occupational community with a low level of specialisation (1972: 51-4).

In contrast with the trait theorists, who saw the professions combining a high level of specialised intellectual training with a responsible service to their clients, Johnson argues that 'the myth of equal competence is effective in generating public trust in a system in which members of the community judge the competence of one another' (1972: 55). The cultural and social homogeneity of an occupation and its autonomous disciplinary procedures are all characteristics of a form of occupational control which, Johnson believes leaves power firmly in the hands of the producers rather than the consumers. The key to understanding professionalism lies in the power relationships not in the presence of a service ethic or sense of responsibility amongst the practitioners.

The other forms of occupational control that Johnson discusses are Patronage and Mediation and he argues that they are equally applicable to occupations commonly seen as professions. Patronage occurs in its fullest form 'where consumers have the capacity to define their own needs and the manner in which they are catered for' (Johnson, 1972: 65). He cites accountancy as an example of an occupation that has been under large measures of corporate control and suggests that under Patronage a 'fragmented, hierarchical, locally oriented practitioner group' is usually present (1972:
In contrast to Professionalism, under Patronage, the emphasis is upon superior graded competence rather than equal competence across the entire occupation.

There are many similarities among Johnson's various forms of occupation control. For example, one client group that does offer strong occupational control is clearly the State. The State as a Mediator between producer and client is, however, discussed specifically and in more detail in Johnson's third form of occupational control - Mediation. Mediation arises where the state attempts to remove from the producer and the consumer the authority to determine the content and subjects of practice, perhaps by becoming the effective employer of all producers (1972: 77). The uncertainty between the producer and client is mediated by reducing the opportunity for exploitation on both sides (1972: 78).

McDonald notes that Johnson's approach of seeing professionalism as a form of occupational control never found particular favour with sociologists of the professions - particularly in the United States and suggests that this is because his 'typology is perhaps more intellectually interesting than it is empirically relevant' (1995: 5-6). Furthermore in his discussion of the various forms of occupational control Johnson spends a great deal of time discussing the characteristics that occupations display under each form of control - a process not too dissimilar from the work of the trait theorists. Indeed Freidson cautions against using power as a 'single, truly explanatory trait or characteristic' (1983: 32). Where Johnson does move away from the trait theorists and offer a real advancement in the sociology of the professions, is in placing power at the forefront of the tensions between producer and consumer in his discussion of professionalism. It is this 'power' approach that has proven the most fruitful in the study of professions.

Freidson, Power and Professional Autonomy

Freidson is another important writer in the 'power' tradition. McDonald notes that 'power' is often used as a convenient shorthand for all post-functionalists including neo-Weberians such as Larson (1995: 5). While acknowledging that such a broad brush label can ignore the subtleties of Larson's more theoretically developed work,
there is little doubting the considerable impetus she drew from Freidson (Larson, 1977: xii-xiii). Clear links can therefore be made with Freidson’s work, which focuses on the concept of professional autonomy and the control that emerges from this power, with the later work of Abbott and Larson. The professional control identified by Freidson (1970), does not exist as another form of occupational control as in the terms addressed by Johnson, but rather stands as specific power that professions have come to wield over clients and society at large.

Freidson asserts that ‘the only truly important and uniform criterion for distinguishing professions from other occupations is the fact of autonomy - a position of legitimate control over work’ (1970: 82). He sees a profession’s strength as flowing from its ability to control and regulate its own work. While acknowledging that much of the profession’s claim to have this expert knowledge flows from establishing an abstract and esoteric body of technical knowledge, it is his theory about the role played by this knowledge which sets Freidson’s work clearly within the canon of the power theorists.

The profession, according to Freidson has been granted its autonomy - ‘it has been given the right to control its own work’ (1970: 71). Freidson’s work can therefore be seen as a development of the work of Everett Hughes, and in particular Hughes’ conceptualisation of an occupation’s ‘licence and mandate’ (1981: 78-80). While all occupations have either an implicit or explicit licence to carry out certain activities distinct from those of others, those occupations with a sense of community deriving from their shared work experience may also claim a mandate to influence the technical content of their work and nature of its delivery. It is however, the professions, which Hughes sees as holding the fullest scope of a mandate - ‘the right to control its own work’. The privileged status held by professions is an inducement not to exploit the specialised knowledge they hold.

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3 Interestingly, Freidson places a glowing testament to the value of Larson’s work on the dust jacket of the hardback edition, ‘This is the most important book on the professions in years...It will serve as an essential scholarly resource for some time to come.’

4 NB. This reference refers to a reprint of Hughes’ (1958) work. See bibliography.
Freidson considers that there must be a reason for the distinction emerging between the professions and other occupations. Why were some occupations rather than others granted this autonomy and the right to regulate their own affairs? The trait theories might have suggested that it was because the professions were the only occupations to demonstrate an altruistic ideal or a clear knowledge base with regulated training and discipline regimes. Freidson, however, sees issues such as the technical knowledge base and training schemes as a means to justify fundamentally political claims:

A profession attains and maintains its position by virtue of protection and patronage of some of the elite segment of society which has been persuaded that there is some special virtue in its work. (1970: 72)

He continues to make connections between power, profession and class: 'The work of the chosen occupation is unlikely to have been singled out if it did not represent or express some of the established values of the civilisation' (1970: 73). This is what Freidson means when he talks of a 'qualified autonomy' from the state (1970: 23). The professions certainly possess considerable control in terms of regulating the nature and content of their own work. However, Freidson suggests that the ability to do this flows from an elite segment of society, and the profession’s autonomy ‘may be allowed to lapse or even taken away…if a profession’s work comes to have little relationship to the knowledge and values of its society’ (1970: 73). For Freidson, a systematic body of theory or strong training scheme merely exist as rhetorical devices to convince the elite that the occupation deserves the award of professional status and the autonomy from control that that brings. Indeed he dismissively says of a profession’s cognitive base: ‘If there is no systematic body of theory, it is created for the purpose of being able to say that there is’ (1970: 80). He is equally scathing of the service ideal of professions and of their code of ethics: ‘there appears to be no reliable information which actually demonstrates that a service orientation is in fact strong and widespread among professionals’ (1970: 81); and ‘a code of ethics may be seen as one of the many methods an occupation may use to induce a belief in the ethicality of its members without necessarily bearing directly on individual ethicality’ (1970: 187).

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5 Larson (1977) also conceptualised the professions as a powerful class legitimating the dominant ideology in society.
Having established the links between the elite and the occupation in the emergence of professional status, Freidson is concerned with how we view the expert in our society. If many of the traditionally important characteristics of the professions are simply rhetorical, then there are strong arguments for reassessing the autonomy that professions hold over their work (1970: 345). Freidson examines the medical profession in detail in the light of his theory, but considers that the criticism he makes is equally applicable to all professions (not even absenting himself and fellow university teachers):

I believe that expertise is more and more in danger of being used as a mask for privilege and power rather than, as it claims, as a mode of advancing the public interest. (1970: 337)

His 1970 work, *The Profession of Medicine*, provides empirical support for his arguments over how professional autonomy works in practice. 6

He found a divergence between the knowledge contained within the profession’s theoretical base and that actually employed in practice (1970: 342-3). Freidson argues that the professional has more influence than experts do generally, because the gap between theory and practice is ‘obscured and mystified by the aura of modern science and the ideology of ethicality’ (1970: 337). In his analysis of the content of medical work, Freidson concludes that ‘an essential component of what is said to be knowledge, is the designation of illness which, ... is in and of itself evaluative and moral rather than technical in character’ (1970: 340). Jamous and Peloille also identify this indeterminate nature of an occupation’s ‘professional’ activities, not governed by ‘cognitive rationality’. An important way in which this indetermination is controlled and then emphasised is in ‘the institutions and the organisations which turn out these “professionals”’ (Jamous and Peloille, 1970: 114). The indeterminate ‘professional knowledge’ becomes ‘a means of defence, exclusiveness, self-perpetuation’ (Jamous and Peloille, 1970: 116). Occupations that challenge such

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6 His study has its roots in the Chicago school of sociology, which Dingwall notes, ‘had a central belief in the importance of first hand experience of the social world (1983: 6). The latter chapters of Freidson’s work are explicitly concerned with the social policy implications of his first hand experience.
dominant ‘professions’ without this level of indeterminancy are, therefore, subordinated as technicians (Jamous and Peloille, 1970: 117). Wilensky also notes the importance of ‘tacit’ knowledge in ensuring a profession’s ‘aura of mystery’ (1964: 149).

Freidson’s conclusion ‘that the outcome of my analysis suggests that the claim of special expertise is not sustained in the activity of [medical practice]’ (1970: 345) is a dichotomy recognised by other writers, for example Abbott (1988: 68) and Larson (1977: 44-5). However, they discuss the dichotomy in terms of how the professions shield the public from the workplace image by using their standardised knowledge base as a vital mechanism of professional socialisation (see further below). Freidson focuses on the public and social policy implications that this represents for the clients and society as a whole. When medical professionals were not making decisions based upon their expert cognitive base, Freidson found that they were making judgements that a lay person would have been able to make had they had not been excluded from doing so by the maintenance of professional autonomy (1970: 382). Freidson argues for a re-assessment of the profession’s ‘mandate’, for ‘professional “knowledge” cannot therefore properly be a guide for social policy if it is the creation of the profession itself, expressing the commitments and perception of special occupational class, rather than that of the public as a whole’ (1970: 350).

Like Johnson and Larson, Freidson represents a view of the professions that looks beyond the claims of the professions to self-regulate, to act in the public interest, in short, to accord to the ideal of a classic profession. Freidson’s theory attempts to determine the links between the professions and the elite in securing professional autonomy and importantly goes on to consider the consequences of that professional autonomy. There is, however, a danger in this work that Freidson doesn’t pay sufficient attention to the real knowledge base of the profession and the role that that may play in securing professional autonomy. Abbott, in particular, focuses to a far greater degree on the profession’s cognitive base, seeing it as the means by which a
profession's work jurisdiction is won and lost. For Larson too, the standardisation of knowledge is a prerequisite of professionalisation.

Illich's (1977) critique of the professions goes even further than Freidson in his concern over professional power. In this essay he expands upon the notion of professional knowledge and the way that the language and skills of certain occupations have transcended something that can be learnt by simply anyone and now requires induction. He uses the metaphors of religion, both traditional religion and black magic to describe the professions' role in society. He sees the professional as the priest of the secular age and furthermore sees the professions being accorded the deference that was due to the clergy (that first classic profession) in the Middle Ages. For Illich the professions wield power over the rest of the population both in terms of the influence that they hold and in the problems caused by the population's acceptance of solutions to their problems flowing from treatments dictated by professionals. Illich perhaps over-emphasises the malevolent dominance of contemporary professions within society. However many of the points he makes about professional language and its power are still salient if perhaps overstated.

Larson and *The Rise of Professionalism*

Larson, falling broadly in the 'power' tradition, for whom a profession's standardised knowledge base was an integral part of professionalisation, draws upon Marxist and Weberian theories in order to place the professions within the class system in her seminal 1977 work *The Rise of Professionalism*. Freidson saw the professions as a fairly autonomous group wielding considerable power in society but particularly within their own working environments. In her treatment of professions Larson places professions in a wider context, within the layers of stratification which emerged in society following 'the great transformation' of the nineteenth century, explicitly challenging Mannheim's conceptualisation of professions as 'detached from a given class' (1977: xiv).

Like Freidson, Larson invokes the concept of a professional project. She argues that this undertaking achieves far more tangible results, in terms of understanding the
development of professions, rather than beginning from a vague definition of professional status. Friedson follows Hughes in attempting to understand what professions actually do to achieve their privileged position – their project of professionalisation. Larson sees professionalisation ‘as the process by which producers of special services sought to constitute and control a market for their expertise’ and ‘as a collective assertion of special social status and as a collective process of upward social mobility’ (1977: xvi-ii). The dual projects of collective market control and status gain are central to Larson’s conceptualisation of professions. For Larson, the characteristics of professions, as identified by Carr-Saunders and Wilson, Millerson and the other trait theorists, can be viewed with a twofold perspective. The characteristics must not be viewed as simply structural elements of professions for that would ‘incorporate uncritically much of the profession’s appearances and ideological self-perceptions’ (1977: 9), but they can also be regarded as ‘specific resource elements’ for the professional project (1977: 208). The traditional claims of the professions to disinterestedness and public service ‘deny the invidious implications of monopoly and are used to stave off attacks’ (Larson, 1977: 52). While these characteristics may appear in all professions, their importance will vary according to different historical contexts (1977: 208).

Her work is Anglo-American in its focus and historically specific in that she argues that the professions were able to emerge as a result of specific conditions generated by the industrial revolutions and growth of capitalism in the nineteenth century. She argues that the professions were able to emerge because of two key factors in modern society, the growth of scientific knowledge (and a growth in the recognition of its superior legitimacy) and the existence of the free market. Larson reviews the conditions that are most favourable to the professional project of market control (1977: 47-9). These conditions are similar to those Johnson noted were conducive to the use of professionalism as a form of occupational control and include, heterogeneous clientele, un-competitive market (although a competitive market will drive a profession to monopolise) and an affinity with the dominant ideology. The central role of the state in legitimising the professional project is continually emphasised throughout Larson’s work, because ‘only the state, as the supreme
legitimizing and enforcing institution could sanction the modern profession's monopolistic claims of superiority for their commodities' (Larson, 1977: 15).

The standardisation of the professions' knowledge base is an important pre-requisite to the professionalisation of an occupation (Larson, 1977: 40-9). The cognitive structure has to be standardised 'in order to clearly differentiate their identity and connect them in the minds of consumers' (1977: 14). The standardisation of the profession's knowledge gives the profession the stamp of scientific legitimacy. The rationality of the profession's knowledge, also suggests to society that the profession's knowledge is objective, in that it is used on a formalised basis, transcending the personal preferences of the practitioners (1977: 40). The codified knowledge base additionally has democratic appeal, because it appears accessible to all. In her case study of the legal profession, Larson argues that the rationalisation of the knowledge base brings specific advantages for lawyers. The appearance of scientific standardisation reinforces the claims of objectivity for law and those who employ its cognitive structure. Furthermore, the association with scientific reasoning brings mutual beneficial with the emergent capitalist class:

In modern capitalist societies, legal formalization appears to establish an affinity of orientation between those who direct the economy according to principles of functional rationality and the class of lawmen. (Larson, 1977: 168)7

The legal profession's close relationship with the state is also reinforced by the standardisation of its cognitive structure. The legal profession is inherently conservative in resisting major social and legal change because 'its expertise and livelihood directly depend on the stability and legitimacy of a given institutional and legal framework' (1977: 168; see also Rueschmeyer, 1973). Furthermore, because the profession's knowledge base articulates 'transcendent' values, such as justice, fairness, legality and so on, which are backed by the state, the profession's objectivity only appears 'neutral' as long as the state itself appears to be neutral (Larson, 1977: 169).

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7 Cain also closely identifies the class interests of lawyers with those of capital (1994: 40-1).
However, like Jamous and Peloille (1970), Larson recognises the tension between the standardised aspects of the profession's knowledge and those aspects which cannot be reduced to 'technical' parts (1977: 41). Larson argues that the standardisation of professional knowledge does not secure this 'distinct and recognisable' identity with consumers directly, but is achieved through the training of the producers (1977: 40). Although the professional product itself may be relatively intangible, the profession's control comes through its production of producers — the education of the next generation of the profession.

There is an inherent difficulty posed with the standardisation of a profession's knowledge. Once the knowledge is standardised it no longer appears as a 'special skill' that sets the professions apart from the laity (once again, see the tension recognised by Jamous and Peloille, 1970: 111-19). As the codification of the profession's knowledge develops, formal training in universities supersedes the older apprenticeship model of training (1977: 44). These institutions increasingly become the main centres for the production of producers, and produce a professional membership who share the same standardised cognitive base, and are socialised to accept the existing model of internal professional stratification. Larson concludes that 'the standardization allowed by a common and clearly defined basis of training... is in fact, the main support of a professional subculture' (1977: 45, Larson's emphasis).

The professions claim to control the market and enjoy higher status was 'on a new basis, that of competence, defined and measured by a [standardised] system of testing... Elite status was no longer claimed on the basis of identification with the extraneous stratification criteria of 'aristocratic' elites' (Larson: 1977: 70). However the educational institutions, sharing the cognitive base with the practising profession, tightly control the numbers and type of people who are allowed access to the profession's standardised knowledge (1977: 52), despite the rhetoric of equal access to education (1977: 136). Indeed it was ideologically necessary that access to

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8 Perkin, also describes professional society as being 'one in which people find their place according to trained expertise and the service they provide rather than the possession or lack of inherited wealth or acquired capital' (1990: 359). However he also notes that many of the first professionals were younger sons of landed gentry.
education should appear open (1977: 51). The institutions where the producers are produced, equip the profession with standardised objective knowledge, appear accessible to all, and serve as vital process of socialisation for the future members of the profession (1977: 51).

The standardisation of professional knowledge is clearly an integral aspect of the professional project, however the professions needed the support of the state to sanction the control of the education institutions and back the profession’s monopoly of service provision. Larson notes that in the initial stages of professionalisation, the professions were too small to coerce the state and therefore relied upon ideological persuasions. The support of the state is vital because:

once state-backed monopoly is obtained, it represented the ultimate sanction of market control by a group of professional ‘producers’ and a proved means, thereafter of protecting themselves against ‘undue’ interference from the state.

(Larson, 1977: 53)

She argues that the professions invoke many of the historically identified anti-market professional characteristics such as the ‘service ideal’ and the ‘professional community’ in order to justify their monopolistic position. The professions argue that their innate altruism, safeguarding society’s interests as well as their own clients, will mitigate against the power asymmetries created by the monopolistic project (1977: 56-63):

Anti-market and anti-capitalist principles were incorporated in the profession’s task of organizing for a market because they were elements which supported social credit and the public’s belief in professional ethicality. (Larson, 1977: 63)

Interestingly, Larson notes that professions still had to make appeals to ‘gentlemanly’ values of ethicality in the past, before the professions’ new values of competency became accepted.

Professionalisation is a project for status gain as much as it was one of market control and Larson describes this aspect of a professional project as a ‘collective mobility project’ (1977: 66-79). It is important to note that many of the devices employed for
the construction and control of the market also served the drive towards ‘respectability and social division’, and were mutually supportive (Larson, 1977: 66). Larson argues that the analysis of the means of the collective mobility project and the sources from which it drew support, clarify ‘the connections of this path of new middle class mobility with the system of stratification that takes shape during “the great transformation”’ (1977: 68-9). Although the aims of the mobility project are fundamentally individualistic – that is greater social prestige for individual practitioners, the means by which these aims are achieved are collective.

For Marx, collectivities (or classes) were the appropriate units of analysis of the class system, and for Weber, status derived from communities no matter how amorphous those communities were. For Larson, analysis of social prestige therefore begins with the analysis of the collective unit. Professions are too loose a group, with too diverse a set of interests to form ‘a community of fate’. However, they are spurred to organise collectively, because from the point of view of stratification their raison d’être is the collective credit rating which they pass on to their membership. This collective credit rating is determined by the success of the profession’s organisational efforts (Larson, 1977: 69). A general indication of a profession’s organisational strength is the emergence of a professional association, recognised as the representative voice of the profession, both internally by the profession and externally by the state. The recognition of the state is vital because only the state has the appearance of ‘neutrality necessary to guarantee the “objectively” superior competence of a category of professionals’ (Larson, 1977: 70). An even more significant indication of organisational strength is the institutionalisation of the passage from training to practice – that is, most practitioners are produced by the legitimately accredited educational institutions. Once more Larson emphasises the importance of a shared cognitive structure as a socialisation mechanism for the profession. Any hierarchy within the profession becomes intelligible within the profession, and furthermore the links within the collective, between the elites and non-elites are structurally supported by the overlap between the project of individual social mobility and organisational ranking (Larson, 1977: 72).
Larson then considers why it is that the disparate individual interests converge collectively. Fundamentally a collective project always serves the individual self-interest of the participants. A profession’s collective mobility project must then be able to promise higher or more desirable rewards than could be achieved outside the bounds of the collective. Because professionalisation is also a project for market control the prospect of higher economic rewards is clearly an integral part of the appeal. However, Larson notes that it is difficult to establish when it becomes ‘profitable’ for individual practitioners to decide that they should submit themselves to the requirements of professional control and price-fixing, and, therefore, it is hard to explain collectivisation in purely economic terms (1977: 74). From a stratification perspective, Larson argues that the collective professional project was appealing because it promised to free members from the controls of the old elites, in substituting new criteria of status and control for the old systems of stratification. Larson notes that an upgrading project implies both inclusion and exclusion from the project (a theme developed by Witz, 1992, see below), and considers which groups are likely to be excluded or included. Typically she sees the old professional groups entrenched in elite system of stratification as most resistant to the project, although their presence may influence the mobility project of the reformers. Conversely the ‘modern’ professions emphasising competence and accessibility have nothing to fear, and many of the more marginal professionals see the collective mobility project as an opportunity to put social distance between themselves and their ‘unprofessional’ competitors (Larson, 1977: 74). The symbiotic relationship of the status and market projects is central to Larson’s conceptualisation of the professions and is well summarised in the following passage:

The double nature of the professional project intertwines market and status orientations and both tend towards monopoly – monopoly of opportunities for income in a market of services on one hand, and monopoly of status in an emerging hierarchy on the other. The institutional locus in which both monopolizing tendencies converge is the educational system. (1977: 79)

\[9\] See Burrage’s analysis of the status project of the solicitors heavily coloured by the relationship with the Bar (1996: 51).
I would add to this summary, the state’s role in sanctioning the monopoly of status and opportunity and in legitimating the accrediting role of the educational institutions.

Larson argues that simply because professional rhetoric now bases hierarchy on merit, this does not absolve the professions from the inequalities throughout society. She maintains that there are fundamental inequalities arising out of the educational systems to which the professions are closely associated. Furthermore, she argues that the professions are too monopolistically powerful (and yet too closely reliant on the state for this monopoly) to claim that they can act outside of class interests. She asserts that:

even the purest and worthiest of professional behaviors cannot help legitimising inequality and elitism by their factual demonstration that knowledge is beneficent power. (1977: 243)

Larson asserts that professionals are ‘in general, only agents of power’ spreading the dominant bourgeois ideology of superior knowledge legitimising undemocratic and monopolistic action. Ultimately, Larson conceptualises professions as a powerful class legitimising the dominant ideology in society. Commentators have noted the Marxian tones of the later section of the book (McDonald, 1995: 12) and Larson herself explicitly draws upon Marx’s treatment of commodity in Capital (1977: 203). This aspect of her work is something to which she returned in a later piece considered below (Larson, 1990). Nevertheless, it is this analysis of professions which sees market control and social mobility not simply as facts of social life but as a result of the professional project, achieved through standardisation of the knowledge and collective mobility which represents a considerable re-appraisal of how we view professions.

Abbott’s system of the professions

The central argument of Abbott’s thesis is well summarised in the following passage.

The professions... make up an interdependent system. In this system, each profession has its activities under various kinds of jurisdiction. Sometimes it has full control, sometimes control subordinate to another group. Jurisdictional boundaries are perpetually in dispute, both in local practice and in national
claims. It is the history of jurisdictional disputes that is the real, the determining
history of the professions. (Abbott, 1988: 2)

Although he acknowledges his debt to Freidson and Larson (1988: xv), Abbott
continually emphasises the originality of his theoretical position and its
incompatibility with the power tradition. He argues that previous theorists, both
functionalist/structuralist and those falling broadly within the ‘power’ tradition, have
focused on professionalisation as a ‘fixed sequence of events or functions’ (1988: 6).
His focus is upon inter-professional battles, and he asserts that in previous writing
there had been ‘no attempt to see these inter-professional battles as central aspects of

He sums up:

I have derived the strengths and weakness of jurisdiction from the various acts
and structures of professional work from the abstraction of professional
knowledge and from the degree of differentiation. None of this allows for the
professional power discussed by Freidson, Larson and others. (1988: 134)

He argues, for example, that over a long period of time no profession delivering poor
services would be able to stand indefinitely against competent outsiders making
jurisdictional claims on that profession (1988: 135).

However, many of the strategies that Abbott identifies the professions using in
pursuing their claims for jurisdiction, are similar to those noted by the power theorists.
For example, in his discussion of a profession’s claim of jurisdiction to the ‘public
audience’ he notes that obligations such as a lawyer’s duty to see that justice is done
are, in practice, often ‘merely paraded in the preambles to codes of professional
ethics’ (1988: 60). Elsewhere Abbott notes the powerful legitimating role that a
profession’s body of academic knowledge can play in its claim for jurisdiction,
despite the fact that ‘the theoretical education in a dominant profession is often
irrelevant to practice’ (1988: 68). These points serve to illustrate that the theoretical

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10 However Jamous and Peloille discuss jurisdictional competition, asserting that within professional
ideology, ‘the most strategic and profitable dividing line to detect is… that which is intended to
distinguish between those who claim their authority from an expertise and a definition which are
recognized but threatened, and those who hold the potentialities of innovation and rationalisation’
distance between *The System of the Professions* and the ‘power’ theorists is not as
great as Abbott asserts.

Abbott (1988) claims that his conceptualisation of professions operating in a system
offers a new departure from studies of isolated professions or ‘new class’ theories
such as Larson’s. Despite Abbott’s assertion, Larson did not deny inter-professional
battles within the professions:

Moreover, although professionalization may be seen as ‘a power struggle, on a
societal level’, it is a struggle waged within the same class, against rival
occupations rather than across class lines. (Larson, 1977: 157)

Despite these criticisms, Abbott does offer important insights that can be used
alongside the work of Larson and Freidson. His discussion of the profession’s
cognitive base in terms of securing, maintaining and defending the exclusive control
of work, internal stratification and inter-professional relationships, are a valuable
addition to our understanding of the professions and offer particular guidance to this
thesis’ exploration of the relationship between solicitors and legal executives.

This ‘system of professions’ is an interdependent chain of professional occupations.
The professions occupying this system hold what Abbott describes as a ‘jurisdiction’.
‘Jurisdiction’ is the link between a profession and its work and is ‘more-or-less an
exclusive claim’ (Abbott, 1988: 34). Abbott sees the story of the professions as being
a competition between the various professions to hold these jurisdictions against
challenges from others - areas of work in which the profession’s expert knowledge is
accepted and dominant.11 The tasks of professions are human problems amenable to
expert service. Abbott argues that these tasks have both objective and subjective
qualities, over which the professions try to assert rights to exclusive abstract
knowledge.

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11 Perkin notes that this competition, a ‘mutual disdain between the different professions, [together
with] individual arrogance [and] collective condescension towards the laity’ has been the ‘Achilles’
Heel’ of the professions preventing them achieving the class based homogeneity of the old ruling
classes (1990: 390).
The objective properties of a task area tend to be relatively fixed and therefore provide an obstacle to a profession’s claims that a competitor’s work falls within its own knowledge base (Abbott, 1988: 36). But, because of the difficulty of such abstraction, a profession is, therefore, always vulnerable to objective changes in its central task area (Abbott, 1988: 39). On the other hand, the subjective qualities of a task may be altered by the activities of other professions. Fundamentally, ‘the subjective qualities of a task arise in the current construction of the problem by the profession currently holding the jurisdiction of that task’ (1988: 40). Therefore, Abbott asserts that his analysis of the subjective qualities of jurisdictions is to analyse the essence of professional work itself.12

The three parts of the subjective qualities are Diagnosis (that is the claims to classify a problem), Inference (the claims to reason about it) and Treatment (the claims to take action on a problem). The varying ways in which a profession constructs these parts of the subjective qualities will determine its vulnerability to a jurisdictional challenge from another occupation. For example, too much inference and the claim of expert knowledge will become too esoteric to be sustained, and too little inference can lead to routinisation. Either way, jurisdiction will be weakened (1988: 51). Of course Jamous and Peloille also identified the tension implicit in a profession’s ‘attempt at rationality and emphasizing of indetermination… two contradictory endeavours in which within the act of codification, there exist[s]… the possibility of takeover by others’ (1970: 117).

The other key aspect of a profession’s cognitive base, ignored by early writers who ‘viewed the knowledge system as equivalent to the profession’ (Abbott, 1988: 52) is the academic knowledge used by the profession. While diagnosis, treatment and inference are seen as part of professional practice, they are tied directly to a body of academic knowledge that formalises the skills the profession uses. The body of academic knowledge that forms the basis of professional work is distinct from theGenre Set

12 An interesting example of the professional competition to define the subjective qualities of a task area is seen in the recent debate between anaesthetists and surgeons over the point at which death occurs. Anaesthetists are keen to use general anaesthetic to prevent ‘pain’ during organ donation. However, if medically defined ‘brain stem death’ has occurred, the surgeons assert that there is no need for anaesthetic. ‘Transplant row over pain rule’ The Guardian (19th August 2000: 1).
academic knowledge accomplishes three tasks: legitimation of the profession’s work, research and instruction and in each case, once again, it ‘shapes the vulnerability of professional jurisdiction to outside interference’ (Abbott, 1988: 56).

However in order for a profession to claim jurisdiction, it needs to go further than simply perform particular tasks and have a rational abstract knowledge base behind it. Abbott notes that:

- to perform skilled acts and justify them cognitively is not yet to hold jurisdiction. In claiming jurisdiction a profession asks society to recognise its cognitive structure through exclusive rights. (1988: 59)

It is the constant competition to secure, maintain and defend these exclusive rights to deliver the expert service that Abbott sees as underpinning the system of the professions. The professions make their claims for jurisdiction within three different arenas: public, legal and workplace. Jurisdictions confirmed by law may be more lasting than one simply won through public opinion, and the ways in which jurisdiction is claimed in the workplace may differ again, but the three are all important arenas within which the professions make their claims for jurisdiction.

Abbott argues that jurisdictional boundaries are particularly blurred within the workplace and consequently there is a ‘profound difference between the two somewhat formal arenas of jurisdictional claims, legal and public and the informal arena, the workplace’ (1988: 66). The professions in seeking to maintain their jurisdictional control must therefore spend time reconciling these dichotomous models.

Professions holding full jurisdictional control are the usual models of what a ‘profession’ is, such as Freidson’s ‘professional autonomy’ (Abbott, 1988: 70). Abbott, however, considers the occasions when professions may secure something less than a full jurisdiction, something, he argues, Larson omits (1988: 6). He describes five types of settlement. A full jurisdictional settlement is the goal of every profession and most closely mirrors ‘professional autonomy’. Within the full settlement, the dominant profession would have full and complete control over that jurisdiction and would normally be a formally organised group (Abbott, 1988: 70).
The other settlements are those which fall short of a full settlement, the most common being a subordinate jurisdiction. Often a subordinate settlement will have been created following an unsuccessful claim for a full settlement as in the case of nursing (1988: 72). This conceptualisation has particular salience for legal practice, where we see legal executives and paralegals operating as subordinate workers to the solicitors’ profession.

The other settlements Abbott identifies are: division of labour (with other professions); intellectual jurisdiction whereby a profession retains control of the knowledge base but allows other professions to practice in the area on an unrestricted basis. A further still weaker jurisdiction is an advisory jurisdiction whereby notwithstanding the full jurisdiction held by another profession, the profession seeks ‘a legitimate right to interpret, buffer, or partially modify actions another takes within its own full jurisdiction.’ (1988: 75). Abbott sees the relationship that the clergy have with medicine and psychiatry as an example of such a jurisdiction.

Since jurisdictions are exclusive (even within the cases of the various settlements seen above, one profession will hold an exclusive claim), Abbott argues that the professions constitute an interdependent system with a move by one inevitably affecting the others (1988: 86). This system of the profession can, for Abbott, be subject to both external and internal changes. These changes sufficiently alter the conditions within the system of the professions to allow challenges to and defences of jurisdictions to occur. External changes may create or close jurisdictions for task areas, which necessarily have an impact upon the system of professions (Abbott, 1988: 91). Established professions may attempt to expand their jurisdiction to take account of the new opportunity, in doing so they may leave their established jurisdiction weaker and more susceptible to attack from other professions.

While internal sources of system change do not create or abolish whole jurisdictions in the same way that an external change can, they can have the effect of strengthening or weakening particular jurisdictions - which could of course ultimately have the same result (Abbott, 1988: 96). Many of these internal changes are stimulated by the
profession's use of its cognitive base. Under Abbott's system, 'knowledge is the currency of competition' (1988: 102). The contests for jurisdiction have both cognitive and social-structural elements, but it is the cognitive elements that dominate the contests (Abbott, 1988: 98). The importance of knowledge is seen in relation to its applicability to the work of which the profession currently has control or would like to move to a position of control. For example, an attacking move made by a secure profession could show some new task to be 'reducible' in principle, to one of the attackers' already secure jurisdictions (1988: 98).

Abstract knowledge is for Abbott, therefore, central to any effective understanding of a profession (1988: 102). A highly abstracted knowledge base will allow the profession to extend its influence into wider jurisdiction. However, the inherent danger in this strategy, is that if the profession takes the abstraction and attempts to stretch itself over several increasingly unrelated jurisdictions, then it may begin to lose legitimacy in the eyes of those in whichever arena it is making its jurisdiction claim. Again the profession's problem is to maintain optimum abstraction (1988: 102). Wilensky also identifies this tension in a profession's technical base:

If the technical base of an occupation consists of a vocabulary that sounds familiar to everyone... or if the base is scientific, but so narrow that it can be learned as a set of rules by most people, then the occupation will have difficulty claiming a monopoly of skill or even a roughly exclusive jurisdiction. In short, there may be an optimal base for professional practice. (1964: 148)

Throughout Abbott's discussion of the system of professions, he refers to professions as homogeneous organisations. Indeed the existence of a homogeneous body is often seen by many writers as a key characteristic for a profession which will then allow it to develop the autonomy required to further its professional project. Abbott also acknowledges the importance of the structure of a profession, noting that the more strongly organised a profession, the more effective its claim to jurisdiction (1988: 82). However, he also acknowledges this can be a simplistic route of analysis given the often very disparate interests and status within the professions. He sees this internal stratification as incredibly important for a number of levels. Essentially the existence
of internal stratification within the profession enables a profession to more effectively maintain its jurisdictional position within the system of the professions. It allows for flexibility and efficiency in its workforce and enables the promulgation of the rhetoric of professional unity to the public to continue, which further cements its position. As Abbott writes ‘Internal Stratification also provides the basic mechanism that keeps the public picture of professional life separate from the workplace one’ (1988: 134). The workplace operates as both the arena for conflict within the profession itself and also the wider inter-professional challenges.

The position of knowledge in the workplace as the cognitive basis for the profession’s jurisdiction is of the utmost importance in Abbott’s work. Through both external and internal changes affecting the nature and structure of this knowledge the profession’s control of its jurisdiction can be altered. However, Abbott’s central emphasis on competition within an interdependent system as the defining explanation of the professions has been criticised. Dimaggio points out that Abbott simply ‘brackets the question of how professions achieve collectively rationality’ thereby glossing over Larson’s theoretical complexity (1989: 535) and Johnson argues that Abbott’s contribution and insight is ‘weakened by the obsession with competition as the overriding dynamic’ (1989: 413). Abbott’s claim for originality is perhaps also less than he imagines, Dimaggio argues that his theory ‘complements… rather than supplants’ those he criticises (1989: 535; see also Abel and Lewis, 1995: 10). Just as Abbott says of the power theorists, ‘the existence of dominant power and of system conservatism is not to be doubted, the issue is of their degree’ (1988: 135), it could equally be argued that the existence of a system of the professions, focusing on knowledge in the workplace, is not to be doubted, the issue is of its degree. To be fair to Abbott he does acknowledge that the choice between his equilibrating model and the power model involves a choice between ‘things to be explained and things to be ignored’. In choosing his own theoretical model Abbott chooses to ‘forgo the explanatory power lodged in each of the other models’ (1988: 135). The work of Larson and Abbott are clearly not mutually exclusive and I will draw upon both to provide a theoretical framework for the professional projects of lawyers and legal executives and their competing claims for jurisdiction.
Subordinate professions

As Abbott notes, most theoretical works on the professions fail to consider those groups which hold something less than full jurisdiction (1988: 6). Indeed for Freidson, it was the existence of autonomy over work that was the defining characteristic of professions (1970: 82) - an autonomy that, by definition, was not held by subordinate groups. Although there has not been much in the way of thorough consideration of subordinate groups, there is enough in more general works to allow us to start to piece together a theoretical framework.

Etzioni’s focus on The Semi-Professions (1969) is simply another example of the categorisation process exemplified by the trait theorists. His work reviews traits, rather than providing a more incisive analysis of the strategies and motives of those involved in these ‘semi-professions’. Carr-Saunders and Wilson omit from their study ‘a large number of vocations which claim professional status’, arguing that those vocations offer little to their project of uncovering the characteristics of professions (1933: 3). Carr-Saunders and Wilson, do however spend some time on a review of nursing and midwifery (1933: 117-125). Yet, in common with the rest of the book, the discussion does nothing more than identify characteristics. It concludes by noting only that nursing has professionalised, developing from a religious calling, with higher training facilitating greater co-operation with doctors, albeit under ultimate medical control (1933: 121).

Johnson, in his consideration of professionalism as a form of occupational control, identifies:

the proliferation of subordinate professional grades [as] a possible consequence of specialisation where the generalists are sufficiently powerful to maintain control of the professional-client relationship. (1972: 58)

He notes that auxiliary professions, such as occupational therapists and chiropodists are subordinated by the fact that doctors retain the initial diagnosis of the problem. The treatment is auxiliary to the diagnosis. Johnson therefore conceptualises subordinate groups as indicative of the power in the hands of producers under the
form of occupational control described as professionalism. While he argues that a better understanding of these power relationships might have helped those who struggled to categorise 'the semi-professions', he does not elaborate on the position of these subordinates. He does not, for example, consider whether they could ever invoke professionalism as a means of claiming greater occupational control.

In her discussion of the standardisation of knowledge as a keystone of the professional project, Larson considers the routinisation of aspects of professional knowledge, and suggests that:

the elites gradually delegate the most standardised areas of practice and research to subordinate groups, which may be added 'at the bottom' of the professional hierarchy. (1977: 43)

Larson notes that the classic example of such subordination is nursing. However, she also notes that within architecture there has been a reluctance to delegate increasing routinised drafting work to fully trained junior architects. There is a move to delegate such work to a subordinate technician grade while keeping the two occupations distinct (1977: 260). Later in her analysis as she attempts to situate professions along reconstituted class lines, Larson argues that the increased specialisation and greater subordination to management amongst technician grades has seen them emerge as the 'new working class'. But she also notes that these subordinate groups are disinclined to associate and act together as trade unions because of a continued deference to professional ideology (1977: 234).

Abbott, as might be expect from his criticism of previous writers (1988: 6, and above), does spend a little more time discussing the position of subordinate groups, although he later concedes that 'subordinate professions are in some senses, contradictions in terms' (1988: 73). For Abbott, subordination is a jurisdictional settlement less than a full settlement (1988: 71). He suggests that subordination often arises following an unsuccessful attempt to sub-divide an existing jurisdiction and gives nursing as a classic example (see also Abel-Smith, 1960 and Dingwall et.al., 1988). Abbott notes that the profession envisaged by Florence Nightingale was one of 'administrative and custodial' parity with the medical profession, but it failed to
achieve equal division partly because of the stance of the medical profession and partly because of a lack of recruits (1988: 71).

Attempts at sub-division can occur following work place assimilation, although Abbott suggests that more frequently today subordinate groups are often directly created as a result of a division of labour, without contest (1988: 72). Like Johnson and Larson, Abbott notes the advantages that subordinate groups can bring to the profession holding full jurisdiction. An important factor is that subordination settles the public and legal relations between incumbent and subordinate at the outset:

Subordination, then, is an explicit settlement between formal professional groups. It is an inherently uneasy settlement, partly because it is undercut by workplace assimilation and partly because subordinates become absolutely necessary to successful practice by superordinates. (Abbott, 1988: 72)

Interestingly, as part of the continuous maintenance of the subordinate groups, some of the public/legal messages are also subtly emphasised in the more complicated workplace arena. The exclusionary clarity of the public/legal image is normally only applied to subordinates. Therefore doctors, for example, tend to invoke their clear public relations with everyone, whereas nurses on the other hand tend to emphasise their formal distinction from their subordinates, while highlighting the knowledge and skills they share with doctors. ‘Public clarity applies below, workplace assimilation applies above’ (Abbott, 1988: 67). These trends are mirrored by the occupational closure strategies invoked by subordinate groups and their dominant groups (Witz, 1992: 44-50).

Subordination, Professions and Patriarchy

Witz identifies the occupational closure strategies available for any professional project as ‘exclusionary, inclusionary, demarcationary and dual closure’ (1992: 44). The dominant group employs exclusionary and demarcationary strategies, and the subordinate social or occupational group may invoke inclusionary and dual closure strategies. Although Witz utilises this model to consider the gendered dimensions of occupational closure (which will be considered below), this model is of more general
application, when considering the strategies available to incumbent groups and their subordinates.

The distinction between exclusionary and demarcationary strategies lies in the dominance an occupation may hold either of its own task area or adjacent occupations. Exclusionary strategies can be invoked by the dominant group aiming for 'intra-occupational control over the internals of access' to that dominant group, whereas demarcationary strategies aim for 'inter-occupational control over the affairs of related or adjacent occupations in a division of labour' (Witz, 1988: 44). Conversely, 'inclusionary and dual closure strategies describe the different countervailing responses of groups who are subject to either exclusion or demarcation' (Witz: 1992: 48). Inclusionary strategies occur within an intra-occupational context as excluded groups seek entry to positions within an occupation. Dual closure allows us to see subordinate occupational groups, not only challenging the demarcation of the dominant group, but also invoking exclusionary and closures strategies to support their professional project. There are clear links with the workplace strategies discussed by Abbott above (1988: 67).

Witz discusses these strategies within a specifically gendered context. She notes that gendered means of exclusion have been invoked by dominant professions, preventing women from taking their place within professions, serving 'to create women as a class of “ineligibles”' (1992: 46). Gendered strategies of demarcationary control are 'concerned with the creation and control of boundaries between gendered occupations in a division of labour' (Witz, 1992: 47). Under these strategies the dominant profession ring-fences women within a related but distinct occupation and serves to subordinate them to the dominant (male) occupation. The introduction of a gendered strategy of demarcationary closure allows us to consider inter-professional relationships - particularly between superordinate and subordinate occupations, as 'crucially mediated by patriarchal power relations' (Witz, 1992: 48). Gendered strategies of demarcationary closure are particularly salient in the case of law. The

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13 Witz (1992: 47) acknowledges that demarcation refers to similar strategies, described by Larkin as 'occupational imperialism' (1983: 15).
dominant male paradigm within the solicitors profession is carefully analysed by Sommerlad (1994 and with Sanderson, 1998; and by Skordaki, 1996). The gendered aspects of the relationship between the lead and auxiliary occupations of solicitors and legal executives are increasingly important as the legal executives profession is feminised (numerically at least). It has changed from a predominantly male occupation (Johnstone and Hopson, 1967: 402) to one in which women make up 72% of the membership of ILEX (ILEX Membership Survey, 2000, see further chapter 5 and conclusion).

Witz argues that the relationship between professions and patriarchy has been neglected in conventional sociological literature (1992: 1). While accepting that there has been considerable sociological debate about the value of ‘patriarchy’ as a theoretical tool, she defines it as:

- a societal-wide system of gender relations of male dominance and female subordination...[and] the ways in which male power is institutionalised within different sites of social relations in society. (Witz, 1992: 11)

Witz argues that ‘profession’ is a gendered notion, and conventional paradigms of profession ignore the fact they concern ‘professional projects of class-privileged male actors at a particular point in history’ (1992: 39). Witz sets out to explore the gendered aspects of the occupational closure strategies of the professions and additionally the overlooked histories of female professional projects. She achieves this with a perceptive analysis of the case study of the medical division of labour in Part II of her book (1992: 73-210).

Witz identifies the case of medical professionalisation as a classic example of exclusionary closure (1992: 73-103). However, she also asserts that:

- [the] exclusion of women from the practice of medicine was an important plank of professional closure in modern medicine and one that is understated in mainstream analyses of medical professionalisation. (1992: 193)

She argues that this exclusion of women as an integral part of the professionalisation of medicine was achieved through gendered collectivist criteria within the institutions.
of civil society. These gendered institutions, including British universities and medical corporations made up the portals of entry to the medical register (established under the Medical (Registration) Act 1858), which served to exclude women from the profession despite silence on this matter in the statute. Witz goes on to discuss the often ignored female professional projects of women seeking to entry to the profession, initially through the use of creditionalist inclusionary tactics seen, for example, in the struggle of women students to study and receive medical degrees from Edinburgh University (1992: 89). Ultimately, in noting the relative successes women achieved when targeting the state, Witz concludes that it was civil society ‘within which male power was more effectively institutionalised and organised and where it was more resilient to the usurpationary claims of women’ (1992: 195).

Witz further explores the gendered aspects of professional dominance and occupational demarcation within medicine, nursing and midwifery. One of the ways in which she identifies the operation of boundary demarcation, was through the division of labour around the discursive constructs of ‘normal’ labour (which became the province of midwives) and ‘abnormal’ labour (which remained the domain of medicine) (1992: 198). She further notes the varying support of different sectors of doctors for the midwife’s professional project can be better understood from a gender perspective.

The concept of a dual closure strategy is invoked to analyse the female professional project of the campaign for nurses registration led by Mrs Bedford-Fenwick. Nightingale’s vision, established the discourse of nursing as a ‘gendered discourse which placed the unique qualities of the woman-as-nurse at the centre of this discourse’ (Witz, 1992: 142). This strongly associated the qualities of a good nurse with the qualities of femininity (1992: 142), and while it was successful in terms of securing the matron considerable autonomy within the hospital and the clear identification of a distinctively female occupation, it did little to challenge the patriarchal nature of the medical division of labour.
Mrs Bedford-Fenwick’s campaign for nurses’ registration contained both strongly usurpationary and exclusionary aspects in seeking to challenge existing controls over nursing, while restricting and regulating access to the ranks of nurses (1992: 144). Witz argues, however, that despite the passing of the Nurses Registration Act 1915, the professional project of nurses was ultimately unsuccessful. Occupational control was not in the hands of nursing (1992: 166), and it remained constrained ‘within a state-profession relation within which they were the weaker partner… [and in] the inter-professional relationship between doctors and nurses’ (1992: 165).

Our understanding of professional projects is given greater sophistication by Witz’ work, for it builds on previous theories and suggests that ‘one force for cohesion or basis for collective action has been gendered solidarity’ (1992: 206). Witz also highlights the power of ‘gendered discursive strategies’ within histories of professional projects. It is to the power of discourse in the professions, to which we now turn (1992: 203).

Larson revisited: Knowledge and the Professions

It is possible to see Larson (1990) as a response to Abel and Lewis’ (1989) exhortation to ‘study what professions do’.14 In her essay, Larson examines the professions through reference to Foucault’s ideas, to assess ‘the larger and more important theme of the construction and social consequences of expert knowledge’ (1990: 25). She returns once again to one of the key themes of her 1977 work - the importance of a homogenised and standardised knowledge base for the professionalisation project in order to lend it a degree of objective legitimacy. She reiterates the links she sees with the educational establishments, the professions and the elite in society:

The organisation of compulsory and hierarchical systems of public education strengthens the meritocratic justification of inequality with all the force of institutional objectivity. (1990: 31)

14 Abel (1995) noted that Abbott (1988) also went some way to meeting this challenge with his approach.
The institutional objectivity and standardised knowledge base is something that Foucault has described in his consideration of the way in which discourses have increasingly attempted to secure legitimacy through scientific objectivity (Larson, 1990: 32). Importantly for Foucault was the suggestion that within these various forms of discourse, in addition to asserting that they were speaking some form of immutable truth, there was also a process of internal regulation of the discourse, procedures which Larson described as controlling, classifying and ordering the production of the discourse (1990: 33).

Larson argues 'that the control of knowledge always ultimately depends upon controlling the subjects who know' (1990: 32). Links are made with the construction of professional knowledge discourses and the educational institutions through which the professionals are ordered, drawing additionally upon Bourdieu's notion of 'symbolic capital' (Larson, 1990: 34). A theoretical connection can also be made with Bourdieu and Wacquant's discussion of Bourdieu's theories about dominated groups within social fields (such as the 'juridical field' Bourdieu, 1987). They emphasise the structural aspects of domination within a social field. Bourdieu argues that 'the dominated always contribute to their own domination', not because of 'a deliberate or conscious concession to the brute force of managers, men, whites and professors [or solicitors?]’ (Bourdieu and Wacquant, 1992: 24), but rather because the properties of a social field, for example the power relations 'circumscribe the choices of actors within' (Sommerlad, 1999: 321). Those operating within a particular social field employing the discourse, for example of their employers, would find their choices (in terms of rejecting the domination) circumscribed by the properties of that social field.

Larson argues that the link between higher education and the professions has become a way of 'constituting expertise' (1990: 36), so that it is clear to the lay public that there exist specially denoted people possessing superior expertise to them. Larson's particular concern is in seeing professions as a necessary part of a theory of a state in casting the professions as 'a material link between the state and the deployment of specialised knowledge in the civil society' (Larson, 1990: 44). This builds upon
themes raised in the concluding chapters of *The Rise of Professionalism*, however the earlier consideration of the profession's knowledge base internally regulating those who do *know*, may lead to fresh assumptions about professional work.

Conclusion

This thesis will draw particularly upon the work of Larson (1977) in understanding the professions, focusing as it does on a standardised knowledge base and market control. The development of this work within the legal context by Abel (1988) will be considered further in the following chapter. The strategies identified by the various theorists, including for example the importance of a professional association in marshalling and progressing the collective mobility project will underpin the discussion of the professional projects of solicitors and legal executives, and their inter-professional relationship will be particularly illuminated by Abbott's analysis (1988). The work of Larson and Abbott provides this thesis with a theoretical framework through which to study the jurisdictional competition of solicitors and legal executives. The importance that both theorists accord to a standardised knowledge base is central to our understanding of the limited professionalisation project of legal executives. The *gendered* nature of the projects emphasised by Witz (1992) cannot be ignored, particularly in the light of the career paths of legal executives, being 'women [who] start in law offices as secretaries and later are promoted to positions as legal executives' (Johnstone and Flood, 1982: 176). The work (such as it is) on the subordinate professions within law will be considered in the following chapter.
Chapter 3: Lawyers, legal professionalism and legal knowledge

Introduction

A number of key themes emerge from the classical literature on the professions which provide a theoretical framework for our understanding of the changing relationships between solicitors and legal executives within a shifting legal services marketplace, namely:

- The centrality of the professional associations, as a key feature of a profession, and in marshalling the collective mobility project as described by the power theorists
- The professions’ claim and maintenance of an exclusive knowledge base, vis à vis both other occupational groups and the wider society
- The professions’ claims to act in the public interest either as a trait of a profession or as a strategy through which to maintain autonomy from state control for example through self-regulation
- The professions’ close relationship with the state/status quo

Our understanding of the legal professions (particularly in the common law world) has been hugely influenced by the seminal work of Richard Abel: The Legal Profession in England and Wales (1988) and the three volume comparative and theoretical work edited by Abel and Lewis, Lawyers in Society (1988 and 1989). Abel’s work drew heavily upon the power theory of Larson (1977) and the approach taken has been labelled the ‘market control thesis’ (Paterson, 1996: 139). While a ‘power’ critique of the legal professions has largely become the orthodoxy of writing on the legal professions, this thesis does have its critics; both Berends (1992) and Paterson (1996) criticise what they see as the thesis’ simplicity.

This chapter will continue to explore the themes identified in Chapter 2 and will consider the ways in which scholars have sought, from a variety of perspectives, to

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1 Berends’ principal criticism of Abel’s work (particularly the three-volume collection, Abel 1988b and 1989b) is his belief that it lacks sociological rigour.
understand the roles that the legal profession play in society. In conclusion, the chapter will consider how writers have sought to reconcile the changing conditions in legal practice, such as the growth of a global legal market, with the orthodoxy of the power theory.

Abel’s market control thesis

Abel (1988) builds directly on the conclusions and arguments of Larson’s ideas and uses the theory to provide an explanation for the rise of the English legal profession.2 His thesis sets out how the English legal professions came to occupy their centrality within society and how the strategies that they invoked in the past now point to the profession facing turmoil in the future (Abel, 1989). This turmoil, as predicted by Abel (1988: 308 and 1989: 285), stems from his argument that the legal profession is a historically specific social phenomenon: ‘that found its clearest expression in the last half of the nineteenth century and the first half of the twentieth century’ (Abel, 1988: 308).3 The environment which the legal professions found so conducive to their strategies for market control no longer exists, thereby leaving the profession with a potentially catastrophic balancing act to perform on the ‘tightrope stretched between market and state’ (Abel, 1989: 285).

Abel’s conceptualisation of the legal profession and the strategies it invoked is best summarised in his own words:

In their classical forms, independent producers served individual consumers while acting collectively to improve the ethics and ensure the competence of their peers. Professions persuade the State to protect them from market forces by arguing that commercialism is inconsistent with their noble calling. At the same time professions invoke market imperatives to resist state control, insisting

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2 He follows the Benson Commission (1979) in conceiving the English legal profession in terms of the two traditional branches - barristers and solicitors. He does however consider the position of legal executives, in his discussion of the productive unit (the law firm) of the profession (Abel, 1988: 207-210).

3 See also Perkin (1990) on the rise of the professions generally and their subsequent centrality within society.
that they must preserve their ‘independence’ to serve their clients loyally. (1989: 285)  

In his 1988 work, Abel, explores the rise of barristers and solicitors, predominantly through the use of quantitative material in the form of statistical records. It is worth reviewing his discussion of the strategies that these two professions invoked to secure their ‘enclave of relative autonomy [from market and state]’ (Abel, 1989: 321), in order to understand why he believes that the historically specific environment within which the professions thrived is now under threat.

Although Abel discusses the histories and structures of barristers and solicitors, acknowledging the proximity and frequent rivalry between the two legal professions (see also Abbott, 1988), this thesis is principally concerned with the competing claims for professional jurisdiction between solicitors and legal executives. Therefore we will concentrate on Abel’s work on the solicitors’ profession.

An important aspect of the solicitors’ professional project was the control of the supply of solicitors through the imposition of minimum entry requirements (1988: 139-164), such as secondary education, undergraduate education and most significantly the requirement of articles (or apprenticeship). The nature and the development of the entry requirements identified by Abel suggests that they were not wholly concerned with providing a meritocratic evaluation of the competence of prospective solicitors.  

Abel, however, accepts that (particularly for solicitors) there was some link between the entry requirements and practice: ‘I am arguing not that entry requirements were irrelevant to practice (for then they would be too hard to justify) only that they cannot be understood entirely in such instrumentalist terms’ (1988: 286). He concedes that the entry requirements were not simply a means of ensuring social homogeneity, but argues that this was a major role they performed.

4 Clearly there are strong parallels with this conceptualisation of the professions with those adopted by Freidson (1970) and Larson (1977).

5 Sugarman provides archive evidence from The Law Times (1854) on the strategy behind the entry requirements employed by the solicitors’ profession, including compulsory examinations comprising ‘those branches of learning in which a gentleman is usually educated - Latin and Greek... Translation of Virgil and Homer’... ‘as a remedy for the influx into the Profession of persons of a lower class.’ (1996: 108-9)
Abel draws three conclusions from his research. Firstly, the legal profession consciously sought to limit entry to the profession. Secondly, that there were only loose connections between entry requirements and what was required in practice. Thirdly and finally, that entry barriers clearly did limit the number of practitioners. The operation of the entry barriers had two important effects, both central to the objectives of a profession project: material and status gain. By limiting the numbers of suppliers of legal advice, in the face of increasing demand for their services, they were able to charge monopoly level fees for their services, free from excessive competition. However they also enjoyed status as the elite minority providers of expert services:

When the professional project is at its height and the profession enjoys significant control over the production of and by producers, it secures material gain and status, by consumers, who pay monopoly rents. (Abel, 1988: 298)

However the control of the number of the solicitors entering the profession also affected its social composition.

The entry requirements of the profession produced explicit and implicit exclusions. For example women were prevented from entering the profession until 1919 and non-UK citizens until 1974. However there was also a considerable class (and race) bias, initially produced by the imposition of the requirements of articles, which then remained as the universities assumed greater importance as ‘gatekeepers’ to the profession. The social homogeneity of the profession was further cemented by a stable age demographic within the profession produced by the rigidity of the other entry requirements. Abel’s exploration of the sociography of the solicitors’ profession (1988: 169-176) shows that white, middle-aged, middle class men dominated the profession. This social homogeneity would assist the profession in its collective mobility project in pursuit of material and status gain (Larson, 1977: 66), and would also have an immediate benefit in preserving an image of the profession as a

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6 See also Freidson’s (1970) work on the medical profession.

7 Despite the turmoil in the profession predicted by Abel (1989), and the far greater sea changes discussed in later changes, the social composition of the legal profession appears to be remarkably persistent. See chapter 5.
gentlemanly institution, which significantly reflected the status quo within society and the state.

Abel also detects strong homogeneity in the nature of solicitors' work. He notes that the work remained constant over the last century and a half, concentrating primarily on conveyancing and litigation (1988: 218). Work homogeneity is important because it gives the profession shared interests and shared client groups, thus further consolidating the collective mobility project. This homogeneity was further underlined by the traditional early twentieth century structure of the law firm with most practitioners operating either individually or in small partnerships. The homogeneity of a profession can also be protected through internal stratification, maintaining an external image of homogeneity, while subordinating members of the profession within the workplace (Abbott, 1988: 119). Even as the ability to control the supply of producers faltered with the growth of undergraduate legal education, the facade of solicitors' homogeneity was preserved by the allocation of the new solicitors (primarily women) into specific (and subordinate) positions within the profession. The relative absence of women from both partnership and the Law Society Council underlines the control of the profession by men (Abel, 1988: 172-6).

Abel also identifies the ways in which the solicitors' profession has been able to restrict competition both internally and externally. Solicitors (as opposed to barristers) relied heavily on state support for the preservation of their monopolies, particularly the conveyancing monopoly, whereby it was an offence for anyone other than solicitors to undertake conveyancing work. In addition to defending their jurisdictions externally, competition was also restricted internally, for example the undercutting of fees was proscribed by Law Society in 1934 (Abel, 1988: 193-6). Price-fixing preserved material gains by preventing excessively pernicious price competition but also served to take account of the fact that 'even capitalist societies display considerable ambivalence about the explicit pursuit of material gain' (Abel, 1988: 293). This helped increase the status of the solicitors' profession and consolidated their claims that commercial pressures would not deflect from their loyal
service to the client and to justice. Abel identifies the way in which the profession restricted competition through price fixing in conveyancing work and the long prohibition on advertising for legal services. Even when advertisements about services did occur, for example alerting the public to the legal aid scheme, the advertising campaign was conducted on a profession wide basis rather than by individual firms (Zander, 1978: 43-6).

The homogeneity that the control of the supply of producers ensured, and the distaste for competition, allowed the profession to secure considerable autonomy from state control. This autonomy was evidenced in the form of the many restrictive practices and monopolies that the profession enjoyed but also in the form of self-regulation, as opposed to state regulation of the profession’s discipline. Self-regulation was gradually won from the Courts to ensure that solicitors were eventually in a position to judge other solicitors on disciplinary matters. Solicitors argued that it was in their interests to oversee the maintenance of high standards of competence within their own profession, and due to the specialised nature of the legal knowledge, solicitors had to adjudicate matters of discipline (rather than the courts, drawn from the rival branch - the Bar). These arguments were pleaded on the basis of efficacy and efficiency (Abel, 1988: 249). However, the true motive behind the Law Society’s bid to self-regulate is perhaps inherent within the assurance given by Benjamin Greene, President in 1888, that ‘any accused solicitor, will... come before a tribunal composed of members of his own profession, to whom, if at all, he should be able to justify himself’ (cited in Abel, 1988: 249). Abel notes that the promise that solicitors would look after their own was ‘amply fulfilled’ with 73% of the 2178 complaints the disciplinary committee heard between 1889 and 1913 being dismissed (1988: 250). The ability to self-regulate was a valuable prize for the profession, not only in terms of the market power it allowed, but also in terms of the status attained.

Abel (1988 and 1988b) provides a richly detailed account of the strategies solicitors invoked to insulate themselves from market forces. However, his account is firmly couched within his identification of the rise of the legal professions as a historically
specific phenomena. His argument, particularly in the concluding chapter of his 1988 book and 1989 article, ultimately points towards the decline of professionalism and/or the transformation of the legal profession as it has been historically understood.

He argues that the traditional strategies employed by the legal profession no longer work as effectively as they once did. Abel notes that the expansion of higher education during the 1970s and 1980s meant that the profession lost the ability to control entry into the profession (1989: 286-291). The universities emerged as the new gatekeepers to the profession, with the law degree operating as a significant first step towards a career in the profession. With the loss of this control, the homogeneity of the profession became less stable with women achieving the biggest successes in altering the demographic balance of the profession (Cole, 2000: 2). However, despite the loss of the gatekeeper role, the profession retained considerable control of legal education, by largely determining the content of the courses students must pass to attain a ‘qualifying’ law degree to gain exemption from the first stage of professional training.

The insulation from market forces which the legal profession has historically enjoyed, has come under increasing attack throughout the 1980s, with many of the attacks stimulated by the laissez-faire ideology of the Thatcher Government. Abel argues that this increased competition will stimulate its own momentum, leading to significant and irresistible changes within a profession that has for long periods been able to resist major change. He suggests that these competitive pressures are likely to concentrate the productive units towards oligopoly with a small number of firms dominating large sectors of the market. Such an outcome would clearly weaken the homogeneity of the profession, with fragmentation developing between different firm sizes with different client interests, with fewer ties binding them together as a profession.

Other pressures which Abel identifies support his conclusions that the traditional autonomy and homogeneity of the profession of the legal profession is fracturing. He
charts the lures and pitfalls of demand creation. By this he refers to producers’ stimulation of demand for legal services within the marketplace - that is encouraging people to use legal services. Abel suggests that the demand creation of legal services has only ever been of limited impact, with most successes occurring in the field of legal aid. Yet, even within this field, most people will only need a lawyer in times of trouble in limited circumstances. It is, therefore, likely to be difficult to convince people that they need a lawyer simply for a check up rather than for open heart surgery, to use a medical analogy. Another facet of the loss of professional power that confronts solicitors is what Abel describes as ‘the dangers of monopsony’ (1989: 308-15). He argues that the solicitors are now increasingly vulnerable to the power of large consumers, be they the state or corporate clients, either by purchasing or financing the purchase of services or by employing the solicitors. The dangers of monopsony are particularly pronounced within the public sector with the state responsible for the funding and (through the Legal Aid Board) the administration of a huge legal aid budget. Sommerlad documents the subsequent loss of the professional autonomy of solicitors in this respect (1995, 1996 and 1999). Abel saw the establishment of the Solicitors’ Complaints Bureau (now the Office for the Supervision of Solicitors) as a potent illustration of the increased pressure from the State. Hanlon (1997 and 1999) also explores the growing power of the corporate consumer, particularly upon the nature of professionalism itself. Intriguingly within this turmoil generated by market and state, Abel envisaged the blurring of traditional boundaries between solicitors and barristers, leading to the emergence of a single fused legal profession.

The market control thesis has become the orthodoxy within the sociology of the legal professions over the last fifteen years or so (Paterson, 1996: 139). The changes in the legal profession presage the decline of professionalism and possibly that of the profession itself (Abel, 1989). Paterson (1996) rejects this orthodoxy. He argues not just that specific flaws exist in Abel’s argument but, more fundamentally, he

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8 For both sides of the debate over whether solicitors engaged in a demand creation exercise in respect of legal aid see Bevan (1996) and Wall (1996).
conceptualises the legal professions from an alternative perspective, the 'contractualist' position. This 'contractualist' approach conceptualises the nature of professionalism as a contract between the profession and the state, the terms of which are in a process of continual negotiation. This leads him to conclude that legal professionalism is not in decline, simply going through a period of extensive re-negotiation, on the insistence of the state and the consumers.

Paterson argues that the market control theories actually pay insufficient attention to the market and its impact on the legal profession (1996: 139). He criticises Abel's fivefold argument (1989a) that the profession has lost market control. He sees Abel exaggerating the original environment in which the profession operated, thus seeing the recent changes within legal services as not amounting to the seismic shift detected by Abel. Paterson suggests that Abel overstates the extent that the profession has lost the ability to control the supply of producers, arguing that it is far from clear that the situation has changed greatly over recent years. Of course, between Abel's seminal work and Paterson's article, the expansion of undergraduate legal education continued apace, so that now the number of undergraduates exceed the number of training contracts available, once more leaving the profession with the ability to control supply (see further Chapter 5). Paterson also argues that large numbers of the profession have always been employees so that recent trends are not particularly momentous.

While clearly there were employed members of the legal profession in the past, the numbers or grades of solicitors to which it applied, were nothing like the numbers that exist now. It seems odd, therefore, that Paterson should downplay this change in the way in which solicitors' work is structured. A more pertinent point is his argument that 'market control' assumed greater homogeneity than, in fact, previously existed.

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\[9\] Although see Cousins on the legal profession's success in defining as legal many problems that the poor may face which may have social or political causes or potential solutions (1994: 128-30).
\[10\] This issue of the extent to which the gatekeeper role has returned to some sectors of the profession will be explored in later chapters, particularly the concluding chapter. See also Francis and McDonald (2000) for the possible repercussions that this situation poses for part-time law students.
\[11\] The proportion of solicitors employed outside private practice has increased to 19.5% from 12.9% in 1988. (Cole, 2000: 16). Of those employed within private practice, 38.7% of all solicitors are employed as assistant solicitors (Cole, 2000: 18). Lee also comments on the need of solicitors' firms to employ grades of senior assistant solicitors in order to maintain profitability (1999: 31).
The solicitors’ profession has always been fragmented, not least between City of London practitioners and their regional brethren (Sugarman: 1996: 102). However a key aspect of the power theories was the profession’s success in maintaining a \textit{facade} of homogeneity if not necessarily substantive homogeneity. Both Larson (1977: 69-71) and Abbott (1988: 119) recognise the role that internal (perhaps both functional and hierarchical) stratification plays in managing tensions within a profession, and the allocation of solicitors to roles within the profession is something that Abel himself discussed (1988: 289-93). Finally, Paterson argues that the ‘market control’ thesis both underestimates the extent of state intervention in the past and exaggerates the profession’s control of its market while downplaying the importance of status. The status charge, however, seems misplaced. Abel’s work constantly stresses the professional project’s attempts to secure material gain \textit{and} status gain, and for Larson ‘market control and status gain are inseparable’ (1977: xvii), describing them as ‘two distinct analytical constraints that can be read out of the same empirical material’ (1977: 66). However, Paterson’s assertions that the grand explanation of the market control thesis makes too many sweeping claims by underestimating or exaggerating certain key factors, must be acknowledged. The claims of metanarratives like Marxism or, perhaps, like the market control thesis, to provide all embracing claims to absolute truth have come under significant criticism from post-modern theorists (Strinatti, 1995: 227-8). However a similar accusation may be levelled at Paterson, for simplifying many of the subtleties of Abel’s work in just under half a page, in order to criticise it for being simplistic.

Paterson’s response attempts to draw upon the work of Nelson and Trubek (1992) in adopting an interpretativist account of the evolution of legal professionalism. He conceptualises the legal professions from what he describes as a ‘contractualist’ standpoint. He argues that professionalism is in a continual process of negotiation between clients and lawyers and the ‘traditional’ model of professionalism, that has been the dominant paradigm, is only viewed as \textit{the} model of professionalism following a relatively stable period in the evolution of professionalism. He
conceptualises the 'traditional' model of professionalism as the contract between lawyers and clients and sets it out as follows:

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<tr>
<th>THE CLIENTS' SIDE</th>
<th>THE LAWYERS' SIDE</th>
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<tr>
<td>COMPETENCE</td>
<td>HIGH STATUS</td>
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<td>ACCESS</td>
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<tr>
<td>SERVICE ETHIC</td>
<td>RESTRICTED COMPETITION</td>
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<tr>
<td>PUBLIC PROTECTION</td>
<td>AUTONOMY (1996: 140)</td>
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He acknowledges that this may not have been a fair contract, nor that this agreement was ever explicitly concluded, but that it is 'a heuristic device which asserts in the era of traditional professionalism, the profession and the state behaved as if such a written agreement existed' (1996: 141). For Paterson, the importance of his approach is the stress he places on the 'contingent and negotiated essence of the bargain' (1996: 141).

Central to Paterson's thesis is the fact that the 'traditional' model of legal professionalism did not emerge intact on a certain date but developed over time, through a process of implicit (and sometimes explicit) negotiation. To further his argument, he explores two historical case studies of different aspects of the agreement, 'Public Protection' and 'Restricted Competition' (1996: 141-4). He concludes that not only did these aspects of the bargain take years to develop, but they did so in conjunction with each other, thereby signalling a negotiating process. Citing Pitt's imposition of stamp duty on deeds prepared by solicitors (1996: 144), and the establishment of separate client accounts following Board of Trade pressure (1996: 142), he suggests that the evidence he reviews demonstrates that the State was not the dupe characterised by the power theorists, but the driver of a hard bargain.  

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12 This approach clearly has parallels with Rawls' 'veil of ignorance' in his Theory of Justice, similarities which Paterson acknowledges.

13 Cf. Freidson (1970) and Larson (1977), for whom an important factor in the success of a collective mobility project was the extent to which the profession's interests were allied with the state. Thus, for example, a staple conservative legal system would appeal to the state just as it would the legal profession, see Finer cited in Podmore (1980 at 39). See also Sugarman on the Law Society's often ambivalent position on law reform (1996: 99).
He argues that because the 'traditional' model of professionalism was only a transient stage of a concept of legal professionalism in constant negotiation, the recent changes in legal services, are not inevitably leading to the decline of the legal profession, but are simply a re-negotiation of the 'traditional' model. He suggests that there has been growing unease amongst consumers with their side of the bargain and that the profession have not been 'self-confidently united in their rejection of these concerns' (1996: 149). He argues that on the issues on which the profession has been fighting back it has been explicitly 'contractualist' in its position, be it on multi-disciplinary practices or the regulation of new entrants into the legal services market place.

Paterson concludes that many of the core values of legal professionalism will survive and that ultimately more will unite the profession than will divide it (1996: 157).

Despite Paterson's explicit rejection of the market control thesis, it is not clear that his 'contractualist' perspective is theoretically markedly different from the power theories of Abel and Larson. Many of the explanations for the success or failure of a particular bargaining position bear a striking similarity with the strategies that the power theorists ascribe to the professions. For example the profession's failure to react to growing consumer unease because it was not 'self-confidently united' in its response does not appear too far removed from the power theorists' emphasis on the importance of homogeneity in the collective mobility project. What appears to distinguish Paterson from the power theorists is his emphasis upon the state's ability to extract consideration from the profession in the negotiation of the bargain. Like Halliday (1987), Paterson suggests that there is substance, rather than simply style, to the profession's side of the agreement. The profession is responsible in its dealings with its clients, and the state, in its concordat with the profession, can have a powerful role in maintaining levels of professional standards. The importance Paterson places on state directed professional competence perhaps reflects his active involvement in piloting the legal aid franchising specification – a key state driven attempt to regulate and assess the profession's competence (Sherr, Paterson and Moorhead, 1994).
Ultimately it may be that Paterson does not offer us anything new in terms of understanding why or how the professions may be more or less successful in their claims at particular times. His model may be more useful as a description of the evolutionary nature of professionalism. The bargain may be negotiated, for example, with the professions invoking the strategies ascribed to them by the power theorists. The consideration that the profession offers in its bargain may be nothing more than a shallow rhetorical facade. Self-regulation, while ostensibly protecting the public, is highly valued by the profession for the status and the autonomy from state interference it brings them - witness the Law Society’s efforts over recent years to preserve self-regulation (even perhaps in a bastardised version, see Shapland, 1995). The legal profession may not be in the terminal decline foreseen by the market control theorists, but neither is its resilience fully explained by Paterson’s ‘contractualist’ approach. Before seeking to understand the current picture of legal services and the responses of the Law Society and ILEX to the changes which confront their members, this chapter will now examine how the legal profession has been able to successfully adopt many of the strategies (for many of the reasons) identified in the sociology of the professions.

Centrality of Professional Associations

This history and structure of the Law Society will be discussed in greater detail in Chapter 4, so a brief review will suffice at this point. The Law Society has metropolitan roots, having been established by a group of leading London practitioners, developing from the Society of Gentleman Practisers. Following the award of its first Royal Charter in 1831, the Law Society began to develop its educational role through the provision of courses for articled clerks. The award of the second Royal Charter in 1845 saw the Law Society continue to strengthen its claims to represent the majority of solicitors developing stronger ties with powerful local law

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14 Although both Abel (1988: 286) and Larson (1977: 51) are clear that the professions’ claims must have some ‘semblance of reality’.
15 These elite origins were important in enabling the Law Society to be recognised internally as the profession’s representative voice (Larson, 1977: 70).
societies. A key reason for the Law Society’s strength, from this time onwards, was the close relationship it cultivated with the state.

The importance of the state to the professions was a central theme of the literature reviewed in the previous chapter. Larson describes a state backed monopoly as the ‘ultimate sanction of market control’ (1977: 53) and Freidson argues that a profession was unlikely to secure its autonomy with the state if it did not share some values with that elite segment of society (1970: 73). The key way in which the Law Society established itself as the voice of the profession was through its relationship with the State. As Sugarman notes,

the Law Society’s intimate and mutually dependent connection with the City and the State were established soon after its formation and have remained an enduring feature of its power and influence. (1996: 118)

This connection with the state was seen through the Law Society’s involvement through advice and general lobbying on law reform matters. The lobbying ranged from issues of explicit concern to the membership of the Law Society such as the Solicitors Act 1844, (see Sugarman, 1996: 96-7) to statutes of far broader impact, such as the Settled Land and Crown Proceeding Acts (see particularly Sugarman, 1996: 101-2 on the Law Society’s influence between 1845-1914). One of the key reasons why the Law Society was able to exert such influence was the lack of a Government legal service until 1919. The state did (and still does) depend heavily upon the legal advice provided by the Law Society. The state’s recognition of the Law Society was vital because ‘only the state has the appearance of neutrality necessary to guarantee the “objectively” superior competence of a category of professionals’ (Larson, 1977: 70).

The Law Society, largely as a result of the good relationship it established with the state, right from the time of its formation, was responsible for driving forward the profession as a whole, initially carrying much of the profession who were not even members. One of the important aspects of the solicitors’ professional project and one with which the Law Society were ineluctably linked was status gain for the profession
(Burrage, 1996). As Abel noted, the requirements of entry examinations were an important part of this push for status and the Law Society during the nineteenth century was explicit about its use of examinations to raise the status of the profession (Sugarman, 1996: 108-9). The Law Society has always been concerned with raising the status of the profession it represents, and appears to have secured a steady status ascent for its members (Burrage, 1996: 57).

However entry barriers were but one small aspect of the status gains marshalled by the Law Society for the profession. For Burrage, an important aspect of the success of the solicitors’ profession led by the Law Society, was not so much astute leadership of the Law Society, but rather the social and political environment in which the solicitors’ profession emerged (1996: 62-6). Thus, ‘whereas the French and American revolutions increased state control of previously self-governing professions, the English reinforced and legitimised their autonomy’ (Burrage, 1996: 63). However, the Law Society’s claims to protect the public have ensured status for the profession and considerable insulation from regulation from the state (see particularly Abel). During the nineteenth century there was considerable debate over whether the Law Society was a trade union. Although, the Law Society conceded (at that time) in 1886 that it was a species of a trade union, it tempered such a distasteful revelation with a familiar appeal to the altruistic ideal with the President of the Law Society arguing that:

It is for us to set an example to other unions, and show that by acting on more enlightened views we are really benefiting both ourselves and the public. (cited in Sugarman, 1996 at 113)

Similar examples of the Law Society’s centrality in arguing for the public service ideal of the profession are found throughout its history. Goriely charts the Law Society advocacy of the Poor Man Lawyer schemes in an effort to stave off state regulation, during the 1920’s and 1930’s. The Law Society came to support the Poor

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16 These schemes were a form of legal aid for the very poorest, and relied on the legal profession donating their time to give legal advice. Unsurprisingly, it provided far from universal coverage. See further Goriely (1996: 218-20).
Man lawyer scheme (rather than the introduction of an official legal aid scheme), arguing in keeping with the 'professional ideal' of the time, that 'educated men were expected to give their time selflessly to the public cause' (Goriely, 1996: 220). In 1967 the Law Society set out how it saw the role of professions in society:

Before any profession may emerge, circumstances must exist in which the general public need protection’, and that solicitors contribute to the resolution of human problems by putting ‘their clients’ interests above their own. (cited in Campbell, 1976 at 200)

The Law Society’s current home page on the Internet proclaims that ‘We serve society by working to improve access to the law’. Goriely, also notes that the profession’s success in co-opting the provision of legal advice to the poor following the publication of the Rushcliffe report (1944), and then again in the 1970’s in response to the law centres movement, was significantly linked to the Law Society’s successful pleading of the public service ideal (1996: 233).

The Law Society has had a central role in the collective mobility project of the solicitor’s profession. From metropolitan origins it came to represent and regulation the entire profession. It could take much of the credit for raising the status of the profession (Sugarman, 1996: 108) and was instrumental in securing strong professional autonomy with control over the education and regulation of its profession.

The following sections will consider other perspectives on the profession, looking at the importance of an exclusive knowledge base to the solicitors’ profession, and the challenges that the profession faces in the form of globalisation.

17 Working to improve access to the law, while using the language of ‘access to justice’ employed by organisations such as the Legal Action Group, could also be seen in the context of a demand creation exercise which Abel saw as one (small) aspect of the profession’s project of material and status gain (1988: 226-234).
Knowledge, Exclusivity and Homogeneity

The distinguishing factor of professions from other occupations was, for Freidson, a position of legitimate autonomy - the ability to control and regulate its work (1970: 82). The exclusivity of control over a particular work jurisdiction was central to other major theorists such as Abbott and Larson. For Abbott, holding a ‘full settlement’ within a work jurisdiction depended not only on performing skilled acts supported by a coherent theoretical knowledge base but securing the rights to practise those rights exclusively (1988: 59). The shared knowledge base, practised exclusively by a homogeneous profession are central aspects of the conceptualisation of professions by Abbott, Freidson and Larson, and writers on the legal profession have also charted aspects of this project.

The solicitors’ profession’s collective mobility project has maintained the exclusivity of their knowledge base and preserved their work jurisdiction. Clearly there were divisions within the profession, and certainly tensions between the Law Society and the wider membership. However, within these jurisdictional battles, we find the Law Society taking a strong lead nationally (and particularly through its relationship with government) in establishing the accepted limits of the discourse of the solicitors’ profession and developing what came to be accepted as the profession wide model of legal professionalism.18

Jurisdictional battles with other professions

The principal area in which the profession fought to preserve its exclusive rights to practice, often to the neglect of other areas, was the conveyancing monopoly. Hanlon notes that throughout the period of 1700-1900 the solicitors’ profession was heavily involved in jurisdictional disputes over conveyancing (1999: 46). The strategies that

18 An early example of the claims to the exclusivity of lawyering is seen in the following remark from Chief Justice Coke, when discouraging James I from judging cases in person, stressing that legal reason was not simply a matter of common sense or royal fiat, ‘but the artificial reason and judgement of the law ... which requires long study and experience’ (Proclamations del Roy, 12 Co. Rep, 63, 7). The case was also cited by Sugarman (1996: 84). The judicial statement can also been viewed as part of the moves of the Judiciary and Parliament throughout the seventeenth century to limit the claims of the Stuart Monarchs to govern by divine right.
the profession employed against their competitors - scriveners, the bar and certified conveyancers - were varied, ranging from litigation to legislation. Interestingly, it was the scriveners who originally held a monopoly on conveyancing in London, and it was solicitors who gradually moved in and began to impinge upon what was ostensibly a protected market. Ultimately this dispute led to litigation and, with the help of a pragmatic alliance with the Bar, the scriveners’ monopoly was broken and they slowly faded away. The actual legal monopoly on conveyancing came about almost by accident during Pitt the Younger’s time as Chancellor of the Exchequer. It emerged as legislation was drawn up to enable the Government to tax solicitors, as an invaluable source of revenue, to fund the Napoleonic Wars. The Society of Gentleman Practisers (a predecessor of the Law Society) sent Pitt a clause which provided that only lawyers who held a practising certificate and paid the fees (which the Government then taxed) should be allowed to undertake conveyances. Pitt then incorporated these proposals into his fiscal legislation in 1804 (Sugarman, 1996: 89). Despite the almost accidental acquisition of its monopoly, solicitors and the Law Society were to hang on tenaciously to the monopoly for almost another 200 years.

Hanlon charts solicitors’ attempts to push the Bar out of the conveyancing market they originally shared with solicitors and to completely sideline the profession of certified conveyancers (members of the Inns of Court who were not barristers) (1999: 47-50). The Bar’s interest in conveyancing declined because of a number of factors, principally their concentration upon advocacy within the higher courts and a gradual withdrawal from direct access to clients. However the solicitors’ action against certified conveyancers was more aggressive, with direct appeals to Parliament eventually securing the legislation they wanted, which led to the conveyancers dying out as a profession by the end of the nineteenth century. It is interesting to note the importance of the conveyancing monopoly to solicitors in their professional project because it increased the status of the profession, which was otherwise in the shadow of the Bar (Burrage, 1996: 51). The conveyancing work brought with it associations with land and the landed gentry. It provided solicitors with a significant proportion of their income and additionally,
afforded them much inside information, local influence and, in the case of those solicitors who worked for landed gentry, a vicarious respectability and status higher than that of the doctor. (Sugarman, 1995: 230)

Sugarman notes that the material and status gain that control of conveyancing brought, was an important factor in encouraging the complacency of the solicitors’ profession when it failed to engage in other potential jurisdictional battles with accountants in the late nineteenth and early twentieth centuries (1995: 230). It is easy to understand why, with so much at stake, the Law Society mounted a fierce rearguard action in the 1980s in a last ditch effort to preserve the conveyancing monopoly following Austin Mitchell’s private members bill and the eventual Administration of Justice Act 1985 (Abel, 1988: 179-85). The fallout from this episode is still being felt within the solicitors’ profession and the Law Society and will be discussed further in later chapters.

While conveyancing was the major area of work over which solicitors had exclusive control, they have been continually engaged with other occupations holding overlapping work jurisdictions in a battle to establish full control of their work jurisdictions (see Abbott, 1988: 247-79 on English and American lawyers). At one time estate agents, debt collectors, auctioneers, general agents, law stationers, barristers, arbitrators and many other public officials all competed with each other and solicitors over certain fields of work (Sugarman, 1995: 228 and Abel, 1988: 185-189).

Hanlon provides an account of another area in which solicitors were particularly successful in carving out an exclusive market area - dispute resolution (1999: 50-51). In concentrating both on court based litigation, with the expansion of county courts, and in asserting their presence and expertise within arbitration, the solicitors were able to establish themselves as primary providers of advice about dispute resolution. Solicitors also benefited from the proactive policing of their jurisdictional boundaries by the Law Society. As late as 1861 a wholly unqualified person could advertise his ability to perform the work of a solicitor (Abel-Smith and Stevens, 1967: 62), but the Law Society lobbied hard for legislation to be pushed through increasing the penalties
for such activity. Abel charts the Law Society’s prosecutions of these people (1988: 185). Other occupational groups which came under fire in this time included London law stationers, lay people who drafted contracts under seal, and those who helped recover debts (Abel, 1988: 185-6). The centrality of the Law Society during these battles is clear from the literature, and the national voice it claimed, together with its relationship with the state, enabled significant victories to be won.

The Bar was another enemy of the solicitors’ profession, although the relationship between the two has frequently been complicated, with pragmatic alliances frequently invoked to mask thinly veiled hostility. Much of the solicitors’ project to acquire status was carried out in the shadow of the Bar, and in many respects solicitors looked to the Bar for their model of what a profession should be (Burrage, 1996: 51). Burrage argues that the two professions were really interdependent and not truly part of Abbott’s conceptualisation of a system of professions containing competing occupational groups (1996: 55). With two professions occupying such close jurisdictional proximity, frequent clashes occurred (see Abel, 1988 generally and an overview 187-189). The solicitors’ exclusion from the Inns led to a slightly patronising air adopted by the Bar with regard to solicitors and equality was not formally sealed until a joint statement in the 1970s. There were frequent disputes over conveyancing, direct referral, late payment of fees by solicitors, late return of briefs by barristers. However, the interdependence discussed by Burrage remained an important aspect of their relationship.

The accountancy profession was and still is an occupation, in close jurisdictional competition to the solicitors’ profession. Popular histories of the profession paint a picture of an ascendant accountancy profession (for example Hanlon, 1999: 51-4), with the accountants ‘ensconced… as the principal advisers to the middle classes in their personal affairs…by the 1950s’ (Sugarman, 1995: 227). Sugarman, however, argues that the situation is more complicated, with the pervasiveness of the ideology of law providing an alternative to the traditional narrative of the ascendant accountants (1995: 226). Hanlon argues that the success of solicitors in establishing
control over the conveyancing and dispute resolution markets, led to them effectively ‘deserting the field’ of jurisdictional battle (1999: 51). Such complacency following their other successes is also identified by Sugarman (1995: 230), but he notes that, on other occasions, the Law Society was proactive in asserting the primacy of their cognitive structure over that utilised by the emergent accountancy profession.

He suggests that for many solicitors in the nineteenth century the spectre of the rising profession of accountants became something of what Sugarman describes as a ‘folk devil’ (1995: 229). The Law Society sought to assuage this fear through pressing for legislation to increase the penalties available to anyone found giving legal advice or drafting legal documents for financial reward who was not a solicitor. Although the number of prosecutions was in fact relatively small, each prosecution was accompanied by a great deal of publicity (Sugarman, 1995: 229). Other instances of the Law Society’s attempts to preserve its professional knowledge from encroachment by accountants were seen in relation to its professional examinations. The Law Society had withdrawn accounting and bookkeeping from its examinations for a period of thirty years and when it re-introduced the requirement in 1906, the standards of accountancy it sought to assess were greeted with derision by the accountancy profession. Despite complaints from the University of Leeds in 1911, who urged the Law Society to accept the accounting procedures and standards of the main accounting professional association, the Law Society doggedly stuck to its premise that the method of accounting it tested was the one that the Courts required, regardless of contemporary accounting practice (Sugarman, 1995: 232). Although the Law Society persisted in its own examination standards, contemporary accounting practice continued to deride the Law Society’s system as ‘unintelligible to the ordinary businessman’ (The Accountant, 1911, cited in Sugarman, 1995: 232-3).

Despite the success of the accountants in establishing their exclusivity over many areas of work, including book keeping, auditing and later taxation, Sugarman and Burrage suggest that part of their success could be explained by the solicitors’ reluctance to engage with accountancy work. Accountancy was associated with
business, and business, for a profession seeking to enhance its status in the image of the gentleman barristers, was anathema to most solicitors (Burrage, 1996: 55). However despite the solicitors' failure to achieve exclusive control of these new important jurisdictions, Sugarman suggests that the situation remained complicated. Accountancy continued to be governed by the regulatory framework of law, the accountants looked to the Law Society for a model of a professional association while the culture of law remained a dominant social discourse. Sugarman, argues that the 'power of law' is an important perspective through which the ascendancy of the accountants over lawyers must be viewed (1995: 234).

Solicitors, the public and the black magic of legal knowledge
The nature of professional knowledge has been central to the literature on the professions. For Abbott, the currency of competition within his system of the professions is knowledge, and the profession's management of their cognitive structure was a key strategy in their attempts to secure control of a particular jurisdiction (1988: 102). For example, a highly abstract knowledge base could allow a profession to claim expertise across broader ranges of work, while too broad a claim could be difficult to sustain. Freidson also placed professional knowledge at the centre of his analysis of the professions. However, Freidson argued that the cognitive structure of the profession was only loosely related to the work they actually performed. He dismisses a profession's claims to a systematic body of theory, training and examination schemes as existing simply as rhetorical devices employed to convince political and economic elites to award the profession the autonomy it desires. In his study of the medical profession, Freidson found many examples of divergence between the knowledge of theory and the knowledge of practice. Professional knowledge served merely to mystify the lay person and to leave control firmly in the hands of the profession.

By 'power of law' Sugarman is referring to the pervasiveness and dominance of the ideology of the Rule of Law.
Similarly Abel argues that the entry requirements to the legal profession were only loosely connected to the technical competence required in practice (1988: 286). He asserts that examinations and training had as much to do with preserving the social homogeneity of the profession in its pursuit of status, as it did assessing any requisite technical competence. Kennedy also notes that lawyers often say that they learned nothing in law school (1992: 54, although see below for his arguments about what they do learn), and new trainees within law firms can frequently be heard talking about the irrelevance of their academic and professional legal education to their employment.

It is not only that the links between legal theory and legal practice are often tenuous. Law is often presented to the public in a way that precludes their understanding. This is a key trait of the professions (Larson, 1977: 47). For a profession to secure autonomy it must demonstrate that it is employing a specialised body of knowledge over and above that accessible to the lay person. That professional knowledge is presented as theoretically coherent and only properly understood after the years of professional training stipulated and organised by the professional association. This is particularly true of law. Wilensky notes that ‘like primitive medicine men who cultivated the occult knowledge of the supernatural, lawyers have always sedulously cultivated the myth of the majesty and mystery of law’ (1964: 149). Even within universities, the law schools have always set themselves apart from the rest of the institution and excluded outsiders (Twining, 1994: 193). This mystification of law and detachment from the client is something that has been well documented in the literature, reviewed below.

Harris (1992) in writing about a critical legal practice course established at the New College of California reports a case where legal aid lawyers brought a case to improve working conditions for Mexican-American farm workers. A bus was hired for the day to bring the workers to the courtroom. When the liberal judge entered the court and saw all the farm workers, all counsel were invited back to chambers to hammer out a settlement, leaving the 150 or so farm workers in the imposing federal court building
all day. Although the legal aid case was largely successful, Harris argues that the workers were left with less power, because of their exclusion from the processes. They learnt nothing about the law; its mystique was only reinforced by the events of the day:

They left the court not understanding the law’s process, remaining ignorant of the pragmatic dealing in chambers and still conditioned to put their faith in an apparently objective legal system and its professional manipulators. (Harris, 1992: 164)

The mystique of the law prevents the clients from understanding the processes, and the professional autonomy of lawyers limits the clients’ involvement in the processes which they might otherwise be able to understand. Selznick sums up the situation as follows:

Some forms of advocacy exacerbate that dependency, if the law remains for the client a vehicle of mystification, if no educational experience is encouraged, if the lawyer neatly separates the client from his problems, leaving him no less helpless and confused than he was before. (1976: 72)

Similarly, other writers have argued that the mystification of law is particularly acute for those of low and moderate means. Cain (1994) suggests that lawyers have throughout history created new relationships within a legal framework for their clients, linking this role with the development of capitalism. Indeed, we have already seen that the status project of the profession saw them allying themselves with the more socially advantageous landed classes (Burrage, 1996). She doubts whether the legal profession is able to perform the same role for the poor, believing that profession’s interests and beliefs are more closely related to the interests of capital (1994: 41-2). Cousins (1994) also argues that the legal profession has been ill-suited to deal with the problems of the poor, and yet repeatedly been successfully in co-opting the provision of legal advice and assistance to them (Goriely, 1996). Cousins explicitly challenges the legal profession’s concentration upon the legal remedy through individual case by case tactics, rather than attempting to help the poor
develop broader social and political approaches to problems under law (1994: 129-31).

These difficulties are also borne out in empirical studies. Genn found, in a major study assessing people’s attitudes to law and the legal system, that most people believe that using the legal system requires expertise and that ‘legal proceedings are not something that the ordinary person should plunge into without advice’ (1999: 235). She concludes that ‘what many respondents seemed to believe is needed to succeed in legal proceedings is good quality legal advice, which may be expensive’ (1999: 235). This is reinforced by a study undertaken by Baldwin, Wikely and Young exploring the experiences of people within social security tribunals (1992). Even within a sector that was supposed to encourage lay involvement in the process, either through claimants representing themselves or through lay members of the panel, it was still reported that there had been a considerable legalisation of the processes. The message increasingly conveyed to the claimants, both implicitly and explicitly, was that legal representation was required to be successful before this tribunal (1992: 174).20

The values and nature of legal knowledge must also be considered. Freidson, like Larson, stresses the connection between professions, power and class, suggesting that ‘the work of the chosen occupation is unlikely to have been singled out if it did not represent or express some of the established values of the civilisation’ (1970: 73). This is especially pertinent in respect of the legal profession. Lawyers serve a legal system that is deeply embedded within the state and the ruling classes. Kennedy (1992) argues that Law Schools teach their students a positivistic interpretation of law, devoid of social or political context. He suggests that this training within this culture is a preparation for practice, where challenge and unorthodoxy would not be encouraged. By virtue of their proximity to the legal system, Friedman labels lawyers as ‘servants of power’, adding legitimacy to state actions and avoiding all but the most technical of reforms (1989: 21). Johnson, drawing upon Rueschemeyer (1964),

20 Indeed, those that were legally represented tended to be more successful.
argues that, 'the [legal] professions vested interest in a given legal order renders its services irrelevant to those groups in society who seek radical change' (1972: 25). Clearly there have been radical lawyers who secured real successes\(^{21}\) (unless seen from an orthodox Marxist standpoint), however the proximity of the legal profession to the legal system, to the State and to a positivistic notion of law, leads us to the innate conservatism which has always characterised the profession. Larson, drawing upon Weber, seeks to provide a sociological explanation of this phenomenon:

> Because the legal profession mediates the institutionalised resolution of conflict, its expertise and its livelihood directly depend upon the stability and legitimacy of a given institutional and legal framework. In the wider sense of the word, the legal mind is therefore inherently conservative (1977: 168).

As Sugarman notes, the ideology of the Rule of Law has a powerful place within English society, and its place in the professional discourse and everyday culture of the legal profession, is another important explanation of their power (1995: 234). Indeed Cotterell argues that:

> The establishment of the Western idea of the ‘Autonomy of Law’ from other aspects of society has paralleled the struggle by lawyers in Western societies to achieve the full ‘mandate’ associated with the idea of an autonomous legal profession. The two developments reinforced each other. (1992: 196)

The conservatism of the profession is manifested in its social composition. Numerous studies consistently point to the profession having a narrow social base (McDonald, 1982; Abel, 1988: 69-172; Sherr and Webb, 1989; Halpern, 1994 and Goriely and Williams, 1996). This has historically been characterised as the white, middle class, middle aged male, who probably enjoyed an Oxbridge education. The problems of the social base of the profession have been recognised by the Law Society in recent years (Law Society, 1999: 35). However, the most recent study still shows that

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\(^{21}\) The achievements of groups such as the Legal Action Group (Glasser, 1997) in pushing for legislative change in the field of consumer protection are important. Lawyers such as Michael Mansfield QC, and John Wadham, Director of Liberty, can also be seen as ‘radical lawyers’. It is, however, accepted that the term ‘radical lawyer’ is notoriously difficult to define (Scheingold, 1994: 265).
students from 'new' universities (perhaps chosen because of financial reasons) find it harder to secure training contracts (Rees, Thomas and Todd, 2000). The social base is nevertheless changing, for example the number of ethnic minorities in the profession is rising, albeit very slowly while, in recent years, women have been particularly successful in entering the profession in ever greater numbers (Cole, 2000: 2).

Despite, the growth in the number of women solicitors, the conservatism and male domination of the profession has not been significantly affected. Sommerlad (1994, and with Sanderson 1998) and Skordaki (1996) provide accounts of the difficulties that women face working within the solicitors' profession and, in particular, achieving the senior positions of partnership.

Historically women were explicitly excluded from the solicitors' profession; the first woman solicitor did not enter the profession until 1922 (Sommerlad and Sanderson, 1998: 74), however following the removal of the legal barriers, women still did not become solicitors in large numbers over the following fifty years. Sommerlad and Sanderson argue that male domination continued during this period because of an unchallenged culture that served to exclude the participation of women. Interestingly, Skordaki notes that the earliest female solicitors had strong class (and often familial) ties to the profession which supported this acceptance of the dominant culture (1996: 14). Yet, despite the rapid expansion of the number of women in the profession between 1979-97, Sommerlad and Sanderson note that there remained segregation within the profession between men and women in terms of career trajectories, with men securing greater access to senior posts and higher remuneration (1998: 115).

Both Skordaki (1996: 30) and Sommerlad and Sanderson (1998: chapters 5 and 6 particularly) identify the macho culture of the law firm. The emphasis on working long, late hours, entertaining clients and fraternal bonding as a means of consolidating the race for partnership, is seen as a key reason why women are subordinated within the profession. Depressingly while the (equally exclusive) culture of gentleman practitioners may have been receding, Sommerlad and Sanderson note that their
empirical research demonstrates that the *Loaded* culture of ‘laddishness’ with an increased acceptability of sexist attitudes and behaviour was flourishing in its place (1998: 148).

However, the principal way in which woman face segregation within the profession was the perception that women would leave work to have a family and thereafter become the principal carers. Therefore the macho culture of long, late hours is dependent upon a gendered division of labour within the private sphere, that is the expectation that (female) partners of lawyers will provide their child care (Sommerlad and Sanderson, 1998: 225). Even when flexible working is introduced, to allow women ‘career breaks’, Sommerlad and Sanderson found that breaks associated with child bearing ‘generally result in significant career changes’ (1998: 201). Such career breaks were found to be detrimental to a woman’s chances of securing partnerships and involved a general decline in status. These career changes were justified by the use of the supposedly neutral terms of ‘commitment’ and ‘choice’. However Sommerlad and Sanderson, demonstrate that within the solicitors’ profession such terms tend to measure conformity to a male norm, and ignore the fact that women, in balancing ‘domestic and work spheres’, work more efficiently and may produce higher quality work (1998: 217). Therefore any successes that women do achieve are generally negotiated on an individual basis (Skordaki, 1996: 29) or are exceptional (Sommerlad and Sanderson, 1998: 241-50). Interestingly the relationship of the profession to legal knowledge is emphasised in underpinning the dominance of the male culture. Sommerlad argues that the ‘equality argument’ favoured by many women solicitors, shares core values with legal doctrine (1994: 47), and Sommerlad and Sanderson note that western liberal law is sexed as male, emphasising supposedly male traits of rationality and objectivity (1998:52). The identification of the dominant male paradigm offers a further insight about the characteristics of the solicitors’ profession and is important when considering the possible professionalisation of the subordinate group of legal executives which has been increasingly feminised (numerically at least).
Subordinate legal professions

While Chapter 1 noted that little had been written about the subordinate legal professions, there is not a complete absence of material. A number of studies do acknowledge their role and set out the terms of their relationship with the solicitors' profession. The more detailed and insightful work comes from Johnstone & Hopson (1967) and Johnstone and Flood (1982) based on original material and interviews with solicitors and legal executives. It is interesting to note the terminology employed by the various writers. Only Fellows of ILEX are entitled to describe themselves as 'legal executives', however the name has never been statutorily protected, allowing anybody to describe themselves as a 'legal executive'. 'Legal executives' are treated with similar inexactitude by the academics who have studied them. Both Abel (1988) and Johnstone and Flood (1982) took account of the fact that the creation of ILEX led to the replacement of managing clerks by legal executives. However, as Johnstone and Flood were writing a comparative piece, exploring English and American paralegals, the term 'paralegal' is frequently invoked to describe legal executives – a description legal executives would strongly dispute. Despite the creation of ILEX in 1963, Johnstone and Hopson, continue to refer throughout their piece to 'managing clerks'. It appears that four years after the emergence of legal executives, managing clerks still held considerable descriptive power for those working in an unadmitted capacity within a solicitor's firm.

Johnstone and Hopson define managing clerks as:

a distinct occupational group who rarely become solicitors, have no formal apprentice relation with their principals and today generally have a separate career line from those office employees whose work centers on the ability to use a typewriter. (1967: 399)

All authors note that the solicitors’ profession was heavily reliant upon managing clerks to perform their work, particularly throughout the nineteenth and early twentieth century (Johnstone & Hopson, 1967: 400; Johnstone & Flood, 1982: 173; and Abel, 1988: 207). Abel notes that in the middle of the nineteenth century there were roughly two clerks for every solicitor, although many practices had more, and
that a Law Society census of 1939 found 9,633 practices employing 46,183 law clerks. This long standing reliance on ‘paralegals’ was a clear contrast with American law firms, which had a tradition of employing larger numbers of qualified lawyers (Johnstone and Flood, 1982: 172-3).

Despite this long-standing tradition of managing clerks within solicitors’ firms, the managing clerks were slow (in comparison with their employers) to form their own professional association. An association was eventually formed in 1892 – the Solicitors’ Managing Clerks Association. However this remained a small and not particularly influential organisation (Abel, 1988: 200). Following Law Society concern about falling numbers of managing clerks, a new educational scheme and association, the Institute of Legal Executives (ILEX), was created in 1963 (Johnstone and Flood, 1982: 173; and see further details about the negotiations leading to the creation of ILEX in Chapter 6). One view of the creation ILEX is that it was one of a number of repeated attempts by managing clerks/legal executives to raise their status (Johnstone and Flood, 1982: 174; and Abel, 1988: 207).

Johnstone and Hopson identify considerable resentment among the ranks of managing clerks about their status and the perception of their status by solicitors. Many of the managing clerks that they interviewed felt that, although they were performing comparable work to solicitors in their firm, neither their remuneration or their status within the firm was comparable to solicitors. They cite an editorial from the journal of managing clerks The Solicitor’s Managing Clerk’s Gazette. The editorial begins by distinguishing managing clerks from ‘secretarial staff’ and goes on to emphasise the skills and knowledge that managing clerks share with solicitors. A brief selection of some of the phrases from this editorial will provide a flavour of the argument:

...they are, in the main, men and women possessing all the qualities required of a solicitor...[they are] experienced in the practice of law, experienced in exercising the qualities of clear thinking and accurate and unambiguous expression and last, but by no means least, experienced in the capacity for hard work...apart from the ultimate responsibility there is no difference in work of a

The arguments set out in this editorial bear a striking similarity with Abbott's observation (noted in Chapter 2) that 'public clarity applies below, workplace assimilation applies above' (1988: 67).

However, despite the simmering resentment and the continual moves for status, managing clerks/legal executives have struggled to professionalise. Although ILEX is an independent organisation, it 'can do little for its members without co-operation from the Law Society... it is always overshadowed by the Law Society' (Johnstone and Flood, 1982: 173-4). A reason given for this control by the Law Society was given by a solicitor cited by Johnstone and Hopson, 'We do not want responsibility for the Institute, only enough of a veto so that they do not do something foolish' (1967: 407).

Even within this subordinate position, it was felt by all authors that the legal services environment was shifting away from the heavy reliance of law firms upon managing clerks, so much so that one pessimistic prediction saw managing clerks as a 'dying breed' (Johnstone and Hopson, 1967: 401). One of the key explanations for the decline in the numbers of managing clerks was the expansion of the solicitors' profession. The availability of more positions for assistant solicitors and the increasing accessibility of higher education in the 1960s, led many who might previously have left school and taken jobs as managing clerks/legal executives to enter the solicitors' profession (Johnstone and Flood, 1982: 174-5; Abel, 1988: 209). The status and remuneration of managing clerks/legal executives was not considered a sufficiently appealing option for these people (Johnstone and Hopson, 1967: 402). The other major problem for legal executives was that they were unable to control supply (Abel, 1988: 209). While the Law Society requires all solicitors to pass its examinations, the legal executive's educational 'program is optional and leads only to Institute membership with no monopoly rights' (Johnstone and Hopson, 1967: 407).
Firms of solicitors are able to employ anybody to do the work of a legal executive whether or not they have passed the ILEX examinations.

One of the trends within the subordinate legal profession has been its gradual (numerical) feminisation (Johnstone and Flood, 1982: 175-6). Indeed feminisation has taken place at all levels of solicitors’ support staff with the secretarial work originally being carried out by ‘men and boys’ (Johnstone and Hopson, 1967: 402). Indeed this feminisation of the pool from which clerks were historically drawn and the initial reluctance of solicitors to employ women as clerks was given as a further reason for a drop in the numbers of managing clerks (Johnstone and Hopson, 1967: 402). Abel notes, however, that the eventual employment of women as clerks/legal executives was an important explanation for the driving down of salaries for managing clerks/legal executives (1988: 209). It is important to note that even today women paralegals and legal executives tend to earn less than their male counterparts (Sidaway and Punt, 1997: 26; see further Chapter 5). Johnstone and Flood also link the employment of women from the ranks of law firm secretaries to a more ready acceptance of the subordinate role by women legal executives, though it is conceded that this situation may be changing (1982: 181). 22

None of the writers on managing clerks/legal executives were particularly optimistic about their future, noting mainly the decline in their numbers and the strength of the Law Society. Johnstone and Flood argue that the strategy which ILEX adopted, in the form of raising standards of paraprofessional competence, rather than seeking another doomed attempt at professional status, had to be the right one in the face of the power of the Law Society (1982: 187). Although they correctly describe ‘paralegals as non-professional satellites in a professional world’ (Johnstone and Flood, 1982: 190), it may be that many new aspects of legal practice, which they could not have foreseen at the time of writing, will have a significant impact upon the relationship between

22 My interviews with ILEX council members (see further Chapter 7) found no evidence of a gender split in terms of acceptance of subordination. However, ILEX still seeks to market itself to those working in non-legal capacities within law firms. The ‘big step up’ mentioned by Johnstone and Flood may still be a factor for these people (1982: 181).
solicitors and legal executives. These new forms of practice go right to the heart of many of Abel's predictions for the decline of legal professionalism.

Mega-lawyering: The repositioning of the legal profession

Chapter 5 will provide a detailed account of many of the contemporary changes facing the legal profession, looking at access to the profession, the shifting composition of the profession and a number of legislative and other exogenous developments that will impact upon the profession. Abel points to the decline of the legal profession, and one factor which he saw contributing to that downturn was what he termed 'the dangers of monopsony' - that is the profession being compromised by the power and influence of a few large consumers (1989: 308-14). Sommerlad (1995, 1996, 1999 and see further in the following chapter), for example, notes the profession's loss of autonomy to the Legal Aid Board under legal aid franchise agreements. However, a phenomenon that is creating ever greater momentum for change is the mega-lawyering of the city law firms and their large powerful clients.

Galanter and Palay maintain that the considerable and continuing growth of the mega law firm is driven by an internal dynamic (incorporating factors such as the race for partnership) which dictates growth at an exponential rate (1991: 87). Lee argues that, at least within the UK context, external factors are as significant as internal factors for understanding the growth of the largest law firms (1992: 33). One central reason for the growth of the largest law firms within the UK has been their overwhelming concentration within the City of London. The City of London, as one of the world's major financial centres, is closely linked with the work and growth of the UK's (and the world's) largest law firms (see also Flood 1995: 143 and 1996: 172-3 and generally). Furthermore, the link with the City of London meant the largest law firms were one of the principal beneficiaries of Thatcherism through the deregulation of financial services and privatisation of public utilities which created significant opportunities for legal work (Lee, 1992: 34). Unsurprisingly, it was the 1970s and 1980s that saw the belated (by US standards) explosion in the size of the largest law firms (Flood, 1996: 179). A further aspect of the London law firms' geographical
location was the growing internationalisation of legal work. Lee noted that the recent investment into Europe from Japanese and American finance has enabled the UK law firms to capture the legal work associated with these investments (1992: 34). The smaller European law firms were unable to compete on the same scale.

These law firms are predominantly involved in company and commercial work. Flood notes that, in 1991, over half of the London based lawyers in Clifford Chance were working in those departments, which generally account for the largest departments in such large firms (1996: 182). Hanlon finds that the Top 13 firms in his sample are engaged almost exclusively in sophisticated commercial matters for a corporate elite (1999: 129-30). It is an interesting aspect of the fragmentation of the profession that conveyancing, so long the staple of the solicitors’ profession, forms no part of the work of the largest firms in his sample, whereas conveyancing constituted 43.8% of the work of the small firms in his sample. Flood adds an insightful account of the work of the lawyers in these largest firms, using the particularly revealing methodology of analysing the firms’ own promotional literature (1996: 182-89). This is the firm’s external voice as it makes its pitch to potential clients. What is striking about this section in Flood’s work is the level of sophistication at which these firms operate. Their brochures detail previous clients drawn from global elites whether through finance and banking or commercial property.

The size, structure and organisation of these large law firms also significantly distances them from the rest of the profession. The firms with 81+ partners, the Law Society’s largest category, are responsible for the employment of one fifth of all solicitors (Cole, 2000: 32). However, the size of these firms pales into insignificance when compared with the top firms. In 2000 Clifford Chance was the largest law firm with 3021 fee earners and 753 partners globally (http://icclaw.com/1500). The smallest law firm in the top 20, Addleshaw Booth and Co., still employed 573 fee-

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23 It is interesting to note that in the annual Trends in the Solicitors’ Profession, the Law Society increased its largest category of firm to 81+ partners, for some sections of the statistics. The largest category for the previous set of statistics (1997-8) being only 26+ partners, a figure which bore little resemblance to the realities of practice.
earners and 112 partners. These law firms are now moving further from the traditional vision of a small 2-3 partner firm. These are large international practices with global corporate clients. Flood notes that a major strategy for the growth of these firms has been mergers (1996: 179). For example, Clifford Chance itself grew from a merger and continues to grow, with a merger in January 2000 with German law firm Pünder, Volhard, Weber & Axter and New York based Rogers & Wells LLP to create Clifford Chance LLP (www.cliffordchance.co.uk).

Despite their size and the diversity of their client base, these firms, like the small market town practice, still retain partnership as their practice structure. Indeed both Galanter and Palay (1991: 81) and Lee (1992: 35) identify partnership as an important internal factor influencing the growth of these firms. But the system of partnership has had to be modified to accommodate the new mega practices. Most UK firms operate a ‘lockstep’ system of partnership remuneration as opposed to the US system of ‘eat what you kill’ whereby the partner is financially rewarded in line with the clients and fees that he/she brings to the firm (Flood, 1996: 174). The UK system is based upon a points system that rewards seniority and is said to promote collegiality over cut-throat competition.

However cut-throat competition is entering the world of partnership within the largest law firms. The ‘tournament of partnership’ is no longer limited to those aspiring to partnership but is now also permeating the previously comfortable world of the partners themselves. Previously Lee noted the ability of partners to work hard in their younger days and then enjoy the profits in later years, generated by their assistants (1992: 36). While the partners also have had to work in terms of their own case load and further develop the fee earning capacity of the firm as a whole, now they are required to perform amidst an atmosphere of their performance being continually assessed by their fellow partners. Hanlon identifies this shift as being the end of partnership for life (1999: 139). The appraisal and targets that are a feature of the

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24 Lee refers to this 'tournament', to mean the competition for partnership among assistant solicitors (1999: 31).
work of assistant solicitors aspiring to partnerships, are now a feature of the partners of the large law firms who feel that they cannot carry dead wood in any way. A statement from a managing partner from a large law firm cited by Hanlon succinctly sums up this culture:

We were trying to meet the aspirations of... staff moving up, and because of the way this firm has evolved and grown, certain people have - normally you would have dead wood that just sits in partnerships.... And unless you take a conscious decision, I mean these people earn a lot of money, unless you take a decision to say 'right, well we want to move these people out and make space for people to come up', you are not going to create as dynamic an environment as it could be. You are going to have talents restrained because of a lack of talent in the upper echelons. (1999: 138)

This need to remove ‘dead wood’ at the top of the partnership is linked to the need to maintain incentives for senior assistant solicitors who aspire to partnership. Lee (1992 and 1999) writes of the difficulties that exist in retaining senior solicitors courted by other firms offering them the prospect of partnership. Lee’s (1999) empirical work on the working lives of large law firms clearly demonstrated the culture in which these lawyers operate and the desire of these assistant solicitors for some sort of signal from the current partnership about the chances of success in their race for partnership. Clearly not everybody within a particular team in a law firm will emerge as a victor in the tournament for partnership and the large firms must develop new ways of preventing disillusioned but experienced lawyers leaving the firm.

Hanlon notes that the criteria for partnership, and the ways in which partners themselves are assessed are increasingly based not on traditional professional concerns (such as those within Paterson’s model, 1996: 140), but upon managerial or entrepreneurial criteria (1999: 141). This is part of what he identifies as the development of a commercialised professionalism, which ‘stresses tailoring services to meet the needs of the paying client’ (1999: 142). This approach is strongly influenced by the large corporate sophisticated clients they serve (Flood, 1995: 150). These entrepreneurial aspects of the commercialised professionalism are reflected in
the growth of sophisticated marketing by the firms, greater use of networking, an emergence of a cult of the individual and the willingness to tailor services at the last minute to the needs of the client. The commercialised professionalism described by Hanlon (1999) places an emphasis upon getting the job done over traditional professional criteria such as existing strictly within the regulatory framework of the professional body (Lee, 1999: 18-30). This is borne out by recent reports of City firms in a report to the Law Society arguing for a complete overhaul of the current Law Society rules on conflict of interests (The Lawyer, 03/07/00: 3). The reasons for this desire for change are clear from the comments of two senior partners in large city firms cited in Lee:

Rules on conflicts [as applied in strict form] would stop the City stone dead.

If anything our ethical policy is largely... I say largely... in part driven by commercial reasons over and above those implied by the Law Society. (1999: 25)

Another partner cited by Lee remarked that, in certain areas of his firm’s work, there would be ‘daily breaches’ of the Law Society’s professional conduct rules (1999: 24). The working lives of the elite law firms described by Hanlon, Lee and Flood suggest that the big city firms with overseas practices now bear little resemblance to the rest of the profession (Flood, 1996: 201).

It is not only the internal working cultures and structures that differentiate these law firms from the rest of the profession. Flood (1995 and 1996) demonstrates that the global legal culture these firms inhabit sets them apart professionally. He argues that because they operate within a globalised marketplace, the firms are subject to pressures, demands and structures of working far removed from those experienced by firms working within a traditional legal paradigm within a highly localised environment. Using Cavusgills’ (1993) definition of globalisation as being ‘the growing interdependency among the economies of the world’, Flood argues that in operating within such a context, the legal professions are transcending not only their

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21 See also Griffiths-Baker (2000).
disciplinary boundaries generally but, more specifically, strict demarcations of work
demanded by their local professional associations are seen as irrelevant by global

Flood (1995 and 1996) paints a picture of a sector of the profession occupying a place
in a global elite of legal and non-legal providers of services to business and banking,
above and beyond the limitations of state or discipline. Their position within the
global elite of law firms means that these lawyers are generating new practices and
cognitive structures amongst themselves to compensate for the legal black holes left in
the tapestry of overlapping international law (Flood, 1996: 192; and see generally
Flood, 2000). The difficulties of operating in a global legal culture, including the
need for sensitivity towards domestic cultures and legal systems, while appreciating
the fading importance of disciplinary boundaries (Flood, 1995: 146-51), are far
removed from the practice considerations of the domestic profession from which they
originated. The diversity between the global legal elite - the megalawyers - and the
rest of the profession, has led Flood to argue persuasively for a post-modern
exploration of the legal profession on a sector by sector basis, rather than through
analyses of the profession as a whole (1996: 201). His arguments will be returned to
later in this thesis as we look at the conflicting professional jurisdictions of lawyers
and legal executives within the system of the legal professions.

Conclusion
There is a vast array of literature on the legal profession and its work and in this
chapter I have simply attempted to highlight some of the more pertinent work. Most
literature however, on legal executives and their relationship with solicitors, other
than Abel (1988: 207-210) and Johnstone and Flood (1982), is conspicuous only in its
absence. This thesis will contribute to knowledge about this largely unexplored
aspect of the system of the legal professions.

26 Clifford Chance advertise their services as follows: ‘Multinational organisations are undertaking
transactions and projects of unprecedented scale and complexity. Our response is to deliver integrated
cross-border legal services that help our clients achieve their commercial objectives across a range of
jurisdictions (www.cliffordchance.co.uk ).
Abel (1988 and 1989) has suggested that legal professionalism is declining and Paterson (1996) suggests the traditional model of professionalism is evolving. However, Abbot (1988) suggests that external changes within any professional jurisdiction (such as legal service delivery) can prompt shifts in that system of professions. Thus, we should broaden our analysis to encompass legal executives who are also involved in legal service delivery. The following chapters will explore the nature of these shifts in more detail.
Chapter 4: Research into ILEX and the Law Society

Introduction

This thesis seeks to understand the roles of ILEX and the Law Society within legal services. It will focus on their ability to influence policy and consider their relationships with their membership. In order to provide a context for the discussions in the following chapters, this chapter will establish the framework of the organisation and structure of ILEX and the Law Society and provide details of the methodology employed in the research.

The role and structure of ILEX

ILEX was created in 1963, building on the work of its predecessor, the Solicitors' Managing Clerks Association (SMCA). In addition to representing the interests of first managing clerks and then legal executives, SMCA/ILEX has always sought to provide an educational structure through which its members have been able to gain qualifications and develop their legal knowledge. This core role remains with ILEX today.

In the years following its establishment, ILEX did not make significant gains in terms of additional rights for its membership. It did, however, build a reputation in offering an academically rigorous series of examinations leading to full qualification as a Fellow of the Institute. Throughout the 1980s and early 1990s there was an emphasis within the organisation on developing its commercial activities to ensure a solid financial basis. This was both evidenced and facilitated by the purchase of land and buildings in Kempston, Bedfordshire, which allowed ILEX to move beyond its metropolitan origins. As Chapter 5 will indicate, ILEX has recently made significant strides in gaining increased professional recognition for its membership.¹

¹ A more detailed history of the development of SMCA/ILEX is to be found in Chapter 6, which explores the relationship between ILEX and the Law Society through the use of archive sources.
ILEX describes itself as a professional body, although it is a company limited by guarantee rather than a body with a Royal Charter (Legal Executive Journal, April 1998: 2). Its interpretation of this label has significantly influenced the organisation, structure and role of ILEX. The mission statement of ILEX gives a clear indication of the nature of ILEX’s activities:

*The Institute of Legal Executives (ILEX) is the professional body which represents Legal Executives and enhances their role and standing in the legal profession.*

*ILEX is the leading provider of comprehensive legal education and influences law reform.* (ILEX, 1999: 1)

Like professional bodies generally (Carr-Saunders and Wilson, 1933: 319 and Larson, 1977: 56), ILEX explicitly distinguishes itself from a trade union by virtue of its ‘commitment to acting in the public interest’ (1999: 1).

It seeks to ensure this through the activities of its professional body which sets the educational standards for the profession and regulates the profession through its disciplinary code. In keeping with most professions, ILEX is led by a council of elected members. The council members are Fellows of the Institute, rather than simply Members (for the distinction see below) and are elected from a geographically based constituency. In addition to the full council, the members work on at least one of a number of standing committees such as Finance, Law Reform or Education.

Education is a central concern of ILEX. Not only does it provide distance learning courses through its own subsidiary companies, but it also approves courses in tertiary colleges, leading to ILEX qualification. The companies are significant in providing courses for ILEX qualification but also courses for non-lawyers. ILEX is continuing to look at new ways in which courses can meet the needs of legal practice (1999: 5). One of its recent innovations was the launch of the NVQs in Legal Practice with EDEXCEL in May 1998.

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2 Such a distinction is further evidenced by the Secretary General’s comment, in a reply to a Student’s letter about a dispute with her employer before an Industrial Tribunal, that ‘ILEX cannot directly represent members in these circumstances’ (Legal Executive Journal, June 2000: 4).
The ILEX qualification route involves two stages of academic examination (Part 1 and Part 2) leading to Membership of the Institute. Members then need to complete their period of employment in practice (5 years (including 2 years post-Membership) and over the age of 25), before qualifying for Fellowship. Fellows wishing to continue their training and qualify as solicitors, must undertake the Common Professional Examination (CPE), although certain exemptions may be obtained on the basis of their Part 2 examinations (see further www.ilex.org.uk). Following that (like all prospective solicitors) the Fellows must undertake the Legal Practice Course (LPC). They are, however, exempt from the requirement of obtaining a training contract. In 1998-99, 212 Fellows followed this route to qualification as a solicitor. They accounted for 3.4% of all admissions to the Solicitors’ Roll in that year (Cole, 2000: 73).

ILEX introduced compulsory Continuing Professional Development (CPD) from the 1st January 1999 for all Fellows in practice. This brings ILEX into line with other professional bodies such as the Law Society. ILEX requires its Fellows to complete 8 hours CPD each year, four of which must be within the Fellows’ subject specialism. Following the advent of Legal Executive Advocates (see chapter 5), 6 hours of advocacy based CPD is required before annual renewal of the Rights of Audience Practising Certificate. CPD will be compulsory and failure to meet the CPD requirements will be considered a breach of the ILEX bye-laws. Through the introduction of CPD, ILEX intends to build on its members’ reputation for providing quality legal advice but, perhaps more importantly, is also concerned to tie Fellows more explicitly to the organisation, so that there is continuing contact post-qualification. It is hoped to give further weight to the title of Fellow, through increasingly stringent regulation. The testing of the competence of practitioners appears regularly in most accounts of the professions (Carr-Saunders and Wilson, 1933 and Larson, 1977).

1 It is now possible at some Universities to structure the qualifying law degree to enable the student to graduate with a Graduate Entry Diploma (GED), allowing the law graduates’ exemption from Part 1 of the ILEX Membership exams.
Failure to complete the required hours of CPD is a breach of ILEX's code of conduct. The Articles of Association of ILEX provides for a Disciplinary Tribunal to consider breaches of the ILEX code of conduct. The Tribunal has powers to decide whether a person in breach of the Code 'may be excluded or suspended from membership or be fined, reprimanded or admonished' (Legal Executive Journal, April 1998: 36-7). Despite the existence of the ILEX Disciplinary tribunal and of an Investigating Committee, the Legal Services Ombudsman recently advised clients with grievances against a legal executive to approach the Office for the Supervision of Solicitors (the regulatory arm of the Law Society). It is the legal executive's status as an employee within solicitors' firms which means this is the most appropriate avenue for aggrieved clients (Kendrick, 1999: 35).

One of the core aspects of the mission statement was ILEX's desire to enhance the role and standing of legal executives. Recent years have seen evidence of this through lobbying government to further the rights that fully qualified Fellows possess. There have been successes in recent years with the award of higher rights of audience (SI: 1998, No. 1077) and the rights to conduct litigation under s.40 of the Access to Justice Act 1999. However, despite lobbying Lord Kingsland during the passage of the Access to Justice Bill through the House of Lords, ILEX failed to protect statutorily the name 'legal executive' (see further chapter 5).

ILEX also plays a role in law reform. Like the Law Society, it is asked to comment on proposed changes to law. Council members comment on a particular piece of legislation which falls within their subject specialism and the ILEX web site keeps the wider membership informed about the consultation papers currently before council. This offers an opportunity for practitioners to submit their views to the council to be considered as part of the ILEX response. ILEX also aims to forge links with its members through its annual national conference and through developing

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4 See, for example, past President Derek Larkin, a criminal practitioner commenting upon the Government's proposals in relation to jury trial (www.ilex.org.uk: News Releases, 21st January 2000).
relationships with its branch membership. ILEX is keen to re-invigorate the branches as a matter of urgency (1999: 6).

The other aspect of ILEX is its commercial activities. These are a series of companies, controlled by ILEX, which provide commercially available courses for those working in legal practice. The ILEX group of companies are:

- ILEX Tutorial Services Ltd - trading as ILEX Tutorial College (ITC)
- ILEX (Paralegal Training) Ltd (ILEX PT)
- ILEX Publishing and Advertising Services Ltd (IPA)

ITC provides distance learning courses and materials for those who wish to study for an ILEX qualification but are unable to attend their local college for the training. ILEX believes that in addition to the valuable income generated by these courses, it also serves to increase the profile of the ILEX group generally. ITC will also be used to provide some of the CPD seminars which ILEX Fellows must now attend. ILEX PT brings people with no previous legal qualification into contact with the ILEX name. The courses for paralegals provide an introduction to law for non-lawyers working within law firms. One of the stated aims of ILEX is to try and encourage more of these people to retain their interest and training route with ILEX, following the completion of their initial paralegal qualification (1999: 6). Finally, IPA is responsible for the publication of the professional journal of ILEX, *The Legal Executive Journal*, and has a significant role in generating advertising income and bringing the ILEX brand name to a wider audience. The success of these companies in commercial terms, has sometimes led to tension between the aims and objectives of the parent professional body, and a further aim of ILEX in coming years is ‘to maintain a closer monitoring role and to make clearer the close working relationships between the Council, officers of ILEX and the subsidiary companies’ (1999: 8).

The structure, organisation and role of ILEX seeks to educate, regulate and promote the interests of legal executives. Its emphasis on standards and the interests of the

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5 Some ILEX council members, in interviews with the author (see further Chapter 7 and below for the methodology), suggest that the companies have not always been appreciative of the subsidiary nature of their relationship with the professional body.
clients is similar to that of the Law Society - the professional association with which ILEX is very closely linked.

The Law Society

Although there has been a solicitors’ profession of some sort dating back to the 12th century when the language of the Norman French court had to be translated by advisers known as attorneys, solicitors did not really formally associate until the beginning of the 18th century. In 1739 the Society of Gentleman’s Practisers was formed, creating the first association of attorneys and solicitors which sought to safeguard the interests and enhance the conduct of the profession. Although this was the leading law society in London (and England) until the creation of the Law Society in 1825, its membership never really numbered more than about 200 or so lawyers at any one time. It was essentially a club for the elite London lawyers (Sugarman: 1995a: 3).

1825 saw the first incarnation of the Law Society. Like its predecessor, the Law Society had metropolitan roots, and was established by a group of leading London practitioners. The building of the Society’s hall (on the current site, 113 Chancery Lane) was financed by selling shares to leading practitioners at the equivalent of £1,000 per share in today’s money, thereby cementing the elite nature of its early membership. Although the Law Society was originally rooted in the coffee bars of London, it soon began to transform itself into a more recognisably professional association. Following the award of its first Royal Charter in 1831, the Society began its moves to assume greater national significance through the training and education of articled clerks - a role it still carries out today. As Sugarman notes, the beginnings of the formal education for the articled clerks ‘helped lay the foundations for the Society’s claim to be recognised, like the inns, as the examining authority for the solicitors profession’ (1996: 92). In 1841 there was concern that the original objects and form of Society were not suited to ‘the high character and station, and to the important subjects since brought within its control’ (cited in Sugarman, 1996: 92). Following this concern, a second Royal Charter was granted in 1845, which finally

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6 See History www.lawsociety.org.uk
moved the Law Society to a position where it was perceived as an ‘independent, proactive body, continuously servicing the affairs of the profession, with some (albeit ill-defined) public responsibilities’ (Sugarman, 1996: 92). By the 1890s the Law Society had become ‘the role model for would be professional associations’ (Sugarman, 1996: 98).

The Law Society retained its metropolitan focus throughout the rest of the nineteenth century and was directed largely by its London based staff rather than its wider membership (Sugarman, 1996: 102). This inevitably led to conflict with the regional law societies who were initially unconvinced about the Law Society’s ability (or willingness) to represent the interests of the entire profession. For much of this time large, well established local law societies, such as those in Birmingham and Manchester resisted incorporation within the national body and preferred to further the interests of their membership on a local basis. Gradually, during the latter half of the nineteenth century the broader membership as well as the state came to recognise the Law Society as the voice of the profession. It was not until the early part of the twentieth century that the Law Society could claim to represent the majority of solicitors (Sugarman, 1996: 105 and Abel, 1988: 242-247 and 444-447).

Law reform and the dialogue with government were important functions that the Law Society carried out. The government did not establish its own legal service until 1919 and so it was heavily reliant upon the expertise of the Law Society for advice and drafting legislation. The proximity to government enjoyed by the Law Society was an important factor in the maintenance of its position as a pre-eminent profession with strong autonomy within its own jurisdiction (see particularly Chapter 3).

The Law Society’s move to control the education of its entrants also continued during the early years of its existence. Following criticism from the House of Commons Select Committee on Legal Education which concluded that ‘No legal education worthy of the name is at the moment to be found in England’ (see further Sugarman, 1995a: 9), the Law Society established a three tier series of examinations under the
Solicitors Act 1860. The Law Society gradually began to wrest control of the professional examinations from the Courts. However, rather than foster the development of good educational standards, it seems that much of the early system of examinations were part of an attempt by the profession to maintain social class homogeneity within its ranks (Abel, 1988: 286). The testing of Latin, History and Science was conceived as a 'remedy for the influx into the profession of persons of a lower social class' (Sugarman, 1995a: 9).

The role of the Law Society

The roles that the Law Society carved out for itself throughout the nineteenth century have essentially remained with it until today. The Law Society's Latin motto translates as 'Serving Law and Justice' and the Law Society believes that its roles meet this aspiration. It defines its roles as:

- Regulator
- Campaigner
- Service Provider (www.lawsociety.org.uk)

One of the principal ways in which the Law Society acts as a regulator is in the training and education of its future members. There are a number of routes to becoming a solicitor. We have already seen that it is possible to qualify as a solicitor after initially qualifying as a legal executive.\(^7\) Most entrants (71.7%) to the profession (Cole, 2000: 73) took the direct route possessing either a law degree or a non-law degree. Students holding a law degree must enrol with the Law Society, pass the LPC, and then spend a further two years working as a trainee solicitor. The non-law graduate must additionally pass a common professional examination (CPE) or conversion course, prior to starting the LPC. While law degrees are taught and assessed by independent Universities, the Law Society (and the Bar Council) have considerable influence over the nature of the law degrees.\(^8\) The Law Society prescribe what will be deemed a 'Qualifying Law Degree' which requires coverage of various

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\(^7\) Additional 'indirect' entrants to the profession may be barristers, overseas lawyers or justices' clerks.

\(^8\) See, for example, the Joint Statement of the Law Society and the Bar Council (1999). www.lawsociety.org.uk.
core law subjects such as Public Law and Contract Law. There is further regulation of
the LPC. The Law Society validates and monitors those institutions that provide the
course. Once again, the Law Society has considerable control over the course content.

A further aspect of the Law Society’s regulatory role, is its regulation of solicitors in
practice. It requires a prescribed number of CPD hours to be completed by practising
solicitors each year, and perhaps most significantly it regulates its own members
through its own complaints handling body - the Office for the Supervision of
Solicitors (OSS). The OSS investigates complaints from solicitors’ clients about the
service that they have received from the solicitor, or about his/her behaviour
according to the Professional Rules of the Law Society. If the OSS does make a
finding of ‘inadequate professional service’, the OSS may:

- Reduce a solicitor’s bill, in part or in whole
- Order a solicitor to pay compensation of up to £1,000
- Require a solicitor to correct a mistake at his/her expense

(www.lawsociety.org.uk)

Additionally the OSS may discipline a solicitor for misconduct. The other branch of
the Law Society’s disciplinary functions is the Solicitors’ Disciplinary Tribunal (see
s.46 Solicitors Act 1974). The ultimate sanction available to the Tribunal is to strike
off a solicitor from the Roll. The Law Society has faced considerable difficulties in
the operation of its regulatory functions over recent years, and changes such as the
creation of the Legal Services Ombudsman (in the Courts and Legal Services Act
1990) limit the extent to which the profession self-regulates. These difficulties are
explored in greater detail elsewhere in this thesis (see particularly chapters 5 and 8).

The other major role played by the Law Society is what it describes as a
‘campaigning’ role. Although the Law Society engages in a number of important
debates in the public interest, in reality, its primary role under this heading is
representing the interests of its members. The power theorists (Larson, 1977 and
Abel, 1988) see the legal profession acting as primarily in their own interests, using
public interest claims either to mask their self-interest, or as part of the ‘bargain’ they
struck with the state to secure their autonomy. It is interesting to note that on their official web-site, the description of the Law Society's roles adds, almost as an afterthought, 'We also represent solicitors interests' excusing such a distasteful revelation with the statement that 'society needs a strong independent legal profession'.

From the earliest times, the Law Society engaged in law reform work (Sugarman, 1996: 101-2). It continues this work today commenting upon draft legislative proposals and consultation documents from Government. A cursory glance at recent mainstream newspapers and the legal press, sees the Law Society engaging in debates on the reform of legal aid, the right to jury trial and the judicial appointments system. Throughout these campaigns, the Law Society's stated aims are that it seeks to represent the interests of its members and society at large.

The Law Society's third role is explicitly concerned with the interests of its membership, providing them with a range of services. These range from the use of Chancery lane facilities, including a restaurant and well-stocked library, to providing practice support and information about new legal and technological developments. The publication of the weekly Law Society's Gazette serves to keep the profession up to date about the services on offer through the Law Society.

The organisation and structure of the Law Society
Like ILEX, the Law Society is governed by an elected council. There are currently 75 council members who each serve a four year term. The majority of council members represent geographical constituencies (calculated on the number of solicitors within each area), although there are a number of council members who represent specific interest groups such as Sole Practitioners or Young Solicitors. The council meets in full approximately 8 times a year, although there will be occasion for special meetings.
Under the main council, a number of standing committees support the work of the main council. These committees exercise delegated powers on behalf of the full council and cover subject areas such as finance, adjudication of complaints and training. Additionally a number of specialist committees, consisting mainly of non-council members, play advisory rather than delegated decision making roles. These committees cover the main areas of law, for example crime, family and commercial, and are important feature of the Law Society's work on Law Reform.

The Law Society council and decision making structure has recently undergone further reform and centralisation. Following an independent study and recommendations made by Sir Dennis Stevenson, the Law Society formed an Interim Executive Committee (IEC) (www.lawsociety.org.uk: Corporate Governance at the Law Society). This group was charged with developing a strategy for reform of the Law Society's management structure. The plans drawn up by the IEC were approved in October 1999 and have led to the creation of a permanent Executive Committee. This Committee contains the elected office holders of the Law Society, that is the President, Vice President (who chairs the Committee) and Deputy Vice President, a Chief Executive, and other senior members of the Law Society's salaried management, in addition to invited members of council.

The creation of the new post of Chief Executive has led to the abolition of the current post of Secretary General (Law Society’s Gazette, 20th October 1999). The Chief Executive will initially focus on internal organisation but the post will, in time, develop into a stronger managerial and policy role. It is envisaged that the postholder will be a strategic leader and would give the Law Society a more consistent public face.10 The options for the future were laid before the Working Party on corporate governance by Dame Rennie Fitchie, the Commissioner for Public Appointments, who stressed that the Law Society had in the past suffered from a lack of customer focus and a proliferation of meetings and committees. This lack of focus

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has been addressed with many of the Law Society’s previously dispersed powers now exercised by the Executive Committee. In April 2000, a Reform Co-ordination Group was convened to take forward the Working Party’s proposals, and in September 2000 presented a draft consultation paper to the Law Society council. This consultation paper, entitled *A New Law Society for a Changing Legal Profession*, proposes major reform of the Law Society’s role and structure, including the replacement of the Executive Committee with a Main Board. It was sent out to solicitors on the 18th October 2000 and responses to be delivered by 18th December 2000. It will be considered further in Chapter 9.

The work of the council members is supported by a administrative staff of 700. In addition to the Law Society’s headquarters in London, it has offices in Redditch, Worcestershire (dealing with Education and Regulation) and at Leamington Spa (which houses the OSS). There are also regional offices in Preston, Cambridge, Bristol, Cardiff and Brussels. The Cardiff office has recently been strengthened in recognition of the increased pressures and opportunities faced by the profession in Wales following the creation of the National Assembly for Wales. There are a number of departments within the Law Society, all reflecting aspects of the Law Society’s role. For example senior staff, reporting directly to the Chief Executive, lead departments including Legal Education and Training, Regulation and Information Services, Professional Ethics and Membership Services.

The Law Society is a far larger and far more sophisticated organisation than it has been in the past, but it is clear that it still largely carries out the same roles of the classic professions: as a qualifying association, representative organisation, a regulatory organisation and a provider of services for its members.

**Research Methodology**

The thesis is designed around a case study of ILEX and the Law Society. In order to

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10 Janet Paraskeva has recently been appointed to the position (*Law Society’s Gazette*: 3rd August 2000).
answer the research questions, it explores the development of the organisations, the
dynamics of their decision-making processes, their relationship with each other and
the options available to the associations within the contemporary legal services
environment. Although the initial focus was upon ILEX’s role in legal service
provision, it became impossible to consider the role played by ILEX without
reciprocal consideration of the Law Society. This research has been part-funded by
ILEX. Although the limited extent of their funding contribution and careful
application of research ethics has not resulted in any interference with the author’s
research objectives, the involvement of ILEX has allowed tremendous access into the
professional association.

The methodological approach adopted in this study employed documentary analysis,
and two separate stages of semi-structured interviews. The research is in three parts:
• A historical investigation of the origins of ILEX and the original market and
  organisational conditions from which it emerged
• A study of the contemporary changes affecting ILEX, the strategic options facing
  the Institute and the resulting debate within the Institute
• An exploration of the Law Society’s response to the changes in legal services, its
  relationship with ILEX and its own membership

This research strategy was identified as being the most appropriate to answer the
research questions which sought to explore the strategies and underlying assumptions
of professionalism held by the leaders of two key legal professional associations.

Before the main stages of the research were carried out, a pilot study was undertaken
in February 1998. The purpose of the pilot study was to consider the present shape of
the legal marketplace and to develop a better understanding of the nature of the roles
carried out by solicitors, legal executives and paralegals within legal practice. It
involved a series of in-depth interviews with partners, legal executives and paralegals
in different areas of England and Wales. A range of firms was chosen for the study,
covering large commercial firms and generalist rural practices. The author used in-
depth, semi-structured interviews, all of which were tape recorded. Although the
sample in this pilot study was numerically small, it provided a snapshot of the relationship between solicitors, legal executives and paralegals within vastly different practice settings. Data from these interviews has been included within Chapter 5 to support the quantitative findings of previous research projects (for example Cole, 2000 and Sidaway and Punt, 1997) and the study of the contemporary trade press.

The first principal part of the research was archive based document analysis. The aim of the research was not only to chart the development of the relationship between ILEX and the Law Society but additionally to reveal the underlying assumptions about professionalism held by the two organisations at various stages of that relationship. The archives themselves took the form of council minutes and committee reports and the trade press of the two organisations. The contemporary trade press also served as a valuable tool in uncovering current debates within the profession (see also Flood, 1996: 171 on the value of the trade press as a research tool when studying professional elites). The study of sources such as the trade press further enabled analysis of the language used by both law firms and the professional associations, in order to identify common (or differing) themes in the claims that they make to different audiences. Access to the archives was facilitated through the good working relationships already in existence with ILEX, and through contact established with the Head of the Law Society’s library. The research involved several visits to the various sites where the archives were held. The visits were supported by extensive note-taking and photocopying for later analysis.

The next major stage of the research was a series of in-depth interviews with council members and salaried staff of ILEX and the Law Society. ILEX provided a list of council members and staff and, from these, I selected 13 interviewees taking into account gender, a range of different firm sizes, subject specialisms and geographical locations. I travelled to meet all interviewees to conduct semi-structured interviews, all of which were tape recorded for later analysis.
Access to the Law Society was facilitated through a contact on the Law Society council that I had established during a separate piece of research (Francis, 1998). Following a series of telephone conversations with this contact, I drew up a list of council members and staff to be interviewed. Of those contacted, 16 were interviewed, ten being members of the Law Society council. This represents about a sixth of council members in total. Those interviewed represented a range of geographical location, firm size, and areas of responsibility on the council.

All interviews from this research were transcribed verbatim. The order in which the interviews are categorised (A, B, C/1, 2, 3 etc.) does not represent the chronological order in which the interviews took place. Greater biographical detail is not provided about the ILEX and Law Society staff and council members in the body of the thesis, because in the closed environments of the professional associations they would become too easily identifiable. Confidentiality had to be paramount in order to enable all interviewees to speak candidly. The comments are, therefore, entirely unattributable. For the most part, the relevant sections of the interviews are reproduced in full within the thesis, however for considerations of space, irrelevant information within particular interviewees’ statements has been omitted.

The interviews themselves were conducted on the basis of a semi-structured question schedule which was organised in such a way to generate data to answer the research questions of the thesis. The interview itself began with a series of general biographical questions to put the interviewee at ease (Fontana and Frey, 1994: 371). The question schedule progressed through a series of topics focusing on institutional, strategic and workplace issues. The questions were open, in order to invite wide-ranging responses about the current legal professional landscape and the interviewees’ perception of ILEX/Law Society’s place in that landscape. The interviews lasted between 45mins and 2 hours in duration and all those interviewed appeared happy to discuss the issues candidly. However it was noticeable that those closest to the centre of the decision-making process were more likely, at points, to treat the interview as
though I were a journalist and simply repeat the party line (as set out in policy
documents).11

Silverman notes that:

in traditional, quantitatively oriented texts, qualitative research is often treated as
a relatively minor methodology to be used if at all, at early or exploratory stages
of a study. (1993: 20)

Clearly this thesis relies overwhelmingly on qualitative research techniques, drawing
on texts and interviews for its data. However as Silverman later notes, it is
‘increasingly accepted that work becomes scientific by adopting methods of study
appropriate to its subject matter’ (1993: 144). This thesis explores the strategies of
professional associations. It is not possible to conduct this type of research simply
through a mail-shot questionnaire or reliance on statistical data. In attempting to tease
out the underlying assumptions of professionalism amongst the leaders of the
professions of solicitors and legal executives, in-depth semi-structured interviews
represented the most appropriate methodology for this research project.12

In interviewing elites, such as the leaders of national professional associations, a
number of specific methodological problems need to be confronted. In contrast to a
sophisticated social research field generally, ‘the picture at the elite level is rather less
rosy’ (Moyser and Wagstaffe, 1987: 14). Moyser and Wagstaffe, note that an initial
problem can lie in actually defining the boundaries of the elite (1987: 14-6). This
raises a potential problem within the field of legal services. For example Flood
describes his research subjects - the senior partners in global law firms - as members
of the professional elites (1996: 202). However, this is not a serious problem for the
current research questions. This thesis is not seeking to identify the elite within legal
services (although such a discussion will inevitably emerge in later chapters), it is

11 Eliciting an ‘official version’ was a key aim in itself (Dingwall, 1997: 62). It allows us to explore
the discourse and assumptions of professionalism from which the ‘decision-makers’ draw, when
making their claims to government and policy makers.
12 Despite the strengths of participant observation (Dingwall, 1997: 64), practical difficulties precluded
its use in this study. Furthermore, in order to explore the research questions in sufficient detail, semi-
structured interviews did, indeed, represent the most appropriate methodology.
studying the professional associations, representing practitioners within legal services. The ‘elite’ position that the leaders of the professional associations occupy, means that as an object of research, they bring with them many of the methodological difficulties associated with elite groups.

Moyser and Wagstaffe identify a number of methodological approaches that can be employed when studying elites including analysis of official records and participant observation (1987: 17-20). However they note that the use of interviews when studying elites is particularly useful for it can reveal ‘information about underlying attitudes, interactions and intentions’ (1987:18). This was a central reason why interviews were employed in this research. The external reports of the professional associations, while providing an important element of triangulation for this research, do not reveal the underlying tensions within the association. In-depth interviews allow the researcher to exercise judgement and discriminate between those situations in which the interviewee is being frank and those which simply repeat the official line. It is the underlying assumptions of professionalism and the tension behind the ‘official’ strategies that in-depth interviewees are best suited to explore. Crewe is even more effusive about the merits of interviews in elite studies, believing them to be ‘surely superior to any alternative way of discovering what they (elites) believe and do’ (1974: 43).

However, a number of practical methodological difficulties are involved with the use of elite interviews. Perhaps the most striking is securing access. Following difficulties in accessing company executives when studying corporate philanthropy in the United States, one author advocates perseverance as a key strategy (Galaskiewiez, 1987: 156-7). Flood, citing Danet, Hoffman & Kernish (1980) and Rosenthal (1980), suggests that access difficulties can be overcome by approaching the elites using methods which are sensitive to them (1996: 202). I followed the techniques

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13 C.f. Dingwall, who propounds the advantages of participant observation, concluding that '[i]n observation, we have no choice but to listen to what the world is telling us' (1997: 64).

14 Such techniques extended to the interview itself, when in contrast to my standard casual academic attire, I wore the formal dark suit of lawyers to the interview itself (see Fontana and Frey, 1994: 371, on the importance dress can play in establishing a rapport in the interactional interview situation).
suggested by both these authors, contacting the prospective interviewees with a formal letter, accompanied by my curriculum vitae and a covering letter from a key figure in the organisation. These letters were followed up by a telephone conversation or email to secure an appointment. The use of email was a particularly valuable tool when attempting to arrange a number of interviews on the same day in the same location.

While not wishing to associate members of the Law Society with Soviet bureaucrats, the work of Binns (1987) offers a valuable guide to the study of 'defensive elites'. While the vast majority of those interviewed at ILEX and Law Society were open and willing to discuss a wide range of issues, some members of the Law Society Executive Committee were 'defensive' in the sense that they appeared to report a standard 'party-line message' to someone they saw as an outsider. However, following Binns, my familiarity with the subject areas discussed allowed for greater awareness of when the interviewees were simply stating the official line. This broader knowledge, supplemented by interviews already conducted and official publications, enabled me to exercise the judgement necessary to evaluate which interviews should be considered as 'defensive' statements of the official position (1987: 227).

Confidentiality was of course emphasised to all the interviewees, and carried out in the presentation of the results. Furthermore, all interviewees were assured that their comments would be used without attribution (SLSA, 2000: xxi-ii). However, a particular problem did arise in relation to this study of leaders of professional associations. The Law Society interviewees were aware that I had already spoken in depth with ILEX. In general the Law Society interviewees respected the confidentiality attached to ILEX's response. However, on the odd occasions when I was directly questioned about ILEX' position on a particular issue where that position

15 In the case of ILEX, the covering letter was written by the then President and in the case of the Law Society, the covering letter was written by the council member, who served as a key contact. The use of an introductory covering letter was a key strategy to convey organisational support for the research project to the individual interviewees.
was confidential, I was able to reply in broad non-committal terms revealing nothing about the ILEX response.16

Heavy reliance on the use of interviews, raises some other potential methodological difficulties. Silverman considers the use of interviews in detail, noting the divergent approaches of the traditions of ‘positivism’ and ‘interactionism’ (1993: 90-114). He doubts that interviews allow access to ‘facts’ about the world (as suggested by the positivist) tradition, but equally so, suggests that an unquestioning adherence to an interactionist tradition is also naïve. He argues that rather than the interview being viewed as a social event based upon mutual participation, in reality both interviewer and interviewee will seek to structure the event in some way. Dingwall also sees the interview as a social construct between interviewer and respondent (1997: 59). The question schedule, which formed the basis of the semi-structured interview, is included within the Appendix to give the reader some guidance as to the ‘interactional cues… given off by the interviewer’ (Dingwall, 1997: 59). Silverman also cautions the interviewer against simply accepting the uniqueness of the interviewee’s position, for then it is difficult to move beyond a purely common-sense interpretation of events. However, Silverman does acknowledge the strengths of the interview as a research technique and argues that it can bring valuable insights into how the interviewees demonstrate their perceptions of reality, instead of simply seeking to decide whether the interviewees are reporting true or false statements (1993: 197). Bearing in mind Flood’s call for a post-modern reading of the legal profession (1996: 201), it could be argued that interviews with council members and staff of professional associations can only provide ‘truths’ that would be contested by an increasingly diverse membership. However the thesis was explicitly attempting to explore what assumptions were held by the professional bodies, while acknowledging the realities of the fragmented profession they represented. Some flavour of the workplace picture is produced in the data from the pilot study (see chapter 5 particularly) and future

16 For further discussion of the problems such research can bring, see Brannen for his reflections on his experiences observing both workers and directors in the steel industry (1987:174).
research will clearly have to explore in more detail the jurisdictional competition and the role of (legal) knowledge in the workplace.

Silverman discusses the ways in which the validity and reliability of qualitative research can be strengthened (1993: 144-170 and 196-211). He notes particularly that interviews are necessarily fragmentary in the way that they are represented to the reader and therefore:

The critical reader is forced to ponder whether the researcher has selected only those fragments of data which support his argument. (1993: 162)\(^{17}\)

Silverman suggests ways in which the plausibility and credibility of the evidence presented by the researcher can be supported (1993: 152). One of the principal ways is to explain to the reader the ways in which the representativeness of the sample has been achieved, both in reference to the larger population in which the sample resides and through choosing the sample from a theoretical basis. This study was particularly concerned with assessing the nature of a classic profession within legal services. The role of the professional association has always been considered vital to both the trait theorists (who saw it as a characteristic) and the power theorists (who saw it as a key facilitator of the profession’s homogeneity). The sample population was therefore council members of ILEX and the Law Society. This sample was chosen to represent certain biographical characteristics of the councils as a whole, covering firm, location and responsibility variables. A greater proportion of ILEX council members were interviewed as the ILEX council is significantly smaller than that of the Law Society.

Silverman further suggests that the credibility of the author’s evidence can be supported if the author notes exceptions to his or her central argument, ‘where deviant cases are cited and explained, the reader feels more confident about the analysis’ (1993: 162). Accordingly I have sought to identify the deviant cases throughout the following chapters. In addition to providing evidence of deviation from my central thesis, I believe that the reference to exceptions also provides evidence of the context

\(^{17}\) Dingwall also notes that in an interview study ‘we can pick and choose the messages that we hear and that we elicit’ (1997: 64).
in which the interviews were held. Silverman warns against simply taking a particular interview response as an explanation or truth in itself (1993: 199-201). Furthermore, he cautions that the researcher must be aware (and make the reader aware) of the cultural forms or context in which the data was gathered.

The interviews reported here did occur within the specific context of massive upheaval within legal services (which is in itself one of the underlying reasons for the research). State support for, and the market conditions of, both ILEX and the Law Society were changing significantly (Hanlon, 1999). Both organisations were additionally emerging from or were in the middle of enormous internal organisational upheaval.\(^{18}\) The immediate circumstances of the interviews which took place at either the organisational headquarters or at the interviewees’ place of work, could also have had a significant impact upon the interviewees responses, for example perhaps through the prioritisation of practice or professional concerns or perhaps leading to franker exchanges away from the ‘corridors of power’.\(^{19}\) Two of the interviews were, however, conducted by telephone. The first for practical considerations of travel and second as the only alternative following rescheduling of the original face to face interview. Although telephone interviews can give rise to problems in utilising ‘non-verbal techniques of interviewing’ (Fontana and Frey, 1994: 371), a good rapport was, in fact, established with both interviewees.

Denzin and Lincoln also caution against interpretative bias on the part of the researcher (1994: 14-5). The reader must be aware not only of the cultural context of the interviews, but also of my role in the interviewees and the interpretation of the data, as a white, university educated male with a political unease about professional power (see Arora and Francis, 1998). While acknowledging Denzin and Lincoln’s

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\(^{18}\) ILEX had to appoint a new Secretary General, a ‘matter which no-one foresaw’ (*Legal Executive Journal*, May 1998:6). The Law Society conducted and implemented a review of its internal governance during 1998 and 1999. Shortly after the interviews were completed the Law Society experienced further upheaval following allegations of harassment made against the then Vice President, Kamlesh Bahl (*The Guardian*: 24/03/00: 1).

\(^{19}\) My experience of both ILEX and Law Society interviewees was that both were more prone to gossip away from the organisational headquarters.

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warning that ‘there is no interpretative truth’ (1994: 15), nevertheless I have attempted to enhance the objectivity of the interpretation of the data through introducing deviant cases and employing ‘multi-method research techniques’ (Denzin and Lincoln, 1994: 2).

An additional way in which Silverman suggested supporting the validity of qualitative research data, was through ‘simple counting exercise’ (1993: 162). Throughout the analysis of the interview data (and linked with the need not to treat an individual response as an explanation in itself), the numerical weight of particular themes and responses was taken into account. To further provide a context for the research and to provide comparative data, the findings of other research exercises (Cole, 2000 and Sidaway and Punt, 1997) are included within Chapter 5 to allow the reader to compare the interviewees’ perceptions of reality with statistical data. Triangulation was achieved through the use of written materials such as internal reports of ILEX and the Law Society and the use of the trade press, to corroborate the responses given in interviews with the author (Silverman, 1993: 156-8) and as ‘an attempt to secure an in-depth understanding of the phenomenon in question (Denzin and Lincoln, 1994: 2). It is important to note that the documentary sources do strongly support the evidence of the interviews.

Finally, this chapter outlines how have I sought to ensure the validity and accuracy of the evidence on which my conclusions are based, by clearly documenting my research approach (Silverman, 1993: 146, citing Kirk and Miller, 1986: 72). In addition, the Appendix and Bibliography includes the full question schedules upon which the interviews were based, together with a full list of sources and the locations of the archive materials which would enable any subsequent researchers to check my findings.
Chapter 5: The Legal Services Marketplace

Introduction

The legal services marketplace is rapidly changing. This chapter will consider some of the driving forces for change in the environment of the legal professions. Abbott demonstrates that external changes, such as state intervention in the workplace, can create or close jurisdictions (1988: 91). Larson notes the historical specificity of the conditions conducive to the rise of professionalism (1977: 47), a point Abel develops to suggest turmoil for the legal profession (1989). What is happening in the workplace can have a powerful influence on how the professional organisations refine and develop their strategies.

Hanlon (1999) notes how market changes and state pressures operate both at an institutional level and firm level, and at the level of individual practitioners. Market forces determine the demand for legal services, which will in turn determine the number of solicitors in employment. State action can affect the ways in which the profession practice, perhaps necessitating increased employment for a particular grade of legal practitioner. The leaders of the professional associations must consider the labour market for legal services as they formulate their strategies for an increasingly competitive legal marketplace.

The chapter will identify the increasing dominance of the largest (mainly commercial) firms of solicitors, growth areas for particular categories of legal workers and the gap between the numbers of those enrolling on the LPC and numbers of those being offered training contracts each year. The environment in which this labour market operates provides some important drivers for change. There have been moves towards the increased standardisation of legal knowledge, following specialisation within legal services as a result of the Woolf reforms, the IT revolution and increased competitiveness in the marketplace. Furthermore, the state has increasingly intervened to structure the legal services marketplace with legislation to regulate the ways in which different categories of legal workers can practice.
The rise and rise of the large law firm

The labour market for legal services is increasingly dominated by the largest law firms. These firms, such as Clifford Chance and Freshfields, primarily work in the commercial sphere and are increasingly operating in a global marketplace, attempting to compete with American firms and the Big Six accountancy firms (Flood, 1996). Their importance stems not only from their position as employers, but the influence that they wield on a national level within the profession. While these firms are numerically few, the sheer number of legal workers that they employ mean that they are powerful players in discussions about the future direction of the legal profession.

Not only are these firms the largest employers of solicitors in private practice, but they are the category of firm which has increased their number by the greatest percentage between 1994 and 1999. The number of sole practitioners grew by 6% (perhaps a result of niche practices being opened by lawyers leaving established firms); the number of 2-4 partner firms fell by 3% and the number of 5-10 partner firms by 7.6%. In contrast the number of 11-25 partner firms rose by 1.9% and the number of 26+ partner firms increased by 11.8% (Cole, 2000: 28). The move in legal services is towards larger and larger firms.

Although the trend towards larger firms is clear, there are many more sole practices than any other size of partnership, numbering 3,641 out of 8,561 private practice firms. 11-25 partner firms and 26+ partner firms together account for only 5.1% of all private practice firms. However the significance of these larger firms is that, despite being relatively few in number, they are the major employers of solicitors in this country. When we focus on the largest firms, those with 81+ partners, we find that 24 firms, that is just 0.3% of all firms, employ 17.5% of all solicitors, 24.7% of all assistant solicitors and 16.3% of all staff (Cole, 2000: 32). This picture is borne out by Hanlon (1997). His survey of commercial law firms (an area in which the largest firms overwhelmingly practice) found that firms with over 20 partners (4% of his total sample) accounted for 30% of all partners in commercial law, 63% of all

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1 The title of this section is derived from Lee (1992).
trainees and 75% of all assistants. He notes, ‘These firms appear to be the training ground for the profession, at least in its commercial sector’ (1997: 805). We shall see later that the largest firms generally provide the training for the whole profession.

The picture becomes even starker with Hanlon’s figures for those firms with 55 partners or more, which includes the elite firms. These firms represent only 0.7% of Hanlon’s sample population, but employ 12% of all partners, 35% of all trainees and 45% of all assistants. The power of the elite firms within the employment structure of the legal profession is obvious. The largest firms, the work they do and the pressures to which they are exposed, are providing significant impetus for change within the labour market for legal workers.

The number of solicitors has steadily increased over the last ten years (Cole, 2000: 12). This time period has also seen a similar increase in the numbers of all staff employed in private practice firms. The fastest growing sector of legal personnel was assistant solicitors, which grew by 83% between 1989-99 (Cole, 2000: 33). The other significant area of growth was that of ‘other fee-earners’ (that is those to whom clients are directly charged for their work other than partners or assistant solicitors). Interestingly this growth has not been mirrored by a reciprocal growth in the number of administrative staff. This group has fallen in number by 1.1% between 1998-9 (Cole, 2000: 33).

It appears that the largest firms have made a conscious decision not to support the increase in fee-earning staff with a similar increase in administrative staff. This is borne out when we look at the Law Society’s statistics charting the ratio of staff per principal within each firm size.

The ratio of staff per principal gives some indication of the structure of a firm. The traditional picture of a solicitor’s firm was a vaguely pyramidal structure with a few principals at the top, supported by a larger number of support staff. Although administrative staff still make up the largest category of staff within solicitors’ firms

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1 The total number of private practice firms declined slightly by 2.4% between 1998 and 1999 (Cole, 2000: 28)
(Cole, 2000: 32), they have not risen at the same rate as assistant solicitors and other fee-earners (Cole, 2000: 33). At the very least this suggests a shift in the shape of the pyramid, to a far sharper gradient. In some firms this notion of a gradual and balanced pyramid no longer accurately reflects the employment structure of the firms.

The ratio of all fee-earning staff to partners increased with firm size (Cole, 2000: 34). For example in the largest firms (81+ partners) the ratio of assistant solicitors to each partner was 2:1, and the ratio of other fee-earning staff to each partner was 1.31:1. On the other hand, in 2-4 partner firms that ratio was significantly lower with 0.58 assistant solicitors per partner and 0.75 other fee-earners per partner. Such variations are perhaps predictable with the larger firms obviously employing more staff. However, whereas in smaller firms the partners constituted the largest group of solicitors within the firm, and other staff were employed to support, within the largest firms, partnership is still reserved for the successful minority, with not all assistant solicitors achieving success in the race for the top (see Hanlon, 1999: 136-7 and Lee, 1999: 41-5). This suggests that many solicitors are being employed to provide a pool of relatively cheap labour from which the partners can draw their profits. In this vein Abbott argues that internal stratification within a profession allows the elite to distance itself from dirty tasks further from the profession’s core knowledge base (1988: 118-21). However the large firm environment in which these partners, assistant solicitors and other fee-earners work, is already distanced from concerns about the exclusive purity of legal knowledge (Hanlon, 1999: 123-63). These firms operate among global business elites, perceiving themselves as unfettered by traditional disciplinary boundaries or nationally defined jurisdictions (Flood, 1996: 173). The division of labour within these firms is not driven by the need to preserve the integrity of the profession’s cognitive structure (Abbott, 1988: 118), but like many other aspects of the firm’s working life, more by managerial and entrepreneurial criteria (Hanlon, 1999: 141). Furthermore, the standardisation and accessibility of

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3 A fee-earner’s hourly rate will vary depending upon seniority, whether senior partner or paralegal.

4 Sommerlad and Sanderson suggest that this pool of relatively cheap labour will be a role for women (1998: 266).
legal knowledge may make it increasingly difficult to preserve the exclusivity of the experts' claims to knowledge.\textsuperscript{5}

Across all firm sizes the ratio of other fee-earners per solicitor varied only within the narrow range of between 0.4 and 0.5. Within this category the lowest value was attached to the largest firms where the ratio stood at 0.40 for 16-80 partner firms and 0.44 for the 81+ partner firms. Therefore, other fee-earners are present in increasingly comparable numbers within firms to that of assistant solicitors. Across all firms the number of assistant solicitors totals 28,364 compared with other fee-earners totalling 27,824. However, it is only within the largest firms that the numbers of assistant solicitors outnumber the other fee earners. All the other firms maintain a pyramidal structure in terms of their subordinate workers, while retaining greater numbers of partners than either of the other categories of fee-earners. The 26+ partner firms maintain a pyramid structure apart from the bulge of assistant solicitors (slightly) outnumbering the partners and other fee-earners. There is a reasonable level of consistency between the various categories of fee-earners within all firms. It is only the administrative staff who outnumber every other category of worker within all categories of firms.

When the ratios of the administrative staff to solicitors are examined, it is clear that there were fewer support staff per solicitor within the smallest and the largest firms (Cole, 2000: 34). For example, within sole practitioners' firms the ratio was 1.43 and within the 81+ partner firms, the ratio was 1.45. Elsewhere the ratio stands at 1.89 for 5-10 partner firms and 1.71 for 2-4 partner firms. However when the staffing ratios are examined \textit{per partner} we find that the largest firms possess the highest ratio of 4.36. So while the partners in the largest firms might appear to have good support from their team (at all levels) their own fee-earners do not appear to enjoy the same ratio of support from administrative staff as fee-earners in smaller firms. This suggests that within the largest firms particularly, administrative tasks are performed by the assistant solicitors themselves, supported by a growing army of other fee-

\textsuperscript{5} However issues such as personal client contacts may remain a province of the partner's specialised knowledge known only to themselves (Hanlon, 1999: 142-6).
earners, also performing administrative tasks - perhaps increasingly paralegals. In addition, these firms are the most technologically sophisticated and are likely to have standardised work and documents accessible from computer. This will enable all levels of fee-earners to generate their own documentation without continuous referral to administrative staff for support (see further Susskind, 1998 and below in this chapter).

Before this chapter moves on to provide a more detailed descriptive profile of the solicitors' profession, it is worth pausing briefly to note the geographical location of solicitors' firms. In 1999, 47.2% of private practice firms were located in London and the South East, of which a quarter were located in London. Given the obvious gravitation of the largest commercial firms to the City of London (Lee, 1992: 34), it is unsurprising that these firms employed 42.15% of all private practitioners. Furthermore, there has been a slight increase in the concentration of private practitioners in London between 1998 and 1999 (Cole, 2000: 36). The significance of these firms within the employment structure of the legal profession is a fundamental characteristic of the labour market for legal services.

Entry into the legal profession

In common with the trends identified across the legal profession as a whole, the number of traineeships is increasing. There were 4,827 new traineeships registered between 1998-1999, which is described as a new record high (Cole, 2000: 62). Although the continuing increase in the number of traineeships should offer some succour to prospective solicitors, the number of traineeships appears to be reaching a plateau with an increase of just one traineeship on the previous year, and an increase of only 1.8% between 1997 and 1998.

However in common with the trends across the rest of the profession, this growth is far from uniform. Overwhelmingly the traineeships are being registered in London and the South-East, and predominately within only the largest firms. Of the 4,827 trainees registered in the year 1998-99, 30.2% of them were registered in the City of
London. A further 19.2% were located in the rest of London. Taken together, 49.4% of trainees were located in London in 1998-9 and in total 60.3% of trainees were registered in London and the South East.

96% of trainees were trained within private practice, and within this sector the dominance of the largest firms is once again underlined by their training of the next generation of solicitors. A quarter of all trainees were located in the 81+ partner firms and a further 20% in the 26-80 partner firms with just 6.6% of trainees registered with sole practitioners. Hanlon’s (1997) study underlines still further the importance of the largest firms particularly in the commercial law fields, in which they overwhelmingly practised. Hanlon found that 6% of firms in his sample trained 59% of all trainees.

At the other end of the spectrum, 60% of those firms with less than ten partners had no trainees and the remaining 40% had less than ten trainees each. It is clear that the training of the profession is overwhelmingly falling to the largest commercial law firms.

The key reason for this is simply that these firms can afford to employ trainees.\(^6\) The pressures that high street practices had suffered over recent years (Law Society Task Force, 1999) have meant that they find it very difficult to plan years in advance. Even if they felt able to employ a trainee solicitor, they could not feel sufficiently confident to be able to guarantee him/her a second year of a training contract, let alone a permanent job on qualification. One partner in a small rural practice, in an interview with the author, set out the difficulties which such firms face:

Traditionally you would take on a trainee confident that there would be a position available two years down the line. Now nobody can be that confident.

_Pilot/Workplace Study_

In addition to being able to afford trainees, it is actually in the interests of the largest firms to recruit trainees. It allows them to seek to ensure that they recruit the best entrants to the profession and then train them in the way that the firm operates. It is a

\(^6\) Abel, notes that the internal organisation of law firms allows for a ‘spread of capitalist relations within firms’ which enables partners to achieve greater profits from the labour of their employees.
means of ensuring continuing dominance within the market (Lee, 1999: 33) and standardising their service.

The current dominance of the largest firms in the training of the solicitor’s profession is likely to have significant implications for the profession. The large firms have already been able to successfully lobby for an increased business law element to the Legal Practice Course, and eight City firms have recently unveiled plans for an ‘enhanced’ LPC (The Lawyer, 21st February 2000 internet edition). Such a move was supported by the Trainee Solicitors’ Group’s submission to the Lord Chancellor’s Advisory Committee on Legal Education and Conduct’s (ACLEC) Review of Legal Education. The group advocated the removal of courses from LPC which were not a core part of the work of most trainees, while retaining core elements of business law (Moorhead and Cushley, 1995 cited in Hanlon, 1999: 127). The trainees clearly were concerned about their future employability.

The fact that these young solicitors have received training within the large commercial firms has key implications for the rest of the profession. The skills and knowledge that the trainees develop within the largest firms are not necessarily appropriate for practice in another sector of the profession. It is for this reason that many solicitors fear for the continued sustainability of the high street sector (Devonald, 1994: 2). Furthermore Hanlon argues that the largest firms engender notions of commercialised professionalism in those who work in that sector (1999). Again, is this commercialised professionalism appropriate for work within the high street sector or even the Government’s new Community Legal Service (CLS)? The CLS, in particular, will depend for its success on values far removed from commercialism.  

Although the number of traineeships being offered each year is gradually increasing, a significant problem for the legal profession (although in reality it is a problem for those seeking to enter the profession) is the insufficiency of training contracts for

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1 Cf. Sommerlad (1999), who charts the impact of contracting within the legal aid sector, noting that it requires more businesslike ways of working within firms. However, an initial motivation to work within the CLS may indeed still draw upon more traditional aspirations towards justice than those contained within commercialised professionalism.
those graduating from the LPC. 6,285 students were enrolled on the LPC in the year 1998-9, although in 1999-2000, there are 7,088 full-time places and 1,526 part-time places available. Although some students will fail, or decide not to pursue a career in the legal profession, just 4,827 traineeships were registered in 1998-9 (Cole, 2000). Although the situation has improved since the early nineties, when the number of training contracts offered actually fell, at best the LPC graduates face extremely stiff competition and at worst may not be able to pursue the career for which they have trained.

Similarly there are a growing number of law graduates moving through higher education each year. The total number of graduates with a qualifying law degree has grown from 4,834 in 1987 to 8,943 in 1998.8 Obviously not all of these students will even take a place on the LPC, but recent research indicates that at the outset at least, the overwhelming aspiration of first year law students is that they will work in the legal profession as either solicitors or barristers (Rees, Thomas, Todd, 2000, and see Francis & McDonald, 2000 for a similar finding in relation to part-time law students). Because of the over-supply of students wishing to secure training contracts, not all are successful. However there are clear indications that it is possible to predict which types of students are more likely to secure a training contract. Halpem found that a person’s chances of obtaining a training contract were significantly related to:

- their A-Level score
- the type of institution at which they studied their degree
- their degree class mark
- the type of school that they attended at age 14
- their ethnic background
- their work experience
- whether they had relatives in the profession (1994: 77-81)

These are factors that have, in general, been confirmed in other research, such as Goriely and Williams (1996: 23-35), and do not necessarily indicate a meritocratic selection process leading to a diverse legal profession.
The fate of those law degree/LPC graduates who do not secure training contracts is not yet clear. Considerable anecdotal evidence suggests that many will opt to work as paralegals for a short-term period, hoping to impress their firm and be offered a training contract. The role of a graduate paralegal does not, at the moment, appear to offer a solid alternative career route. However it is possible that as higher education continues to expand and the number of training contracts continues to rise only slowly, that many will have to re-assess their career aspirations. The graduate paralegal may become more widespread, or these people could decide that a career as a legal executive might offer them better rewards.

The growth of the legal profession: a descriptive profile

The central conclusion that emerges is that the legal profession continues to grow. Despite centuries of public antipathy towards lawyers, from Shakespeare to the anti-lawyer jokes of today, the number of lawyers continues to grow. However, the nature and pace of this growth are particularly revealing in terms of the likely implications for the professions of solicitors and legal executives.

Although this thesis focuses upon both solicitors and legal executives, this chapter will, for the most part, concentrate upon solicitors. The majority of legal executives are employed in solicitors’ firms. Therefore solicitors, as employers, play a key role in determining the number and type of staff that they employ. Furthermore, most solicitors themselves are employees within firms of solicitors and other organisations. Thus the Law Society faces a tension in representing the fragmented interests of both employers and employees.

8 Cole additionally notes that there are a further 3500-4000 students with qualifying law degrees graduating from joint honours or modular degrees (2000:56).

9 See particularly the author’s interviews with paralegals, legal executives, partners and the council members of ILEX and the Law Society.

10 'The first thing we do, let's kill all the lawyers' *Henry VI, Part II*, William Shakespeare (1592)

11 Typing 'jokes about lawyers' into a search engine quickly reveals 20 sites, such as *Worlds' Funniest Lawyer Jokes* (www.wwlia.org.jokes.htm).
There were 100,957 solicitors on the Roll, as at 31st July 1999 (Cole, 2000: 9). Of these, 79,503 solicitors held practising certificates, the number of practitioners having increased by 5.9% on the previous year. Despite occasional downward fluctuations, this steady increase has been maintained over the last thirty years. Since 1969 the number of solicitors holding practising certificates has grown by 237.2% at an average annual increase of 4.1% (Cole, 2000: 11). The slightly higher than average increase in 1999 seems to suggest that the solicitors' profession continues in rude health. However, there are considerable differences among solicitors. As we saw in Chapter 3, the profession is fragmenting over a variety of issues. Therefore this growth is unlikely to be consistent across all sectors of the profession, be that employers/employees or large/small firms.

The vast majority of solicitors (64,026 or 80.5% of solicitors holding practising certificates) work in private practice. This thesis will primarily concentrate on the situation in private practice (rather than in commerce or industry), where solicitors, as employers, have considerable control of the work of their employees, legal executives (and other solicitors).

The solicitors' profession is getting younger. Just over half of the profession, 52.6% of solicitors with current practising certificates, have been qualified for ten years or less (Cole, 2000: 2). This contrasts with the popular image of solicitors as stuffy middle aged practitioners lampooned in sitcom, and borne out in earlier research (Campbell, 1976). Furthermore, of the new recruits to the profession in 1998-9, 52.6% of these were women and admissions from the ethnic minorities represented 16.6% of all admissions of known ethnicity (Cole, 2000: 71 and 77). The number of women in the profession in 1998-9 accounts for 35.1% of all solicitors with practising certificates. The rate at which women have entered the profession over recent years is clearly demonstrated by the fact that while the total number of solicitors holding

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12 When students wishing to embark upon an LPC enrol with the Law Society they have the opportunity to fill in an Equal Opportunities Monitoring Form. Although they are not obliged to fill this in, most do so. The ethnicity of 81.2% of students enrolling with the Law Society was recorded in 1998-9 (Cole, 2000: 77). Interestingly, although with the effect that the data is degraded, this return represents a fall from 91% known ethnicity in 1993-4.
practising certificates has grown by 49.5%, the number of women holding practising
certificates has increased by 153.6% between 1989-99 (Cole, 2000: 2).

Women are increasingly moving into a profession formerly populated by older men.
In the year 1998-9, 52.6% of the new admissions to the Roll were women (Cole,
2000: 2). In 1999, the average age of a female solicitor with a practising certificate
was 35.6 years, whereas the average age of a male solicitor was 42.8 years (Cole,
2000: 3). Women are still a minority (but a growing minority) within the profession,
and are generally among the younger members of the profession. As few women yet
have the requisite years of experience for partnership, relatively few women are found
in senior positions (Law Society Gazette, 24/01/2000: 3). The rate at which women
are entering the profession, perhaps, suggests that the gender balance in the senior
positions within firms will be more equitable in the future. However, when a specific
band of experience is considered, it can be seen that of those solicitors with 10-19
years experience in private practice (the range where most partners or sole
practitioners are to be found), 85.5% of men were partners or sole practitioners
compared with only 60.5% of women. Sommerlad (1994 and with Sanderson, 1998)
and Skordaki (1996) have found that although the legal profession may now be less
numerically dominated by men, there is still a considerable gender imbalance in terms
of control and power within the legal profession (see chapter 3 for further details).

The Law Society is explicitly seeking to address the position of ethnic minorities. In
1998-9 solicitors from ethnic minorities accounted for just 5.5% of solicitors with
practising certificates. This does not accurately reflect the percentage of ethnic
minorities within the general population (for the increasing multi-cultural nature of
British society see www.runnymedetrust.org.uk/med/TheReport.htm). The Law
Society, through their internal document *Training Strategy*, expressed concern about
the performance of ethnic minority candidates at a number of stages - entry onto the
LPC, LPC results and obtaining a training contract. They found that the overall pass

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13 More fundamental explanations for the exclusion of women from partnership can be seen in Witz’
conception of ‘profession’ as a gendered notion (1992: 39), and in the specific difficulties that
Sommerlad and Sanderson (1998) identify women facing in the solicitors’ profession.
rate for non-white students was 50.3% compared with a 78.4% pass rate for white students (1999: 37, para. 4.4). They also found students from an ethnic minority at a similar disadvantage when it came to obtaining a training contract. On average, a white student has a 70% chance of obtaining a training contract compared with only a 47% chance for an ethnic minority candidate who is the same in every other respect (1999: 40, para.6.2). This is a particularly damning indictment of the profession given the primacy of the subjective interview in the selection process (Goriely and Williams, 1996: 23-35). The Law Society has acknowledged this and intends to undertake further research on the level of discrimination. Any such discrimination is, however, clearly dependent on other structural reasons, such as the higher numbers of ethnic minority students who attend new universities. Employers have a widely reported disinclination to offer training contracts to those students regardless of their ethnic origin (Halpern, 1994 and Goriely and Williams, 1996, and see above for discussion of the competition for training contracts). The Law Society is, nevertheless, likely to face considerable difficulty in altering the recruitment strategies of its members, with the largest firms using more commercially orientated objectives in their selection criteria (see further Francis and McDonald, 2000).

To complete the descriptive profile of the labour market within legal services, the following section will consider the employment of paralegals within solicitors’ firms.

Non-Solicitor Fee-earners: The employment of paralegals within solicitor’s firms

The term ‘paralegal’ is a highly nebulous label for categories of legal workers. Sidaway and Punt (1997) employ the term to cover a range of workers, defining a paralegal as anyone who performs legal work in a solicitors’ office who has not qualified as a solicitor, or embarked upon a training contract (1997: 1). While this chapter will refer to that definition when using the statistics from the Sidaway and

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14 Unfortunately, however, most of Sidaway and Punt’s research was carried out in 1993, so considerable changes may have occurred since the statistics were produced, particularly with the growing failure of LPC graduates to secure training contracts. However apart from this omission, most of the trends are likely to be broadly indicative of the current picture.
Punt (1997) study, this definition is contentious within the profession, and it is not one which I use throughout the thesis as a whole (see Chapter 1).

At a meeting of the ILEX education committee attended by the author (5/6/98), the then President Pat Dilley F.Inst.L.Ex, strongly rejected any suggestion that legal executives could be viewed as paralegals. Similarly a partner in a large commercial firm, in an interview with the author, stated:

‘Paralegals’ to us indicates that they may have a law degree but are otherwise unqualified. Legal executives in this firm do not see themselves as ‘paralegals’.

_Pilot/Workplace study_

The Trainee Solicitors’ Group reports an attempt at definition by Philip Jones of Sheffield University, who stated that:

the ‘paralegal’ was an individual who had qualified through education, training and experience, who performed delegated legal work, who required knowledge of legal concepts and undertook work which could, in the absence of delegation be performed by a lawyer. (Launch of the Legal Practice standards for NVQs at Cardiff University: www.tsg.org.uk)

The definition employed by Sidaway and Punt (1997) is considerably broader than those offered above, however their research findings still help provide an important picture of this particular group within the legal labour marketplace.

Again the evidence points to the dominance of the largest law firms. The vast majority of paralegals were employed in the largest firms (those with over 11 partners in Sidaway and Punt’s study), on average around 20 paralegals per firm (1997: 9). Sidaway and Punt also found that the firms that employed more paralegals were those who were more likely to have developed specialisation in its work (1997: 9). This tendency fits with the image of the efficiently organised large firm, employing its staff within specialised departments.

In contrast to solicitors, most paralegals were women. In all but the largest firms, Sidaway and Punt found that 60% of paralegals were women (1997: 11). This is supported by ILEX’s own membership survey which demonstrates that women
dominate (numerically) the membership structure of ILEX at all levels, with 72% of all members being women and 62% of all Fellows being women. This is particularly striking among the student members of ILEX (the next generation) with women accounting for 78.2% of all students and 84% of all students in the 17-25 year old category (ILEX, 2000). However in the larger 11+ partner firms, Sidaway and Punt found that the reverse was true, with 53% of paralegals in such firms being men (1997: 11). Significant variations between men and women existed in terms of salaries. Overall, salaries varied widely, however a median salary for men was £15,000 and for women £10,000. Within the larger firms that employed a disproportionate number of men, the median salary was £18,000. There are a number of easily identifiable reasons for this difference. In general, the largest firms generate a higher turnover and offer higher rewards for all their employees (Cole, 2000) and most are situated in the London and the South East, where salaries also tend to be higher.

**Qualification and Training**

The qualifications of solicitors are clear, and backed with the force of statute (s.1 Solicitors Act 1974), and most follow the route of degree/LPC/training contract, although there are a number of other carefully prescribed alternatives. In contrast, there is no prescribed qualification for a paralegal, indeed anyone can describe themselves as a paralegal. There is little uniformity of competence.

Although most paralegals had O-levels/GCSEs, Sidaway and Punt found that 43% had A-Levels and just 15% possessed a degree (1997: 14). However it is possible that the proportion of those educated to degree level will increase as LPC graduates struggle to secure training contracts. Although just over half of the paralegals possessed some stage of ILEX qualification, few were found to have proceeded to either the Part 2 stage of the ILEX examinations or to full qualification as a Fellow of the Institute - just 17% of the sample were Fellows (Sidaway and Punt, 1997: 15). Again this is confirmed by ILEX' own membership statistics which show just 27% of

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15 There was no explicit breakdown of salaries by gender in the largest firms (Sidaway and Punt, 1997: 26)
the membership are Fellows. This appears to support ILEX’s emphasis, in its activities, upon training and education - even within the 26-40 year old category, there are only 2,799 Fellows compared with 8272 Students and Members (ILEX, 2000). Interestingly, it tended to be the paralegals employed in the larger firms who were ILEX members, with 30% of paralegals in the largest firms qualified as Fellows (Sidaway and Punt, 1997: 15). It may well be that, in their drive towards efficiency and high standards, it was these larger firms which are most concerned that their employees, at all levels of fee-earning, possessed externally validated qualifications. Linked with this is the finding that, overall, those paralegals who possessed some ILEX qualifications, earned higher median salaries than those with none - £11,000, compared to £16,000 (Sidaway and Punt, 1997: 26).

The fact that few of the paralegals had completed their ILEX qualifications suggests that the paralegals may not have been particularly encouraged to pursue further qualifications. Sidaway and Punt found that solicitors tended to view practical experience as being more important for paralegals than formal training (1997: 31). Although 83% of solicitors said that it was their firm’s policy to encourage and subsidise ILEX qualification for their staff, Sidaway and Punt found that most in reality did not spend a great deal of money on external training (1997: 32). The reasons for this are perhaps illustrated by the following comment from a senior partner in a large commercial firm, interviewed by the author:

[Paralegals] have training in how we work... They need training to do the job that they've been taken on to do but we wouldn't commit more than that because ultimately somebody else is going to benefit. Because they are going to move on and join another firm. It doesn't make business sense. Their training needs are firm specific during the time that they're here. We're not altruistic.

Pilot/Workplace study

This partner principally viewed paralegals as law graduates taken on for a specific role for a short period of time. However another partner at a large personal injury firm, while strongly supportive of the skills that paralegals could bring to his firm, identified their frequent lack of formal qualifications as a problem for the worker and the firm.
I think, in many ways, you owe a paralegal more than a solicitor. A solicitor has got a ticket to ride. He’s got a practising certificate. If he’s anyway decent at his job, he should never be unemployed. When you take someone on who’s a paralegal with no legal qualification and you train them in a very narrow field, then you do have a degree of responsibility to them. You can’t just toss them aside, because they will find it a lot harder to find another job. Pilot/Workplace

The emerging pattern is that the qualification and training of paralegals is at best haphazard. One third of all paralegals reported that they had received no training at all from their firm, and a fifth of all paralegals, that they had received only ‘on the job’ training. Less than half had discussed their training needs and requirements with their supervisor (Sidaway and Punt, 1997: 35). ILEX offers a clear and established qualification for non-solicitor fee-earners, yet has never been as successful as it perhaps should have been. A paralegal does not have to be a qualified legal executive to do the work of a legal executive.16 A quarter of all solicitors, in Sidaway and Punt’s sample, felt that there was scope for additional or alternative qualifications to those provided by ILEX.

In May 1998, alternative qualifications were launched when the Law Society and ILEX established the National Vocational Qualifications for Legal Practice. These have not been a success. The Law Society noted that ‘there has not been much take up to date’ (1999: 26). ILEX council members, interviewed by the author, were very disappointed about the low take up, some suggesting that either ‘no-one’ or ‘just two people’ had taken up the NVQs. However, none of those interviewed appeared particularly surprised by the low response. There are a number of reasons that may be suggested for the lack of take-up. NVQ’s generally have been described as being of more benefit to employers than to employees (Hyland, 1994) and yet solicitors, as employers, have historically not shown massive evidence of investing heavily in their

16 Although there have been recent developments under the Courts and Legal Services Act 1990 and the Access to Justice Act 1999, which alter this situation to some extent. These legislative developments will be considered further below.
paralegals’ training. Furthermore NVQs test a series of competences held by the paralegal, in effect confirming the skills that the paralegal possesses. There is not a development of the paralegal during which new skills and knowledge are acquired. If the paralegal is already a law/LPC graduate seeking to work for a short period before progressing to a training contract, they may well see no value in having their competence confirmed in a job that they do not wish to pursue. Perhaps, most fatally, is the fact that possession of an NVQ does not in fact entitle the paralegal to do anything that he or she was not already capable of doing. There are, in fact, more legal rights attached to a Fellowship of ILEX (see further below). Consequently, a paralegal wishing to acquire rights to appear in court and conduct litigation, would be better advised to pursue the ILEX qualification route.

Most solicitors in the Sidaway and Punt study saw the use of paralegals increasing in firms (1997: 48). This was supported by the smaller sample of paralegals and partners interviewed by the author in the pilot/workplace study. It was felt that with increasing specialisation in the marketplace, increased use of IT and the ‘Woolf reforms’, there would be greater and greater need for fee-earners who could be delegated low level work, and support themselves administratively.

A lot of the thrust of Woolf is about streamlining the procedural approach to a lot of civil litigation, but particularly personal injury work... Turning that onto an organisational point, how do you set up an office to deal with that work? Woolf put some kind of costs cap so that the core costs could never be more than one third damages. So you can’t afford to have 25 solicitors doing that work, each on £35,000 p.a.... What you will end up is relatively few solicitors doing... the bigger work, ... you will end up with probably a greater number of paralegals. Some of them may have some form of legal qualification but are not admitted because they can’t get themselves a training contract. What I [also] think we may see... is that there will be a blurring or demarcation between senior secretary and junior fee-earner... If you have a very efficient case management computer system and if you have very competitively paid (let’s put it that way) support staff who are coming into the role of paralegals, they will
provide a very valuable resource. Partner in national personal injury firm, pilot/workplace study

There is a pressure to use our junior staff on routine matters and to use the skilled staff as supervisors and co-ordinators, rather than actual hands on. Standardisation through IT is one way that this could be achieved. Partner in large commercial firm, pilot/workplace study

There is a clear sense that non-qualified fee-earners will increase in number. However it is worth remembering that fully qualified legal executives are in many firms working as solicitors, doing similar work with little supervision. Firms will increasingly require unqualified paralegals to combine the roles of fee-earners and administrative support staff. The entry of graduates into the labour marketplace will further confuse the picture and it is unfortunate that Sidaway and Punt's survey was completed before this change occurred.

There are strong signs that it will be more economically effective for firms to employ paralegal workers for specific pieces of work. As has been referred to above, standardisation of legal knowledge and specialisation of legal practice are key issues with which firms are grappling as they attempt to develop their organisation to meet the competitive needs of the marketplace.

Standardisation in the Legal Marketplace

Rather than a feature of de-professionalisation, Larson saw the standardisation of the knowledge base as an integral aspect of the traditional paradigm of the profession (1977: 40). It was the codification of the knowledge base into a scientifically objective system, that allowed the profession to argue that it employed a body of knowledge 'independently of the interests and specific power of that group' (1977: 41). Abbott too, recognises the importance of a codified knowledge base, however he demonstrates the problem which professions have to balance: maintaining 'optimum abstraction' (1988: 105). The danger in moving from an esoteric knowledge base is that the profession's knowledge may appear too technical, and therefore less
professional. It is the standardisation of the knowledge base in this context that is currently altering the legal service environment.

Drawing upon the 'de-skilling thesis' of Braverman (1976), both Wall and Johnstone (1997) and Sommerlad (1995) consider the ways in which the managerialist imperatives within legal practice have led to a standardisation of the profession's work and compromised its autonomy. Sommerlad (1995) examines the introduction of legal aid franchises and their impact upon the professional autonomy of legal aid practitioners. Franchises were first piloted in 1992 by the Legal Aid Board, and then introduced more widely to ensure a universal level of quality among legal aid providers. However, it was widely perceived to be a precursor to legal aid contracts with the suspicion that the exercise was one of controlling costs and efficiency amongst legal aid providers using managerialist strategies (see further Clements, 1994: 6; and Harman, 1994: 9). Sommerlad argues that aspects of the franchise agreement, with which the lawyer must comply, significantly undermine the lawyer's ability to operate autonomously and the franchise will also have a de-skilling effect upon the legal practitioner. She notes particularly that the transaction criteria which a practitioner must follow in running a case 'appear to strike at the heart of the discretionary element implicit in the practitioner's diagnostic relationship with the client' (1995: 171). A concern amongst her sample was that a standardised service would emerge under the transaction criteria. It was felt that the criteria simply measure the ability of firms to follow set routines rather than to give high quality advice.

Wall and Johnstone also conceptualise the standardisation of legal practice from the perspective of Braverman's work (1997: 108). They suggest that 'many areas of legal practice that were once the domain of the traditional lawyer have been reduced to standardised procedures' (1997: 110). Wall and Johnstone argue that this has been driven by the ideological need of capital to divide labour into its core tasks. This then

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17 CAB staff operating the non-solicitor franchise agreement also experienced difficulty in conducting a relationship with their clients without been able to use their discretion in their interviewing strategies (Francis, 2000: 69-70).
allows cheaper unqualified staff to be responsible for more standardised tasks, thereby reducing overheads and raising profits. Like Buroway (1996), Wall and Johnstone see this phenomena applying equally well to the intellectual tasks of professions as it did to Braverman’s analysis of industrial craftwork. For Wall and Johnstone, therefore, the current engine of change within legal services is not Information Technology (IT) per se, ‘but the managerialist philosophies which embody the “logic of professionalism”… Technology is only a means by which this rationalisation can be affected’ (1997: 97).

However the rate of IT development, and its potential application to law, have the effect not simply of facilitating the standardisation of legal knowledge but of driving on that standardisation of legal knowledge and the routinisation of legal practice to greater levels.

Information technology and the law
Susskind (1998) notes the difficulties involved in predicting the future of IT and therefore, its impact on law. He acknowledges the argument that it is futile to predict changes in IT such is the rate of growth, commenting that:

if a long-term forecasting exercise… had been conducted in 1977 it would have neglected the advent of the personal computer (which came to the market in 1981). (1998: xii)

However certain calculations can be made based on the advent of the world wide web and estimates about the growth in computing power which can provide strong indications about how IT will shape legal services. Susskind argues that it is now believed that computer performance will improve, quicker than the predicted doubling every eighteen months, while becoming thirty per cent cheaper per annum. He suggests that it will now ‘be less than the predicted twenty years before one personal computer will be as powerful as the sum total of all of today’s machines in California’s Silicon Valley’ (1998: xiv). Furthermore the storage capacity of computers will increase with greater hard disk space and the advent of CD-ROM and DVD technology.
As we have already seen there is increasing pressure on firms to develop more sophisticated practice management strategies and Susskind sees IT as being ideally placed to facilitate this greater efficiency within firms (1998: 31).

The use of IT within law firms will have an important impact on the employment structure within legal services. To a large extent, the developments Susskind notes threaten the continued exclusivity of legal knowledge. However as we saw above, he acknowledges that additional factors are involved. He sees IT facilitating, what he terms, ‘widespread institutional memories’ within firms and organisations. These memories will serve as computer based libraries and databases which will ensure that ‘the know-how that is often locked in the heads of specialists or hidden in filing cabinets will become a widely used institutional resource’ (1998: xxvii). Similarly Wall and Johnstone found that most of the large firms in their research sample, were planning to introduce or had already introduced, ‘in-house case management databases’, allowing for a greater exchange of information and practice within the firm itself (1997: 104). This clearly will have enormous repercussions for the legal labour market, and perhaps ultimately the system of the legal professions, as legal specialists lose their exclusive knowledge claims.

Susskind goes on to predict an increased use of ‘Automated Document Assembly’, essentially the re-production of frequently used legal documents through the use of templates. This is something that is already increasingly being used within firms. Even the simplest word-processing package today can facilitate the use of templates. A specialist could draw up a document, and with clear instructions, a lesser qualified worker could access the required form without having to undertake detailed legal drafting. Similarly, although perhaps less likely in the short-term, Susskind’s suggestion that ‘Legal diagnostic systems’ could be developed, could also detract from the specialist’s legal skills and knowledge. He suggests that these systems founded ‘on rule based expert systems technology, can provide specific answers to given problems’ (1998: xxviii). These systems could clearly be operated by lesser qualified employees - perhaps a paralegal with appropriate supervision and training.

A key result of the technological changes, which is already beginning to be seen
within the labour market (Cole, 2000 and above), is that fee-earners will rely far less on secretarial support. There are growing moves within legal practice for all levels of fee-earners to carry out their own administration. Wall and Johnstone found that within their sample, solicitor’s firms were trying to move away from traditional one to one secretarial support for fee-earning, and have one secretary supporting a small team of about three or four fee-earners (1997: 110-1).

Other developments in the IT sphere would support the growing globalisation within the legal services marketplace (Flood, 1996). The growth of telecommunications and the Internet would support international conferences and virtual legal teams, no longer restricted by geography. These developments could help firms compete more effectively and will change the labour market - global competition for jobs would no longer be restricted by lawyers’ geographical location. Virtual legal libraries of legislation, legal materials and judicial decisions, all to be found on the Internet, would further support legal practice. Indeed, even today, many House of Lords judgements can be downloaded from the Internet soon after the judgements have been delivered. The Internet is another example of the ways in which technologies can further facilitate the standardisation of legal knowledge, with accessibility to non legally qualified staff or clients. However, in a recent interview, Susskind warned of the dangers to mid-sized firms if they fail to offer their own services on the Internet. He argues that ‘professional service providers are intermediaries’ between the client and the specialised knowledge (The Lawyer, 19/06/00: 36). The Internet could remove the ‘social distance’ (Johnson, 1972: 41) between the client and the professional adviser, therefore the law firms need to develop ways in which they provide added value to the clients’ use of legal websites.

Ironically, however, Susskind notes one barrier to setting up teams of junior lawyers to work on cases, has been the inclination of the largest corporate clients to pay that little bit more for the status and experience of a senior partner (1998). While many

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18 We can view the status and experience of the senior partners as their ‘cultural capital’ (Bourdieu and Wacquant, 1992: 99). Employed solicitors and legal executives cannot hold this cultural capital and so remain subordinated within the field.
of his conclusions point to the demystification of legal knowledge, and the lawyer's loss of exclusive control over its knowledge, it is interesting to note the continuing status of legal knowledge as an expensive commodity in a fiercely competitive market. However, the appeal of the partners may lie not only in their legal expertise, it may simply be a matter of their status as senior personnel within the firm, which influences the large corporate client seeking prestige.

One of the principal themes of Susskind's hugely influential work is that he sees IT having an impact on law, far beyond the confines of the traditional law firm. He advocates a co-ordinated IT strategy for the entire justice system, incorporating the voluntary sector into the same network as courts and other legal providers. The Government has followed this strategy in its plans for the Community Legal Service (LCD, 1999). The Consultation Paper places great emphasis on the ability of ordinary citizens to access legal advice and information, from terminals in public places, in addition to supporting the advice sector with a uniform advice and information resource. Susskind believes IT will have a tremendous impact in the Courts themselves, allowing management of cases as they progress through cases, in addition to providing a library of cases and legislation to assist the judges in their decision making process. The ability of IT to support case-management within the court systems was an underlying assumption of much of the 'Woolf Reforms' (see below).

**Woolf, civil justice and IT**

The 'Woolf Reforms' have been the key driver for much of the routinisation of civil justice work. The changes in court procedure and the management of civil cases emerged from *Access to Justice* by Lord Woolf (1995 and 1996). The changes came into force in April 1999, with many practitioners and judges anxious that systems were not sufficiently in place to cope with the changes. The key principles behind

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19 The revised paperback edition carries glowing testimonials from the senior partners of major law firms. Woolf (1995) was heavily influenced by Susskind's ideas, as were many of the Law Society Council Members interviewed for this research. In the article in which he was interviewed, the journalist described Susskind as the 'new media guru' for the legal profession (*The Lawyer*, 19/06/00: 36).

20 At the end of the first year, however there appeared to be cautious optimism about the new Civil Procedure Rules (*The Lawyer*, 15/05/00: 17).
the reforms derived from the recognition that it was no longer viable to operate a civil justice system in which time and cost were no object. Woolf felt that the fundamental problems arose from the ‘unrestrained adversarial culture’ (1995: Chap.4, para.1) that pervaded the civil justice system of England and Wales. The specific problems he identified were:

- excessive, and lack of control, of civil litigation
- inadequate control of costs, delay and the maintenance of equality between the parties
- excessive complexity within civil litigation
- the absence of any satisfactory judicial responsibility for the effective use of resources within the civil system (1995: Chap. 4, para.1)

The ‘Woolf reforms’ entail a fundamental culture shift for all actors within the civil justice system, the full impact of which has yet to be properly assessed. One thing, however, is clear. The reforms mean that firms involved in civil litigation will have to manage their caseload more efficiently than ever before in order to comply with the new procedural rules in the courts.

As well as the culture shift for firms operating within the civil justice system, there will also be a significant culture shift for the judiciary whose involvement will be greater in the running of cases. One of the fundamental tenets of the reforms will be greater court directed case management. There will be various routes through the civil justice system, which a case will follow depending upon the sums of money involved in the case and the legal complexity. For example there will be ‘Fast-Track’ procedures for cases of up to £10,000, and a new ‘Multi-Track’ procedure for other cases. The ‘Multi-Tracked’ cases will have a series of judicially directed timetables to ensure that costs are kept down, to prevent unnecessary delay and maintain equality between parties. This will mean that the firms involved will need systems in place to ensure that the judicial deadlines for the various stages of the case are met.

A key concern of Lord Woolf was the excessive cost of civil litigation and there were a number of procedural rules drafted to ensure that the costs were kept down to a
reasonable level. For example, there is a requirement that solicitors inform the parties
at the commencement of the case, of the method of charging and then subsequently, at
key stages, provide the parties with information about the current level of costs and
any likely increase in costs. This is designed to introduce greater transparency into
the costs calculation of solicitors' firms, again with a view to keep the expense of civil
litigation at a manageable level. A further, more direct, approach to costs is seen with
the operation of costs capping, linked to the likely damages that the client may win.
Once more these factors will place pressure on the firms to manage their caseload in
the most efficient manner, standardising procedures wherever possible. There is a
strong possibility that this will lead to greater numbers of subordinate workers being
engaged on such tasks, while the partners retreat to supervisory roles or high-level
legal casework. The firm will not be efficient if its highest paid lawyers are engaged
on low return work (see interviews with partners above).

Woolf was keen to see the increasing use of information technology supporting his
reforms, particularly in the sphere of case management by the courts:

Case management, the administration of the courts and the conduct of litigation
itself can, and should, be assisted by a variety of new technologies. New
technologies will also enable the courts to respond better to litigants' needs for
information and advice. (1995: Chap. 4)

This interest in the role of IT and the administration of the courts has been further
developed with the recent publication of the consultation document civil,justice.2000:
A vision of the Civil Justice System in the Information Age (2000). Once again this
document relies heavily upon the involvement of Richard Susskind, appointed as an
advisor to Lord Woolf.

Specialisation within legal practice, like IT, can also be seen as a force for the
standardisation of legal practice. The development of specialised fields of practice
has required the creation of departmental structures. Staff, particularly subordinate
staff, are increasingly allocated specific standardised roles within these structures. It
must, however, be remembered that the development of specialist fields of practice is
not necessarily of a routine nature, but may require highly creative and sophisticated
applications of legal knowledge. Such specialisms can have an equally significant impact upon the profession and the labour market, for the profession must reconcile this division of labour and internal stratification with its legal and public audiences (Abbott, 1988: 67). Abbott also argues that only professions with a strong internal structure can resist specialisation leading to formal division (1988: 106). The question of the strength of the internal structure of solicitors and legal executives will be explored in more depth in Chapters 7 and 8.

Specialism within legal services

Firms at all levels claim expertise over more closely defined fields of work and ensure that their staff, from an early stage in their career, specialise to a high degree of expertise in their chosen field. There has been a recognition that a firm's claims to expertise will be diluted if it claims expertise over too broad a field of law. It is interesting to see the similarity of this market imperative with Abbott's recognition that a profession needs to maintain optimum abstraction of its knowledge base when making its jurisdictional claims (1988: 102-4). In addition to having a significant impact upon the categories of legal workers employed within practice, specialisation also has a large impact upon the tasks they perform in the workplace.

The largest firms are now re-organised into a series of specialised departments. Historically solicitors would work as generalists. Today, however, as the complexity of law increases, for a firm to be truly successful as an expert provider in legal services, it needs to ensure that its staff master an area of law, without the distraction of attempting to accommodate additional fields of law. This phenomena has been growing across the legal services marketplace but is particularly pronounced within the largest firms. It is amongst these firms that competition is at its most acute, requiring greater efficiencies of time and expertise. Furthermore, the largest firms tend to work in commercial areas of law, where working with legislation and regulation is often particularly complex. 21

21 Wall and Johnstone noted that an increase in the volume and complexity across all fields of law had necessitated greater 'operational efficiency' (1997: 97-98). The 'black holes' left in international law requires complex and sophisticated application of legal skills, which could prove lengthy and costly unless effectively managed (Flood, 1996: 192).
Hanlon found that 80% of the firms in his sample had organised their work into some form of departmental structure (1999: 128). Kerner (1995) explored specialism within Scottish private practice. Although she states that there is broad similarity between the professions of Scotland and those of England and Wales, the Scottish solicitors' profession is about a sixth of the size of the profession in England and Wales and, furthermore, there are far fewer examples of the 'mega law firms' (Galanter and Palay, 1991) which are increasingly dominating private practice in England and Wales. However the research does offer general evidence of the growth of specialisation within private practice. Her study found that almost half of the principals considered that they had become more specialist than they had been three years prior to the study, with 68% of principals describing themselves as specialists. Many solicitors in the study observed that 'the law has now become so complex that no one person can know it all' (Kerner, 1995: 2).

Hanlon found that, although departments were in existence across all sizes of law firms, the use of departmental structure was significantly affected by firm size (1999: 132). The larger the firm, the more likely it was to employ a departmental structure to organise its work. Interestingly, he found that the number of departments did not increase dramatically with an increase in firm size. The most common number of departments was 4 for 20+ partner firms and 3 for small firms. Hanlon identifies the key factor for this is that the largest firms are moving away from a traditional departmental structure based on an area of law. Instead they are adopting a structure of groups which more accurately reflects the sectors of industry in which their large clients operate. However firms are certainly attempting to organise their structures in a way in which efficiency can be maximised. Staff working in either an area of law (for example commercial litigation), or a client group (for example utilities), allow the legal worker to develop expertise in the area of law and develop a more responsive understanding of the corporate client's needs.
The pressures of the market have paved the way for increased specialisation over recent years, particularly within the largest firms. This will have implications for the labour market. The longer any fee-earner works within a particular specialisation, the greater difficulty they will have in moving jobs to another specialism. This will have particular significance for trainee solicitors. As we shall see below, the largest city firms overwhelmingly act as the trainers for the profession, and the emphasis of the largest firms on commercial and corporate work, does little to equip a trainee for an alternative career of more general practice in the high street sector, or welfare rights work in a law centre. This fragmentation of the profession, particularly between the large commercial firms and the rest of the profession has been well charted by Glasser (1990) and Hanlon (1997).

The competitive pressures with the legal services marketplace

One of the principal explanations for the increasing difficulty lawyers face in controlling the market, particularly within the largest firms, has been the sophistication of their corporate clients (Hanlon, 1999: 108). These clients, often large multi-national corporations themselves, have a clear idea about the nature of the legal services they wish to buy and the price and the quality that they expect. The response of the profession (particularly amongst the largest firms) has led to increasing competition at all levels of the legal profession.

This competition has had a big impact on the employment structure. The need to increase efficiency and maintain competitiveness has signalled the end of partnership for life (Hanlon, 1997 & 1999; Lee, 1999). Interview statements from a number of managing partners in Hanlon’s study suggest that there is a clear agenda to remove ‘dead wood’ from the upper echelons of the partnerships, perhaps even as the partners reach their mid-fifties. The perceived need is to keep partners, just as much as junior fee-earners, hungry for reward to generate greater fee-income.

Flood notes the pressure that firms are under to deliver services on a tight schedule to global time differences which often require late night and weekend working (1996: 189). For example Addleshaw Booth and Co. advertise its operation of ‘a 24 hour service’ for the international nature of its clients. (http://www.icclaw.com/500). For a detailed analysis of the frenetic ‘working lives’ of the largest law firms see particularly Lee (1999).
The demise of the notion of partnership for life is also evidenced by the widely reported poaching of partners between the large firms. Partners' contacts with clients and legal ability are still a highly prized commodity and firms will go to great lengths to ensure that their staff is of the very highest quality. This poaching and movement between firms can be seen from even the most cursory reading of trade publications like *The Lawyer*. This gives the talented individual great sway in bargaining for enhanced remuneration packages with a firm and is described by Hanlon as the 'Cult of the Individual' (1999: 142). Interestingly, it is the individual's own talents and contacts that are emphasised here rather than any quality inherent in being a solicitor.

The increased competition for the best lawyers, has been exacerbated by the growing encroachment of the large American firms into the UK market. Most firms have reacted to the pay threat posed by the US firms, by raising their salary levels particularly at junior levels (*Law Society's Gazette*, 11/08/99: 23). A recruitment consultant noted that the increases in salary would continue, albeit at a more gradual level, 'there will be a steadying of the market, with firms taking more control, and firms becoming globalised, there will be more consideration of the remuneration paid in New York, London and Hong Kong' (*Law Society's Gazette*, 11/08/99: 23).

**Competition, the Profession and Multi-Disciplinary practices**

Multi-disciplinary practices (MDPs), that is partnerships between professionals of differing disciplines, are currently prohibited for legal professionals by the Law Society’s Practice Rule 7 which restricts ‘solicitors from fee-sharing and/or being in partnership with anyone who is not a solicitor’ (Law Society, 2000c: 12 web version). Discussions about the possibility of allowing MDPs within a legal practice setting have been gathering force since the mid-eighties. The growing overlap of work between the Big Six accountancy firms and the large law firms within the corporate marketplace has given momentum to the calls for the restrictions upon MDPs to be

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23 For example, ‘Anderson Legal takes capital markets partner from Norton Rose’ (*The Lawyer*, 01/09/00: 1). Interestingly, the links Anderson Legal have with accountancy firm Anderson Consulting raise issues about jurisdictional competition from other professions. These issues will be explored further below in the discussion of multi-disciplinary practices.
relaxed. Furthermore, in an effort to operate with greater efficiency many law firms have begun employing senior staff from other disciplines including management, human resources and increasingly IT.

The Law Society has, for many years, been resolute in upholding the ban upon the MDPs. In 1989, for example, the Society opposed Government plans to remove the statutory obstacles to MDPs (Law Society, 1999a: 2). A series of consultations within the profession suggested only limited support for MDPs (Law Society, 1999a: 2). In 1996, the Law Society moderated its position, deciding then that blanket opposition to MDPs could ultimately leave solicitors in a disadvantaged position within the marketplace. Following the publication of a consultation paper in 1998 entitled *MDPs: Why? Why not?* (1998), which elicited only a low response rate from the wider profession, the Law Society’s Working Party on MDPs was established early in 1999 with the objective:

To take forward a review of MDPs to ensure that restrictions on the business vehicle/organisation through which solicitors practise, are the minimum necessary in the public interest and do not stand in the way of solicitors’ business development planning. (Law Society, 1999a: 4)

The Law Society’s Working Party is in the process of reviewing the current restrictions on MDPs with an ‘open mind’ (Law Society, 2000c: 13). The working party’s deliberations have been seen in the publication of *Proposals for the Way Forward* (1999a), an *Interim Report* (2000) and in the Law Society’s response to the Office of Fair Trading’s consultation on fair trading in the professions (2000c). The Law Society now believes that that there is no fundamental public policy objection to lifting restrictions on MDPs. However it is concerned with how to preserve client protections within MDPs, given the statutory framework within which the Law Society operates. Two interim solutions have been proposed: The ‘Legal Practice Plus’ model, whereby the Law Society’s practice rules could be amended to allow a minority of non-solicitor partners within practices, who are not necessarily also members of other identifiable professions. The second model is ‘linked partnerships’ with alliances between independent practices of, for example, solicitors and
accountants. The Law Society is concerned that any deregulation in respect of MDPs should not comprise the solicitors’ duties to clients, summarised as:

- the independence of advice
- the duty of loyalty, i.e. avoiding conflicts of interests
- the duty of confidentiality
- the client’s right to legal professional privilege (Law Society, 2000c: 15)

Even so, the global context of the move towards MDPs cannot be ignored. It is a pressing question with which most legal professions across all jurisdictions are currently grappling (Law Society, 1999a: 4-5). There is not, however, consistency of approach across national boundaries. While the American Bar Association voted to retain its ban on MDPs (Law Society’s Gazette, 13/7/00: 8), its incoming President, Martha Barnett declared that ‘even in the light of the vote...MDPs in some form are inevitable in the new economy’ (Law Society’s Gazette, 28/7/00). This declaration came before the Law Society of Scotland reaffirmed its policy against MDPs after three years of internal debate (Law Society’s Gazette, 28/07/00). The Law Society can therefore claim with some justification, that it is unusual among the world’s legal professions, in accepting MDPs in principle (2000c: 14). In November 1998 (10/11/00: 1), The Lawyer reported that the Government would be prepared to ‘force MDPs on the Law Society’. Furthermore, the tone of the Office of Fair Trading’s consultation paper on fair trading in the professions appeared to challenge the professions to justify existing restrictions upon practice such as MDPs. Perhaps the biggest sign of the inevitability of MDPs is in the attitudes of the largest firms (Lee, 1999: 11-13, notes that many of the largest firms saw their future in mergers with accountants and US firms). According to Paul Smith of Eversheds ‘All the big firms are already MDPs’. Another senior partner in a large firm, Wragge and Co, notes that ‘we’ve got people like [our marketing director] who we treat as a partner and is in every way a partner of the firm except for some Solicitors Act Regulation’ (The Lawyer, 9th June 2000: 3 internet version).25

24 In general, The Lawyer does not often report events in the legal world in a light sympathetic to the Law Society. Its concern appears to be with the interests and concerns of the large firms. Ample evidence for this can be found in its concentration on stories about partner movements in the largest firms with news sections on international legal practice.

25 The disdain for ‘some Solicitors Act Regulation’ was also strongly evident in Lee’s (1999) research.
The inevitable emergence of officially sanctioned MDPs is further driven by other trends within the legal services environment. The further development of IT and the attendant standardisation of some aspects of legal knowledge will enable legal information and knowledge to be shared far more easily between disciplines within law firms, even at the hitherto formally distinct upper echelons. The more widespread incidence of MDPs will further emphasise the declining exclusivity of legal knowledge. It will be far more difficult for the solicitors' profession to successfully keep the workplace images distinct from its legal and public images (Abbott, 1988: 67). In its discussions about the possibilities of MDPs the Law Society has consistently emphasised its desire to protect the public, and past President Bob Sayer has argued for the need for a comprehensive single regulatory structure to be applied to all deliverers of legal services. It is possible that the Law Society is attempting to defend its own role within dangerously blurred jurisdictional boundaries (see again Larson, 1977: 56, on the role of the 'service ideal' in a profession's project). The presence of 'public service' arguments within the Law Society’s debates on MDPs, is also seen in its recent emphasis of its 'goal of becoming a model regulator' (Law Society, 2000d). Despite the major changes within legal services, the Law Society appears to retain an attachment for many of the classic professional strategies, as described by the power theorists. An interesting further implication arises in relation to the inter-professional relationship between solicitors and legal executives. By virtue of Practice Rule 7, legal executives have always been prevented from entering into partnership with solicitors. In response to the Office of Fair Trading, ILEX has argued that 'same-discipline partnerships' should be permitted between solicitors and legal executives, offering a 'third way' before the more complicated questions of regulating different disciplines can be considered (The Legal Executive Journal: August 2000: 3). This would raise the status of legal executives, and considering many legal executives are already treated as though they are partners, would be welcomed by many legal executives frustrated by the current situation (The Legal Executive Journal: June 2000: 4). However it would blur the differences between solicitors and legal executives still further, inevitably raising questions of fusion.

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26 'DAC takes back legal executive to head up department' (The Lawyer, 15th May 2000: 3).
Struggle in the High Street sector

MDPs are mainly discussed in relation to the largest firms, however possibilities also exist for their application in relation to the beleaguered high street practitioners - a sector of the profession which has had considerable difficulty in adapting to the new competitive climate.

We have already seen above that the sizes of firms most commonly situated in the High Street, the 2-4 partner firms and the 5-10 partner firms, are not growing at the same rate as the successful large firms, indeed their numbers are falling by 3% and by 7.6% in 1998-9 respectively (see further above). Sommerlad notes that these smaller law firms 'envisaged the death of their sort of practice due to the lack of trainees, as well as to increased competition and the related need to specialise' (1995: 179). She also cites a Coopers and Lybrand study, which predicts that one third of all law firms are likely to go out of business (1995: 179). Furthermore Smith argues that, at least in the legal aid sector, only larger firms are likely to be able to achieve the necessary economies to operate a legal aid franchise (1994: 6). Increased competition within the high street sector, has partly come about following the removal of the solicitors' conveyancing monopoly in the 1980s, which had formerly been the lifeblood of the profession (Sugarman, 1995: 230). Combined with the property recession of the early 1990s, many solicitors were forced into ruthless price-cutting competition amongst each other. Such a situation made it very difficult for the firms to plan in advance to take on a trainee (see author's interview with a partner in a small rural practice, above). The subsequent dominance of the largest firms in the employment of trainees has meant that it is unlikely that many newly qualified solicitors will have the requisite skills or inclination to work in the high street sector. A Law Society council member, himself a partner in a small high street practice, spoke in an interview with the author (see generally Chapter 8) of his and his fellow partners' gloomy predictions that they would have nobody to whom they could sell the practice upon their retirement.

One of the consistent complaints from the High Street sector, (Sommerlad, 1995: 179, and see further Chapter 8) is that it does not feel that its interests are being adequately
represented by the Law Society (Devonald, 1994: 2). Such sentiments were partly attributable to the success of the ‘reform’ candidate Martin Mears in the Law Society’s 1995 Presidential elections. However, the Law Society has taken some heed of these persistent criticisms and, in 1999, established the High Street Firms Task Force. This Task Force found evidence of specific problems faced by High Street firms (which bore considerable similarity with those summarised by Sommerlad in 1995). The central recommendation of the Task Force was to establish a commercial division of the Law Society to deliver services supporting High Street firms with:

- Business and Financial Planning
- Managing Change
- Growing existing businesses
- Human Resource planning
- Education and Training (Law Society, 1999b)

The Working Party continues to look at ways of implementing these recommendations and these concerns are part of the Law Society’s Corporate Plan for 2000. The pressures and acute competition that these small high street firms face, means the sector as a whole is far removed from the concerns of the large law firms (Glasser, 1990).

In addition to these market pressures, which law firms of all sizes are having to manage, the state has, in recent years, also intervened to a large extent to alter the legal services environment. These state interventions encroach upon the self-regulation of the profession and significantly alter the control that solicitors hold over aspects of their work, and their relationship with other legal service providers.

State pressures upon the legal services market

Over the last fifteen to twenty years there has been sweeping legislative reform of the way that the legal profession practices. These changes impact upon the nature of the qualification of ‘solicitor’ and ‘legal executive’ and also threaten the position of the Law Society as the self-regulating professional body for solicitors.
Most of the legislative changes that have been initiated have been introduced to sweep away the restrictive practices traditionally associated with the legal professions. The first significant government move was the Administration of Justice Act 1985, which removed the monopoly of conveyancing long held by the solicitors’ profession (Abel, 1988: 179-85). Although licensed conveyancers, created by the legislation, did not encroach upon a great deal of the solicitor’s work, the spirit of competition engendered by the loss of the monopoly led to price-cutting among firms of solicitors, with a fall in conveyancing prices during the mid-late eighties by around 30% (Sherr: 1994: 3). The loss of the ‘sacred cow’ of conveyancing and the lower margins at which High Street firms had to operate as a result, was a significant reason for the difficulties which are now being experienced by the high street sector (Law Society, 1999b).

Following this setback, throughout the late eighties the Law Society lobbied hard for an extension of the rights of audience for solicitors, which would allow its members to practice as advocates in the higher courts. Under s.32 and s.27 of the Courts and Legal Services Act 1990, they were successful, with the Law Society becoming an authorising body for those higher rights. Hanlon suggests that solicitors have shown little interest in taking up their rights as solicitor-advocates, noting that by 1995 only 312 solicitors had taken up the new rights (1999: 94). There appears to have been a rise in demand since then with the Law Society stating that as of 21st January 2000, 999 solicitors have taken up the higher rights of audience (Law Society, 2000b: 3). There are also signs that the large commercial firms are making increasing use of in-house solicitor-advocates rather than instructing independent counsel (The Lawyer, 18/10/99: 12). In its Corporate Plan (2000a), the Law Society re-iterated its intention to ensure that solicitors make full use of all the extended rights of audience available to them.

Under s.27 of the Courts and Legal Services Act 1990 other professional bodies could apply for status as an ‘authorised body’ to award its members rights of audience. ILEX originally made an application in November 1993, and then formally made its application to the then Lord Chancellor, Lord Mackay of Clashfern, in March 1996.
Following the procedures under the Act, whereby the application was examined by five senior designated judges and also considered by ACLEC, ILEX was awarded 'authorised body' status following the passing of Statutory Instrument 1998: No. 1077 'The Institute of Legal Executives Order'. Lord Irvine described ILEX, following the passing of the order 'as a fully fledged part of the legal profession' (LCD Press Release, 105/98). The rights of audience granted to ILEX are as follows:

- To appear in open court in a county court on matters which are within the normal jurisdiction of a district judge
- To appear in family and related proceedings within the normal jurisdiction of district judges in the county courts, and before magistrates in the family proceedings courts
- To appear before justices in the magistrates' courts in relation to all matters, originating by complaint or application, including the applications under the licensing and betting and gaming legislation, but excluding any complaint or application affecting the liberty of the subject
- To appear before certain specified tribunals under the supervision of the Council on Tribunals
- To appear before the Coroner's courts in respect of all matters determined by those Courts

The first six ILEX authorised advocates qualified in Spring 2000 (The Legal Executive Journal, April 2000: 10). However, despite Irvine’s praise of ILEX, these rights, while a considerable boost for ILEX Fellows, do not imply that the organisation is yet 'a fully fledged member of the legal profession'. Considerable differences remain between the rights held by legal executives and those rights of audience held by barristers and solicitors. It is, however, open to ILEX to apply to extend the rights of audience at a later date.

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27 An accompanying order SI: 1998, No. 935, extended the jurisdiction of the Legal Services Ombudsman to cover the activities of Legal Executives. The function of the Ombudsman will be considered further below.
One of the most significant pieces of legal services legislation of recent years is the Access to Justice Act 1999 (AJA 1999). The Act covers a wide range of issues, involving the removal of legal aid for many categories of work and the establishment of the Community Legal Service. It also makes significant changes to the way that barristers, solicitors and legal executives practice and may even have sowed the seeds for fusion of the legal professions.

Under s.36 of the AJA 1999:

\[
\text{every solicitor shall be deemed to have been granted by the Law Society -}
\]

(a) a right of audience before every court in relation to all proceedings…

This in effect equalises the position of solicitors in terms of rights of audience with the Bar (s.36 AJA 1999). Solicitors no longer need to make special application to practice as solicitor-advocates - they are deemed to have been granted the rights, although as the Law Society recognises, ‘subject to reasonable additional training requirements’ (Law Society, 2000b: 2), which the Law Society proposes will be an additional qualification to the LPC (2000b: 7). While the Bar do not, as yet, recognise the need for common vocational training between solicitors and barristers, there is an acknowledgement that there will be a number of common vocational elements (Law Society, 1999: 47). It is possible that increasingly common vocational training will add to the momentum towards fusion.

Further equalisation between the legal professions is seen in s.40 AJA 1999, which defines the General Council of the Bar and the Institute of Legal Executives, as 'authorised bodies' for the purposes of granting rights to conduct litigation to their members. This allows both barristers and legal executives to take instructions directly from members of the public without first either having received instructions from a solicitor or be employed by a solicitor. This was not something that the Bar lobbied for and for which it does not appear to showing great enthusiasm, ‘The Bar considers it unlikely that it will grant this right to independent barristers as they would in effect become solicitors, but the employed Bar may wish to do so’ (Law Society, 1999: 47).

It appears that the Bar is still strongly resistant to fusion. While ILEX is also strongly resistant to the idea of fusion, it has welcomed the grant of rights to conduct litigation
far more strongly (see further Chapter 7). In many ways, the rights to conduct litigation are more likely to complement the work that they already perform in practice than they would for barristers.

A further point about the Access to Justice Act 1999 is that the Government explicitly refused to use it as an opportunity to protect the title ‘Legal Executive’. It has been a recurrent concern of ILEX that anybody can call themselves a legal executive, whereas ‘solicitor’ is a term protected by law.28 Lord Kingsland moved an amendment to the Bill during its passage through the Lords (Hansard, 28th January 1999: 1175-8), to create a criminal offence for anyone to describe themselves as a legal executive who is not a Fellow of ILEX with a current practising certificate. Lord Irvine rejected the amendment stating that when acting as an advocate or litigator, legal executives would already be protected by virtue of similar legislation concerning solicitors. However, he makes the same mistake as many members of legal profession and the public by stating,

The other 17,000 members or so are members of the Institute, and may now style themselves, quite properly, and regard themselves as ‘legal executives’ (emphasis added). (Irvine, House of Lords, 28th January 1999: 1178)

Under the articles of ILEX only Fellows, and not simply members, may properly regard themselves as ‘legal executives’. The misnomer under which the Lord Chancellor labours is symptomatic of the wider problem of protected identity that ILEX have faced throughout their history.

**Increasing regulation of the profession**

This is another key facet of legislation in the legal services sphere. Shapland (1995) asked whether the changes in the way that the professional bodies were regulated really remained self-regulation or were some form of coerced regulation, and the Law Society also argues that ‘pure self-regulation does not exist’ (*Background to Consultation*, 18th October 2000: 2). The state has invoked greater regulatory pressure upon the legal profession, and may at the very least have re-negotiated the ‘contract’ under which the legal professions self-regulate (Paterson, 1996).

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28 See, ss. 1 and 20 Solicitors Act 1974.
The Courts and Legal Services Act established the Office of Legal Service Ombudsman (s.21). This post was created to regulate the way in which the complaint bodies of the legal profession dealt with complaints brought by members of the public. Over the last twenty years or so, Law Society has had a woeful record on its handling of complaints by members of the public against its members. In 1986 a series of well-publicised problems led it to establish the Solicitors Complaints Body (SCB). However this body was also subject to recurrent criticism, from Legal Services Ombudsman, solicitors, the public and other organisations. In the early nineties, the Law Society disbanded the SCB and set up the Office for the Supervision of Solicitors (OSS) in its place. This body has been plagued by similar problems to its predecessor and has faced continuous criticism almost from the outset (Davies, 1999). Throughout 1998 and 1999, the backlog of cases still to be dealt with by the OSS, continued to grow at an alarming rate (see Seneviratne, 2000: 42). The Lord Chancellor has now reserved powers to himself under s. 51 of the AJA 1999 to appoint a ‘Legal Services Complaints Commissioner’, an office which would regulate the legal professions to a greater extent than ever before.

The other significant aspect of the Access to Justice Act 1999 attacks the Law Society’s representative powers rather than its regulatory functions. However, if these powers are invoked, they will represent a considerable attack on the professional autonomy of the solicitor’s profession. The powers are contained under s.47 of the AJA 1999. The section allows the Lord Chancellor, by Statutory Instrument, to amend the Solicitors Act 1974, so that the Law Society will no longer be able to ‘apply fees payable on its practising certificates for any of its purposes’ but only for ‘the purposes of the regulation, education and training of solicitors and those wishing to become solicitors’. In effect, this section, when invoked, will prevent the Law Society from employing the fees it compulsorily raises for any campaigning activities.

The timing of the announcement of the insertion of the new clause, at the very least caused eyebrows to be raised. During the passage of the Access to Justice Bill, the Law Society mounted a vociferous press campaign across national newspapers,
drawing attention to the Government’s plans to remove legal aid for many areas of work. Although the Society’s campaign did not significantly affect the Government’s plans for legal aid, it did cause considerable embarrassment. The clause which would prevent the Law Society from engaging in campaigning activities was introduced soon after. Geoff Hoon, the minister at the Lord Chancellor’s Department at the time, explained the Government’s action:

if a regulatory body has power to raise compulsory fees, to spend money on an activity that it is not strictly regulatory or educational is wrong in principle. The present position imposes an obligation on solicitors to fund trade union activities, which they may not support, and which may in fact be contrary to their interests. The day of pre-entry closed shops are ended for trade unions and should not apply to other bodies acting in a similar way. (Commons Standing Committee E, 13th May 1999: 416)

If the Lord Chancellor does take these powers, he will effectively create a voluntary membership environment for the Law Society. The Law Society will not be able to levy fees at the current rate, and will have to create a voluntary membership fee for those solicitors who wished to support the Law Society’s other campaigning activities. The Law Society has recently set up a working party to examine the implications of such an environment and is currently in negotiation with the Lord Chancellor’s Department on the scope of the practising certificate fee in the hope of securing a decision by December 2000 (Law Society, 2000a).

The other significant way in which the professional autonomy of the solicitors’ profession has been compromised in recent years has been the approach of successive governments to the reform of legal aid. Up until the Legal Aid Act 1988, the Law Society themselves had been responsible for the administration of legal aid. Following the passing of this legislation, responsibility was transferred to a state body, the Legal Aid Board. Subsequent years have seen the Legal Aid Board imposing greater and greater regulation upon the working practices of the solicitor's profession (Smith, 1996: 574). Although the common trait of the Conservative Governments’ (1979-1997) strategy towards legal aid was cutting the eligibility levels

(Hansen, 1992), in the early nineties the then Lord Chancellor, Lord Mackay, began to look at other ways of overhauling the legal aid scheme. Heavily influenced by Bevan et.al.'s (1994) 'supplier-induced demand thesis', he first introduced franchising and then published the White Paper *Striking the Balance* (1996) which developed the notion of franchising into legal aid contracts for solicitors' firms and other advice providers. Franchising is a scheme by which solicitors' firms, in exchange for some concessions (for example quicker payment), are expected to comply with the transaction criteria and franchising specification. The transaction criteria are a number of specific checks made on individual cases and are subject to external audit. The franchising specification relates to the office systems that franchised solicitors are expected to have in place. The effect is again greater regulation of the way that the legal profession practices. Indeed Sommerlad argues that this threatens the professional autonomy of solicitors working within that sector (1995 and 1999).

The contracts theme was developed by the incoming Labour administration from 1997 onwards. Lord Irvine commissioned Sir Peter Middleton to produce a report examining civil justice and the legal aid scheme. *Report to the Lord Chancellor* (1997) largely endorsed the findings of Woolf (1995) and *Striking the Balance* (1996). Drawing from Middleton’s findings, the Government published its own White paper *Modernising Justice* (1998) which led to the *Access to Justice Act 1999*. Central to the Government’s plans was the replacement of legal aid in many areas with conditional fee agreements. Any financial savings are to be used to support a Criminal Defence Service and a Community Legal Service based on contracts between providers and a Legal Services Commission. The contracts will specify both quality and price. This means that the notion of solicitors independently practising with considerable autonomy, is being severely compromised by increasing state regulation.

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30 For a strong criticism of this thesis see Wall (1996) who argues that the thesis ignores many important structural factors.

31 For a more detailed explanation of the franchising scheme see Sherr et. al. (1994).
Conclusion

The legal services marketplace is in considerable flux. The shape of the profession is changing and the nature of the work performed by that profession has been altered by pressure both from the state and the market. The largest firms are dominating the employment structure of the profession to that extent that they are now producing the next generation of lawyers. This has considerable implications for the ideas and ideals of professionalism that lawyers cherish (see further Chapter 3). The growth of competition, and the inexorable rise of IT, will have considerable implications on how the firms structure their activities and which legal workers are most likely to find employment.

New rights have altered the traditional roles of the legal professions. However it is still too early to speculate whether the state, the market, or the legal professions themselves will prove to be the most powerful driver in shaping legal services. While it is possible to see solicitors firms continuing to develop their teams of junior fee-earners supervised by an elite group of highly expert partners, in truth nothing is settled. There is everything still to play for in the tournament of the legal professions.
Chapter 6: The historical relationship between ILEX and the Law Society

Introduction

The Institute of Legal Executives (ILEX) has recently received growing recognition as the third branch of the legal profession.\(^1\) ILEX is a relatively youthful professional association, having being established in 1963. Its predecessor was the Solicitors’ Managing Clerks’ Association (SMCA) which dates from 1892. The balance between solicitors and legal executives (indeed all providers of legal services) is under pressure from both the market and state and it seems likely that the jurisdictional settlement that ILEX hold with the Law Society is in the process of being re-negotiated.

However it is important to understand the historical relationships between the two organisations. Part of the difficulty in defining a profession lies in the continually changing nature of professionalism. This chapter draws upon archive material in the form of the minutes of the councils of the SMCA, ILEX, the Law Society and their various joint committees. It is also draws on the professional journals of managing clerks/legal executives and solicitors, both editorial features and the contents of sometimes lively letters pages. The chapter aims to establish the underlying reasons for the creation of both the SMCA and ILEX, to consider the views of the membership and to explore the changing relationship between the Law Society and ILEX/SMCA. The central conclusion of this chapter is that the relationships between the two have been characterised by the Law Society’s hegemonic power wielded over ILEX/SMCA, despite little evidence of formal links between the two associations.

The inauguration of the Solicitors’ Managing Clerks Association

The managing clerks themselves drove the creation of the SMCA although, as we shall see, the Law Society was a powerful influence in the background. A meeting was convened in London in 1892 following a letter sent to all London managing

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\(^1\) Irvine, 23/04/98 LCD Press Release.
clerks from a Mr William Briggs (himself a managing clerk). The letter exhorted all managing clerks to meet in response to a proposed change to the Rules of Courts that would remove their Rights of Audience before the judges or Masters of Chief Clerks in Chambers. They felt that this proposed rule change would have a significant impact upon both the status and the working practices of managing clerks and, as such, should be resolutely defended. Although the proposal remained a rumour, at the convened meeting they established the SMCA:

1. to protect and advance the interests of the solicitors’ managing clerks;
2. to encourage among them the interchange of opinions of questions of importance to the legal profession;
3. to promote their unity socially and professionally; and
4. for all or any such objects to adopt such measures... as the Council may from time to time deem expedient.

In the early part of the twentieth century the SMCA barely grew either in terms of influence or membership and had few formal links with the Law Society. Broader, more nebulous ties between the organisations begin to illustrate the true power relations. These implicit ties can perhaps best be described as connection through imitation or, as DiMaggio and Powell put it, ‘mimetic processes’ (1991: 69).

Throughout the history of SMCA the Law Society has been an overbearing presence. In the first instance, the pioneering managing clerks looked to the Law Society for a model of what a professional association should be. The ties between the two associations are further emphasised by centrality of the Law Society’s needs in the strategies of the SMCA. At times the Law Society’s needs appear more important than the needs of managing clerks.

This ‘mimetic process’ can be dated from that the very first meeting of the concerned managing clerks who had been rallied to the cause by William Briggs in 1892. In the letter that was written to galvanise the managing clerks into a defence and

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2 Detail of the events leading up to the establishment of the SMCA is set out in A short history of the SMCA by John Murray, SMCA Gazette, (Nov, 1950: 112).
3 Memorandum of Association of the Solicitors’ Managing Clerks’ Association.
advancement of their professional rights (described above), their objectives were defined in terms of their employers. William Briggs wrote that it was necessary that all managing clerks met, for it would be ‘in our own interests and those of our principals’ (cited in Murray, Nov 1950:112). Clearly, from the outset, the managing clerks thought it necessary to stress that they understood their subordinate position beneath their employers and the Law Society, who might otherwise have simply stamped on the managing clerks association as an attempt to form a trade union.

Professions, like trade unions, have always sought to further their interests through collective action but, unlike trade unions, have sought to create individual, rather than collective, paths of advancement (Johnson, 1972). However, although professional associations have a representative role and seek to maintain homogeneity (or at least the facade of homogeneity), they have always carefully disassociated themselves from trade unionism. This strategy can clearly be seen in the words of the chair of the first meeting of the putative SMCA:

…it was necessary that they should have a recognised Association to protect and advance their interests, but it must not be supposed in suggesting this that they were to descend to the level of (cries of Oh!) trade unionism, and for his part the idea must be restricted to being protective, and was not to become in any way aggressive,(cited in Murray, Nov 1950: 112)

An interesting footnote to this meeting, which perhaps set the tone for the subsequent history of the organisation, is that although, on the Law Society’s invitation, the fledgling members of the SMCA gathered at Chancery Lane (the headquarters of the Law Society), the solicitors charged them for the privilege. This arrangement continued for many years, and set the SMCA in the literal, as well as metaphorical, shadow of the Law Society.

The SMCA remained largely metropolitan in character and seemed to be more concerned with the ‘interchange of opinions’ through social events such as ‘Smokers’
Concerts than seeking to expand the organisation throughout the early part of the twentieth century. As Murray writes in his history of the SMCA:

At the end of the first year of its life the membership of the Association was recorded as 101... By 1897 the membership was reputed to be 300 and the growth of the membership, except in recent years continued to be very slow and no doubt to some extent hampered the growth of the organisation.(Jan 1951: 12)

This focus on the social aspects of professional association, particularly through 'gentlemanly' pursuits, at a time when other professional associations, including the Law Society, were beginning to concentrate their efforts on education and building a relationship with the state (Sugarman, 1996 and Perkin, 1990). This is perhaps a central reason why the membership of the SMCA failed to grow significantly in this period (Johnstone and Hopson, 1967: 404). However, rather than a strategic miscalculation, the SMCA's emphasis may in fact simply be a recognition of their subordinate status.

The absence of women implied by 'popular forms of masculine entertainment' and concerns to attract more 'young men' (SMCG, January 1951:12) and 'unadmitted men' (SMCG, November 1956: 132) was also reported by Johnstone and Hopson (1967: 402) and Johnstone and Flood (1982: 176). Witz (1992: 46-8) identifies gendered strategies of closure between professions and their subordinate groups, particularly within medicine. What is interesting to note, therefore, from the history of the SMCA/ILEX, has been the prevalence of men, in contrast, for example to the female profession of nursing. While the managing clerks were clearly subordinate to solicitors, it was not because of their gender (Johnstone and Flood, 1982: 187, suggest that this had a class explanation). Women faced difficulties entering both the solicitors' profession and the subordinate group. It is only in the last twenty years that the number of women has grown in number within the subordinate profession (Johnstone and Flood, 1982: 176). In 2000, the number of women account for 72% of the total membership of ILEX and 62% of all Fellows. However, Sidaway and Punt suggests that even though women may be numerically dominant in their survey of

*Described as 'a popular form of masculine entertainment' (Murray, Feb 1951).
‘paralegals’, it is men who are earning the higher salaries (1997: 26). It has been demonstrated that women experience continuing obstacles to success within the dominant male paradigm of the solicitors’ profession (Sommerlad and Sanderson, 1998). The subordination of legal executives to solicitors has many explanations, many of them institutionalised in the relationship between the professional associations and the employer/employee relationship within the firm. It is possible that women legal executives may face a double marginalisation. Marginalised as women lawyers within a legal male culture and as legal executives under the hegemonic control of solicitors.

1950s: Discussions leading to the creation of ILEX

The first signs that SMCA was attempting to mobilise as a professional association came following an approach made by the SMCA council to the Law Society in 1947. The SMCA had decided that, in order to advance the interests of its membership, it needed to establish a scheme of qualification to give younger managing clerks ‘a goal at which to aim’ and to try and increase the status of the profession. During the creation of the scheme we clearly see the links established between the two associations which have remained the template for their relationship ever since. Murray records the nature of these links:

Finally a scheme was approved by the Law Society, and a joint committee, consisting of four members of the Council of the Law Society and four members of the Council of the Association was set up to work out the details of the scheme. (Dec 1951: 160)

It is interesting to note that despite the apparently equal balance between the SMCA and the Law Society’s representation on this committee, the Chair was always from the Law Society. This joint committee is a link that has survived the creation of ILEX and now meets as the Joint Consultative Committee. It is the principal link between the two organisations. However, in the decade leading up to the creation of ILEX, it is possible to identify other examples of the powerful influence of the Law Society over the SMCA.
The SMCA continued its attempt to emulate the classic model of a professional organisation, subduing, or at the very least, modifying their own interests by their concern to appease their principals and the public. It was, for example, suggested in 1951 that increased rights of audience for managing clerks would ‘be not only of advantage to the legal profession but to the general public as tending to reduce the costs of litigation’ (Murray, Dec 1951: 160). At the time that the SMCA was created, it was possible to see the late nineteenth century as the nadir of classic professionalism (Perkin, 1990), and it is wholly in keeping with the managing clerks’ professional aspirations that they should couch their claims in such terms.

During the 1950s both the Law Society and the SMCA acknowledged that the education scheme, originating from the 1947 discussions, was not attracting sufficient recruits to the profession. Meetings and discussions were held throughout the late fifties in an effort to establish a replacement scheme of qualification for the managing clerks. The nature of these discussions and the objectives of both organisations once again underlines the Law Society’s power.

It is important to note that it was the Law Society that, in fact, initiated the discussions, which led to the establishment of ILEX. The Law Society had initially invited proposals to deal with the shortage of managing clerks - a staff recruitment problem for solicitors. Following the SMCA response to this invitation, the Law Society had indicated that it was not prepared to examine the issue further. The SMCA council had, however decided to press on and formulate their own revised proposals ‘designed to secure for managing clerks recognition of their calling as a profession’ (SMCAG, Nov 1956: 132). However, it was here that the divergence between the objectives between the two organisations became starkly apparent.

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5 Interestingly ILEX council members, in interviews with the author, gave similar justifications increased rights of audience for legal executives.

6 Unless otherwise indicated, the principal sources come from an account of the discussions (revealed after they had initially collapsed) Where do we go from where? and Professional Status for Managing Clerks in Solicitors’ Managing Clerks’ Gazette (Nov 1956: 129-132).
There was initially a large element of shared interest in these negotiations which eventually led to the establishment of ILEX in 1963. Fundamentally, both the SMCA and the Law Society were concerned with raising the status of managing clerks. However even during this period of co-operation the two bodies had differing objectives. The Law Society was simply concerned with raising the status of managing clerks to a level that would make the career sufficiently appealing to attract ‘more young men’ and counteract the staffing shortages that solicitors were experiencing in the post-war period.\(^7\) Mr C.H.S. Blatch, a member of the council of the Law Society stated, at a panel debate, that:

> The weakness in the traditional title ‘managing clerk’ was that it meant nothing. The object of the new Institute of Legal Executives was to give unadmitted clerks better qualifications and status and improved salaries and conditions of service generally so that, once they had entered the legal field, they would stay there. (LSG, Dec 1962: 747)\(^8\)

The Law Society council also made it clear that a principal objective behind the creation of ILEX, was ‘to encourage recruitment to the unadmitted ranks of the profession’ (LSG, Jan 1962: 26).

However, the SMCA were concerned with status on a far broader level. Certainly recruitment was an important issue for them as well. The numbers of fully qualified managing clerks was low and did not reflect the numbers actually performing similar sorts of work in practice (a recurrent problem that continues to plague ILEX today). However, status was also perceived in terms of recognition for the contribution that managing clerks made to a solicitor’s practice. During the long negotiations that eventually led to the creation of ILEX, the council members of the SMCA were clear about what they wanted the new scheme to achieve:

> the Law Society (as representing solicitor employers) accepting Managing Clerks as professional men with a definite status and assuming that those

\(^7\) This staffing problem went beyond the issue of the ‘un-admitted’ managing clerks and was also a problem the profession faced in relation to their ‘admitted’ assistant solicitors. See Lee, 28th October 1960: 856.

\(^8\) See further Johnstone and Hopson (1967: 401) for the falling numbers of managing clerks throughout the 1940s and 1950s.
[managing clerks] participating in the scheme would receive some tangible benefit. (SMCAG, Nov 1956: 132)

As the proposals for ILEX were being finalised, Mr H. J. Elliot, the President of the SMCA was sure that ‘a recognised profession within the framework of the legal profession is being created to produce a standard of dignity and status’ (Elliot, 1960). In essence, the SMCA, unlike the Law Society, saw the creation of ILEX as a means of ensuring greater professional status.

While the SMCA were clearly seeking to build up the professional status of managing clerks, this was only ever going to be an incidental objective of the Law Society. Thus, at a meeting on the 14th February 1956, the Law Society ‘rejected almost entirely the privileges which formed part of the fundamental part of the Association’s scheme’ (SMCAG, Nov 1956: 132). The Law Society’s proposals provided for three grades of membership, Student, Associate and Fellow and suggested that those who qualified for the higher grades were entitled to use some distinctive letters. The SMCA argued that these plans were flawed for (like the pre-existing scheme of qualification) there was no scheme of tangible benefits, such as pension rights and a clear pay structure, which would act as an incentive for prospective managing clerks. The Law Society was equally adamant that there would be no tangible benefits. The negotiations failed at this point. Clearly, it appears that the Law Society was pursuing the employers’ (solicitors) interests in ensuring that the creation of ILEX did not lead to excessive inflation of wages and condition of service claims by the managing clerks.

The deadlock continued for a number of years. The fundamental sticking point was the issue of tangible benefits. The Law Society were very reluctant to allow the SMCA any further benefits beyond the bare minimum with which it hoped to attract sufficient numbers of managing clerks to meet its staffing requirements. The SMCA were seeking to establish ‘a separate profession for Managing Clerks... carrying with it guaranteed benefits’ (Elliot, 1956). At the 1958 Branch delegates conference there was considerable debate about the appropriate response to the deadlock. The
delegates were faced with intransigence from the Law Society on the central issue of ‘material benefits’, for example on pension rights for fully qualified managing clerks, and confusion about what their own response should be. The delegation from Bristol summed up the conundrum by asking: ‘What is the main function of the Association? Should it may be mainly concerned with future possible members or with its present members?’ (SMCAG, June 1958: 82). There was a sense at the conference that some sort of accommodation with the Law Society had to be sought for, as the Sheffield delegation stated:

it was felt that it should be the joint responsibility of the Association and the Law Society, otherwise the standing which members desired could not be achieved. (SMCAG, June 1958: 82)

The frustrations of the membership and the desire for heightened status for the profession was also described by Johnstone and Hopson (1967: 402-3), and can also be seen from a selection of the correspondence to the Solicitors’ Managing Clerks’ Gazette.

It is evident that many managing clerks are considered well able and competent to advise clients and take complete control of very important matters but we still lack a status worth having, indeed (let us face it) we are still ‘common clerks’. Many of us have spent a lifetime ‘in the law’. Is it still too much to ask that, with necessary safeguards, entry to the profession should be made easier for us, for example one comprehensive examination and no articles. (Sols. Jour., 22nd July 160: 587)

This letter is indicative of a further problem that ILEX has faced throughout its development. Because little status is attached to being a legal executive (or previously a managing clerk), it is never seen as attractive in its own right, but at best as a stepping stone to a career in the ‘legal profession’. The clerk quoted above saw the solution for his lack of status not being achieved through enhanced status for clerks but through easier progression through to being a solicitor. The true legal profession is seen in the ranks of solicitors. A similar discontent is seen in a letter from a Mr Daws which complains about the status of managing clerks, describing it as
a 'dead-end occupation with solicitors not taking sufficient account of the good work that is done' (SMCAG, June 1956: 79).

Interestingly, although the SMCA placed a great deal of emphasis on the Law Society, most notably by defining their claims to professional status in terms of their proximity to solicitors, it was these very links that undermined their claims to be an independent self-governing profession with autonomy over their own destiny. It was also reported that there was a feeling among the delegates of the 1958 conference, that accommodation might be more easily reached with the Law Society if status claims were sought prior to claims for tangible benefits. Some delegates went still further and believed that the responsibility for the national education of managing clerks should be left to the Law Society. This change in approach is reflected in the amendment that was eventually passed, which indicates a move from the contentious language of material benefits:

any status scheme must first include the establishment of professional status and certain additional privileges which would enable a certificated member to get a clearly defined position in their profession. (SMCA, June 1958: 82)

The scheme that was eventually established, which led to the creation of ILEX, bears striking similarity to those first proposals of the Law Society which the SMCA rejected earlier. The plans provided that there should be three grades, Student, Associate and Fellow, with those qualifying for the higher grades being entitled to use some sort of distinctive letters. The new scheme was set out in detail in both the leading professional journals, the Solicitors Journal (4th Jan 1963: 11) and the Law Society’s Gazette (Jan 1962: 27). It is clear that the focus is on the educational qualifications to be obtained rather than material benefits to be attached to existing membership. Indeed, one of those existing managing clerks, a W. Bowtell writes in a letter to the Solicitors’ Journal:

To offer them [managing clerks] an official status of a lower grade practitioner in the subject or subjects in which for years they have been working as competently as solicitors is not to be reckoned a compliment.............the
qualification of legal executive will provide no more real or better stepping stone to advancement in the profession than now exists. (Sols. Jour., 16th Feb 1962: 132)

The powerful influence of the Law Society had clearly dictated the terms upon which ILEX was instituted.

The power of the Law Society is also clear in the accommodating approach that the SMCA took in relation to codifying its relationship with the Law Society. It was as though there was clear acceptance that the support of the Law Society was vital to the subordinate profession’s development and, therefore, that it was paramount that good relationships should be maintained. Mr Elliot, as President of the SMCA during the failed 1956 negotiations, condemned the Law Society’s proposals by emphasising that the SMCA’s primary concern was ‘for Managing Clerks and to...acquire professional status’ and asserted that any new scheme must carry with it tangible benefits. However, as President in 1960, Mr Elliot commended a scheme to the membership that entailed ‘professional recognition in two ways viz practical experience and examination’ - no mention of tangible benefits. Furthermore he underlined the influence and support of the Law Society in the establishment of this scheme:

The Association’s relationship with the Law Society has never been better and my colleagues and I have been assured that the Law Society will assist the Association in every possible way. (Elliot, 1960)

The SMCA’s acquiescence in the Law Society’s dominance of their affairs can also be seen from the arrangements for Law Society representation within the constitution of ILEX. The minutes of the Law Society Council on the 5th May 1961 resolved that:

1. the Council approve the scheme set out in the report;
2. the financial support proposed to be authorised; ⁹
3. the Solicitors’ Managing Clerks Association be invited to take immediate action to inaugurate the Institute; and

⁹ The sum of £2000 had been agreed upon in order to contribute to the establishment of ILEX.
4. the maximum publicity to be given to the scheme in the Gazette and elsewhere as appropriate.

In fact, it appears that, when ILEX was established, the Law Society wanted to incorporate far more explicit control over the new organisation than, in fact, transpired. On the 2nd November 1962 in the minutes of the Law Society Council it was noted:

(4) ....that the Solicitors’ Managing Clerks’ Association had been advised that it was ultra vivres the Companies Act to provide in the memorandum and articles of Association for the setting up of an Advisory Committee with the Law Society with the power to control the manner in which proposals for an alteration in the Constitution and objects of the Institute could be made...

and furthermore:

it was also reported that the proposal that the Law Society should be represented on the Disciplinary Committee had been vetoed by the Board of Trade.

It is possible that the state limited the Law Society’s formal domination of ILEX in an attempt to prevent the Law Society extending its monopoly of training and regulation within legal practice. In limiting the Law Society’s control, the Board of Trade underlined the importance of the Law Society’s relationship with the state, in determining the extent of its market control and its control of its subordinates. 10

However, the SMCA still offered (or perhaps felt compelled to offer) the Law Society significant influence over its activities. 11 It was minuted on the 2nd Nov 1962 in the Council of the Law Society that:

the Solicitors’ Managing Clerks’ Association were, however, proposing that a joint advisory Committee could be set up with the power to veto any proposal for change in the memorandum and Articles of the Institute and with the intention that no such change would be made in matters affecting the scheme of

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10 The catalogue of the Public Records Office has been searched to establish the precise reasons behind the Board of Trade’s decision, but no record was discovered. It may be that the veto that occurred was an informal intimation or, more prosaically, the records may simply have been lost.

11 The precise reasons for the SMCA’s decision were not uncovered during the study of the archive sources. It is likely, in the light of the other evidence, that the Law Society’s controlling influence over the SMCA (and of solicitors over managing clerks), was such that the SMCA felt it necessary to maintain good relationships with its superordinate professional body.
education and training and qualification of Legal Executives without the approval of the Advisory Committee.

Furthermore, although the proposal that the Law Society should be represented on the Disciplinary Committee of ILEX had been vetoed by the Board of Trade, 'the Association were prepared to provide in their Bye-laws for a member of the Council of the Law Society to sit with the Disciplinary Committee as an Assessor.' Unsurprisingly, the Law Society council approved these arrangements.

1960s: ILEX, the early years

The support which the Law Society promised to ILEX in 1961 was reflected in the sympathetic editorials in the legal press at the time, both in the official Gazette of the Law Society and in independent titles of the legal profession. A selection of these editorials can be seen below:

We hope that all solicitors will give their support to the newly created Institute of Legal Executives... We wish the Institute and its secretary Mr. L.W.Chapman every success and assure them of our full support. (Sols. Jour., 4th Jan 1963:1)

It is vital that these [ILEX] courses be supported.... We therefore suggest that all solicitors who have not already done so should ask themselves whether they have any or enough fresh blood in their offices. (Sols. Jour., 28th June 1963: 501)

We are, therefore, delighted to learn that the Law Society and the Solicitors’ Managing Clerks’ Association have, after a long period of negotiation, reached agreement about a scheme for improving the status of managing clerks. We welcome this announcement [establishment of ILEX] and hope that it will lead to a great increase in the numbers of those who decide to make their careers in the non-commissioned careers of the legal profession. (Sols. Jour., 7th July 1961: 576)
The Council wish members to know that that this scheme [establishment of ILEX] has their entire approval and it is to be hoped that all members will urge their staff to join the Institute at the appropriate level. (LSG, Jan 1962: 26)

In addition to the official support, ILEX also received support from some solicitors (although there remained a heavy emphasis on its appeal to men). There was a more general recognition that the recruitment crisis did have to be dealt with and that ILEX was a commendable way in which to address the problem.

The legal executive idea is a splendid one. It gives the older men who are now entitled to be classified as fellows a status commensurate with the dedication and skills which they have shown over many years of loyal service. It also gives the younger men something to try for... Through years of neglect and restrictive practices the profession is now facing a crisis. The established fellows of the Institute of Legal Executives must be encouraged in every possible way, even by letting them sign the banking accounts, putting their names on the noteheading, and introducing them to the clients as ‘our legal executive’. The old managing clerk is as dead as the dodo. The very word ‘clerk’ carries undertones of servitude. Any Tom, Dick or Harry could call himself a managing clerk whether he was any good or not. The Institute of Legal Executives will put a stop to all this.

FRANK STIMPSON & SON (Sols. Jour., 5th July 1963: 538)

However, this support was far from universal within the solicitors’ profession (see further below) and was only ever extended as far as ILEX operated within closely defined parameters acceptable to the Law Society. The Law Society was never prepared to countenance moves from ILEX that amounted to claims for heightened professional status.

In 1956, a disgruntled managing clerk, Mr A. W. Bayley had written to the SMCA Gazette (Dec 1956: 150) and had demanded ‘Why cannot the Council achieve the necessary status for its members by a petition for Royal Charter – other bodies have

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12 An issue that the Law Society discussed, but would not approve (Minutes of the Council of the Law Society, 20th December 1963).
done this.’ His pleas were answered in 1966 when ILEX approached the Privy Council in order to gauge whether an application would have a likely chance of success. The reply was not encouraging. The Privy Council advised ILEX that an application from the organisation would have a better chance of success if it was made a few years later and then was done so with the support of the Law Society. The existence or otherwise of the support of the Law Society has been the central variable in the relationships between the two organisations throughout their history. Yet by the 1970s the attention of all providers of legal services was focused on the Royal Commission for Legal Services (1979) (Benson Commission), appointed in 1976, amidst a growing campaign to overhaul traditional structures of legal services, involving groups such as the Legal Action Group (Glasser, 1997: 8).

1970s: Benson, Royal Charters and frustration

Study of this period reveals not only that the Law Society exercised considerable influence over ILEX, but highlights the fact that this influence was a controlling one. The Privy Council had already intimated that the support of the Law Society was necessary for a successful application for a Royal Charter. During the early and mid 1970s there was considerable discussion both within the Joint Consultative Committee of ILEX and the Law Society and in ‘Special Meetings’ between both organisations over whether this support would be forthcoming. By 1976 ILEX had lodged a petition for Royal Charter with the Privy Council, despite lacking Law Society support. However, in the ILEX council meeting of 22nd October 1976, the Director General gave a fairly pessimistic report to the council. He noted once again that:

it was felt that the chances of a successful application would increase if the Law Society supported the application. In view of the relationship that existed between the Law Society, it was not unlikely that the Privy Council would ask the Society for its views.

He felt that a possible sticking point from the Law Society’s point of view was the ‘objects’ of ILEX as set out in the application for the Charter. There was, for

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13 See Minutes of the ILEX Policy Committee (20th October 1978).
example, no mention that a Fellow/Associate/Student of ILEX *had* to be working in a solicitor's office. The Law Society was obviously concerned that this left open the possibility of independent practice by Fellows – something to which they were opposed.

The minutes of ILEX council meetings note discussion over the issue of the acceptability of including reference to ILEX being 'a creature' of the Law Society in the application. Such discussion is understandable. ILEX found itself in a difficult position. It seems the Privy Council was looking for some evidence of a classic profession, independent, autonomous, self-regulating etc., before it would grant the Royal Charter. However, the lead professional organisation - the Law Society - was opposed to the view that ILEX could become a professional association of independent legal practitioners. Furthermore, the Privy Council actually recognised the links between the Law Society and ILEX and consequently sought the views of the Law Society. The support of the Law Society was therefore vital to the success of the application yet, paradoxically, that support, and the links between the two organisations, fundamentally undermined the claims of ILEX to be an independent, autonomous and self-regulating profession. The Executive Officer of ILEX, Mr Huddy, stated that he found it very difficult to 'steer a course' between the Institute’s interests and the objectives of the Law Society (ILEX, 1976). He believed that the Institute should talk to the Law Society and not get into a state of conflict: ‘The basic situation should be maintained.’ It was perhaps this desire to maintain the status quo that informed the submissions of ILEX to the Benson Commission.  

During the late seventies, when submissions were being made to the Benson Commission, there was considerable pressure to change the status quo. The discussions were heavily underscored by the changing shape of legal practice (in much the same way as the negotiations of professional relationships can be contextualised today). One of the underlying issues at the time was the solicitors'  

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14 See further Johnstone and Flood (1982: 173) for ILEX’s submissions which, in effect, accepted the dominance of the Law Society.
possible loss of their conveyancing monopoly, which eventually occurred following the Administration of Justice Act 1985. ILEX, in its applications was careful not to upset the status quo to any significant degree although their proposals were framed in an attempt to raise the status of legal executives.

ILEX was anxious to reassure the Law Society that its members did not represent a threat to solicitors. The ILEX council had already recognised that the support of the Law Society was vital to an application for Royal Charter, and spent time discussing how the Law Society might be persuaded to support the application, including whether legal executives constituted ‘a profession within a profession’ (ILEX, 1976a). Essentially while ILEX continually asserted that they did not wish to allow their members to set up as independent practitioners, or to make membership of ILEX compulsory, there was a subtle positioning exercise taking place. The aims of this positioning exercise were to raise the overall status of the Fellows generally but perhaps specifically to leave ILEX in a favourable position should solicitors lose the conveyancing monopoly. Their submission pushed forward its claims for raised status – whilst at the same time falling back on traditional public service arguments for the status quo in the same breath:

In the course of its evidence it pointed out that if there were to be any relaxation of the present restrictions on conveyancing, the legal executive had the strongest claim for inclusion in the class of persons permitted to do this work independently for gain, and the Institute had the strongest claim to be the examining and licensing authority; but it said .... however the Institute must take its stand on the broad issue of maintaining the unity of legal practice which is

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15 See Minutes of the Joint Committee (16th November 1979), when the ‘Vice-Chair [ILEX] expressed the hope that the Institute’s evidence to the Royal Commission had dispelled the impression held by some members of the [solicitors’] profession that the Institute’s objective was to enable its members to engage in independent practice. As the Institute’s evidence showed, legal executives regarded themselves as part and parcel of the solicitors’ profession working with solicitors.’

16 It is not possible to accurately present a picture of any internal tension within ILEX about how best to frame the submissions to the Benson Commission (and the Privy Council). While the Minutes are a valuable source of information about the strategies being discussed within the association at this time, Minutes are, by their very nature, only a superficial account of the meetings that took place, referring for example, only, to ‘there was discussion about’. It was for this reason that in-depth interviews were conducted with the council members of ILEX and the Law Society to tease out the underlying tension behind their responses to contemporary challenges (see chapters 4, 7 & 8).
thought to be in the long term interest of the general public. (Benson. 1979: 41, para. 31.26)

The proposals that ILEX did put forward to the Benson Commission were not, therefore particularly radical:

(a) The status of fellows of the Institute should be recognised:

(i) by salaries consistent with their work and responsibilities or by being allowed to share profits with the employing solicitor; and by

(ii) conferring greater rights of audience on fellows and enabling them to administer oaths and affirmations and take statutory declarations

(b) Even if those who work in a fee-earning capacity for solicitors are not required to have the qualification of the Institute, solicitors should be required to give more assistance, in the way of payment of course fees and arrangements for day release, to assist members of the Institute to attain qualifications leading to fellowship.

(c) The Institute should be more closely associated with the decisions taken regarding professional matters within the Law Society.

(d) The Institute should be more generally represented on bodies which have functions affecting the legal profession. (Benson, 1979: 410, para.31.20)

Furthermore, not only were they not radical but ILEX appeared, particularly in respect of points (c) and (d), to see the connections with the Law Society as an integral part of its development.

The spectre of independent practice, although explicitly denied by ILEX, was one that continued to haunt the Law Society. The Benson Commission (1979) echoed the traditional concerns of the legal profession in limiting the extent to which status would be accorded to legal executives. Although the Benson Commission recognised that many of ILEX’ proposals were desirable in practice, for example that more people should be encouraged to pursue their education up to the level of Fellowship, it did not recommend that there should be compulsion on solicitors to give day release
or pay either increased salaries or profit share (1979: 412-3). Furthermore, there were a number of proposals made by ILEX that the Commission simply refused to accept, for example in respect of extended rights of audience (1979: 415, para. 31.38).

The central tenet of the Benson Commission’s approach to ILEX’ claims for enhanced status was that ‘there are effectively only two branches of the profession, solicitors and barristers...[and] we consider that the creation of additional branches of the profession would be contrary to the public interest’ (1979: 411, para. 31.22). Once more the subordination of ILEX to the Law Society, and of legal executives to their employing solicitors, was fundamental to the Benson Commission’s failure to accept ILEX’s claims for professional status:

But all its members are subject to supervision by solicitors, who are answerable to their own governing body in respect of the conduct of all work done in their firms including work performed by legal executives. The Institute cannot, therefore operate in the same way as an independent professional body and exercise the same degree of exclusive control over its members. (1979: 415, para. 31.39)

The Law Society’s influence was clearly pervasive and powerful throughout the Benson Commission’s deliberations regarding legal executives. The Commission clearly recognised the power the Law Society held over legal executives. It effectively left any change that was to occur to the discretion of the Law Society, recommending that ‘the onus for developing these arrangements rests mainly with the Law Society.’ (1979: 416, para.31.42). Indeed one of its central recommendations was that there should be development of the formal arrangements between the Law Society and ILEX – perhaps to clarify and confirm the informal power that that Commission had already identified.

ILEX was bitterly disappointed by the conclusions of the Benson Commission (published in October 1979) which leant so heavily towards the preservation of the status quo in terms of the relationships between solicitors and legal executives (ILEX/Law Society, 16th Nov 1979: min.379). It should not have come as a surprise to them...
for the influence of the Law Society was strong at this time, and it has been suggested that composition of the Benson Commission, meant it was always unlikely to provide a radical vehicle for reform. Glasser argues that the Commission’s approach ‘concealed a poorly based objective to shore up the status quo and the economic position of the profession’ (1997: 8). During this period, in response to the growing calls for salaried legal centres, the Law Society formulated proposals of its own. It found a natural ally in the Government and was able to successfully defend itself from these attacks on its work jurisdiction (Goriely, 1996: 234). Furthermore, it was reported to the ILEX Policy Committee (ILEX, 20th Oct 1978), that the Royal Commission had indicated that ILEX should not rely too much on it giving the Institute what it was seeking. The inference perhaps being that, much like the Privy Council, the Royal Commission was looking for evidence of an independent, self-regulating professional organisation (again perhaps understandable given the Commission’s domination by interests tending towards the professional status quo). The Commission was not simply going to recommend full professional status for ILEX, particularly as a strong independent, self-regulating and autonomous legal profession already controlled the marketplace. In a meeting of the Joint Consultative Committee (16th November 1979), ILEX once again recognised the ties between itself and the Law Society: ‘The future of the Institute was bound up with that of the Society. The Institute members explained that the active support of the profession was vital.’

Employment, professionalism and the subordination of managing clerks/legal executives

The central theme in the hegemonic power of the Law Society over ILEX/SMCA, has been solicitors’ employment of managing clerks and then legal executives. This is the key reason for why the latters’ subordination became institutionalised throughout the history of the SMCA/ILEX. The subordinate body has had to place the concerns of solicitors at the forefront of its claims for further status. The desire to accommodate the wishes of their principals can be traced from the very first meeting of the SMCA. Furthermore, the impetus behind the various qualification schemes, indeed the very
negotiations which led to the creation of ILEX, fundamentally stem from a recruitment crisis faced by solicitors. For example, during a meeting of the SMCA and the Law Society on 14th February 1956, it was agreed that any new qualification scheme would have to benefit solicitors, as employers, to meet their staffing needs, and the managing clerks, to encourage them to stay in practice.

Any new qualifications had to be seen as having real value in order to be sufficiently attractive for more managing clerks/legal executives to study for them. It was for this reason that the educational scheme that led to the creation of ILEX was inaugurated and for this reason that ILEX had argued to the Benson Commission that further rights of audience and higher levels of remuneration should be granted to Fellows of the Institute. However, the recruitment crisis for solicitors eased as higher education expanded, and many of the roles performed within legal practice by legal executives became increasingly filled by assistant solicitors (Johnstone and Flood, 1982: 174).

Yet, a recurrent problem for ILEX/SMCA in terms of building its membership has been, not that there was an insufficient number of people performing the tasks, but that 'one of the handicaps from which the Association suffers is that its membership comprises only a fraction of those who are eligible for membership' (SMCG, Nov 1956: 130).

To grow as a professional organisation ILEX needed its qualifications to be recognised and the principal arena in which their qualifications and the attendant claims to professional status could be recognised, was the workplace. We saw earlier the official support that the Law Society had given to ILEX through the pages of the legal press. In this optimistic atmosphere, the Annual Report of ILEX in 1963 reported, that 'it is gratifying that solicitors are encouraging members of their staff to follow courses of study organised by the Institute and to take qualifying examinations'. However, this optimism faded, as did the support of the solicitors, and ILEX's proposals to the Benson Commission argued for real value to be attached to

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17 A problem institutionalised by the Benson Commission (1979: 407, para. 31.7) in its adoption of 'the expression [legal executive] in this general [incorrect] sense. See also Chapter 5 for Lord Irvine's misapprehension about the title 'legal executive'.

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Fellowship, in an effort to make it a more attractive qualification. But the Benson Commission concluded that, although it was desirable that the status of Fellows of the Institute should be raised, 'it would be impossible to require solicitors to pay an enhanced salary to fellows without specifying what rates of pay should be employed by all fee-earners within firms' (para.31.30: 412) and that ultimately:

A solicitor is... entitled to pay his staff according to the value of their work and success [which] ultimately depends on the quantity and quality of work handled, and not on formal qualification. (para.31.31: 413)

Without external intervention, therefore, the ultimate marketability of a Fellow of the Institute remained in the hands of the employers. Solicitors had to believe the Fellowship examinations were indicative of the ability of an applicant to work in the firm. This position was recognised explicitly by both members of ILEX and the Law Society.

The Minutes of the Joint Committee of the 23rd April 1976 noted that more positive steps were needed to encourage both recruitment and training. 'It was felt that what was needed was a planned campaign to increase vacancies rather than simply ascertaining where the vacancies existed.' Such moves were obviously dependent upon the support of the Law Society and the solicitors' profession. Because solicitors were the employers in the marketplace, ILEX had to rely on the Law Society before any fundamental development of ILEX could take place. As one ILEX council member stated in the Policy Committee of the 20th October 1978, 'one matter which was important was that solicitors should employ Institute members only and that members of the Law Society should be made known of this through the Joint Consultative Committee.'

It appeared that this message was not getting through for, in a meeting of the Joint Consultative Committee of the 16th November 1979, the Institute members explained that:

the active support of the profession was vital. The profession should recognise that consistent training was needed for their staff, but the Society had not laid
down the standards. Other areas should be found in which Fellows could have the rights not open to unqualified fee-earners to make the achievement of Fellow a worthwhile undertaking.

The Chair of the Committee (from the Law Society) stated that, ‘It had to be accepted that, at present, the profession did not see a sufficient merit in employing a large number of Fellows and this was the problem that had to be tackled.’ The support of the Law Society was therefore vital to the endeavours of ILEX at so many levels, but it is in the workplace the difficulties that ILEX faced and faces are crystallised.

Notably, many of the workplace difficulties that ILEX faced (or indeed faces) were not limited to the solicitors’ power as employers determining the nature of qualifications which their staff required. It has been noted earlier that SMCA/ILEX as a professional association closely modelled itself in the Law Society’s image. The ‘gentleman’s smoking concerts’ mentioned earlier can be seen as part of an attempt to assume the vestments of professionalism and a superior social class. Even in the 1960s, as ILEX was created, much of the language and actions of the Law Society seemed rooted in the first part of the twentieth century.

The retention of old certainties in the face of changing times within the legal marketplace can be seen from a speech of the President of the Law Society.

  The days of the family solicitor are not numbered; he is not a relic of the past and indeed, his role as guide, philosopher and friend is needed now more than ever. (LSG, Jan 1962: 17)

Further examples of the Law Society relying on social norms from previous ages can be seen in disciplinary cases before the Education Committee of the Council of the Law Society. On the 28th May 1965, the Committee had to consider the case of an articled clerk who had been found to have committed an act of gross indecency with another man.\textsuperscript{18} The Committee considered this conduct to be ‘such that if he were to seek to resume his services under articles of clerkship, he should not be allowed to so

\textsuperscript{18} It is accepted that such activities remained a criminal offence. However, the possession of a criminal record has not necessarily been a bar to practising solicitors. Furthermore, the tone of the discussion suggests that the Committee’s sympathies lie with the establishment on this issue.
without first being subjected to further scrutiny.' In a further case held in the same month the Committee had to determine whether two articled clerks who belonged to the religious sect known as the Plymouth Brethren would make suitable solicitors. The Committee noted that one applicant had declared that:

(a) he would not be able to associate in any way whatever except exclusively in the conduct of professional business with other members of the profession which he was seeking to join.

The Committee concluded that

the applicant was unsuitable [to be admitted] by reason of his lack of ability to identify himself with the profession as such and to associate himself with the profession which has a collective role to play in the administration of justice.

There was a clear sense throughout the Law Society archives that the profession was seeking to control precisely who is admitted to the ranks of the profession (see further Abel, 1988: 139-164). Such attitudes prompted one enlightened solicitor to write despairingly in the legal press:

It is interesting to consider why we cling to the old when so many [other professions] have preferred a change. I would suggest that the reason lies largely in our dying but nonetheless entrenched class structure. The idea of setting aside a special 'upper crust' of lawyers not by virtue of their proven ability or their examination successes, but by virtue of their having a social position and influence to enter chambers was well fitted to Victorian notions. (Geach, 1961: 675)

Although the correspondent was writing in relation to the position enjoyed by barristers, his identification of the Victorian notions upon which the jurisdictions of legal services had been settled are equally applicable in relation to the relationships between solicitors and legal executives. Johnstone and Flood also explicitly identify the position of managing clerks/legal executives within the post-war class-structure of the United Kingdom (1982: 187).

From the following selection of letters regarding the establishment of ILEX, it is interesting to note not only the substance of the criticism adopted by the solicitors, but
also the tone in which the criticisms are made. There is a clear sense of the superiority of the legal profession and a somewhat patronising attitude taken towards the new organisation.

It is worth quoting some of these missives in full to appreciate the full context.

**Legal Executive**

Sir,- Practically my only opportunity to read the Journal presents itself when I am having lunch, which I consume at my desk. Hitherto the provision of mental and physical sustenance has agreeably combined; today the digestion of an admittedly excessive intake of food was much imperilled by the Current Topic of the 28th June, under the significant heading of 'Fresh Blood'. At least twice appeared that disgusting expression 'legal executive'. The belief in which, albeit faintly, I still cherish my chosen profession as a refuge of honesty and culture in the business world may be ingenuous; yet I cling to the hope that a designation so fatuous will ever become current.

The office of Managing Clerk has, rightly an honoured place in the traditions of the law as well as its present administration. I hope I do not sound patronising when I say that managing clerks have their limitations. In nothing is this more evident than in their choice of a new name for themselves. It is deplorable enough that they should thus invite ridicule; it is much worse that you, Sir, in all apparent solemnity should endorse this assumption of a title as meaningless as it is unnecessary, and as silly as status symbols generally are.

To threaten to cancel my subscription if I see the expression again is perhaps just as silly, and I conclude in the hope that I have brethren enough of like mind to register their disgust.

JAMES H. MARCHANT (Sols. Jour., 26th July 1963: 590)

Ironically, despite the widespread use of the title 'legal executive' within solicitors' office, (thus weakening any distinctiveness for legal executives), the chosen title
proved the most heavily criticised aspect of the scheme. The letters to which the Fellows are entitled attracted considerable criticism, for example:

I have read with interest the new status and training scheme for managing clerks, but wonder whether the letters to be placed after the name of a person so qualified under the scheme is a happy choice. I refer, of course, to the letters ‘F.I.L.Ex’, which will recall to some people the perambulating propensities of a certain cat. (LSG, March 1962: 165)

Interestingly, the title was not well loved by at least one managing clerk, ‘I will now be entitled to described (sic) by the rather cumbersome and ostentatious title of “Fellow of the Institute of Legal Executives”. This will enable me to put behind my name letters that look like a proprietary brand of cat food’ (LSG, May 1962: 281).

The employer/employee relationship in the workplace was clearly reflected in how ILEX and the Law Society perceived their roles on the national stage. It was the solicitors, as employers, who determined the marketability of the qualifications through which ILEX sought to attract new membership. The Benson Commission’s failure to make such recognition compulsory left it up to solicitors to recognise of the ILEX qualification on a voluntary and case by case basis. Without any national level recognition ILEX found it very difficult to carve out a clearly defined niche for the Fellows of the Institute.

Although in recent years (see Chapter 5) the qualification of Fellowship has gained increasing value with specific rights, the title ‘legal executive’ remains unprotected in law, despite attempts by ILEX to have the title protected during the passage of the Access to Justice Act 1999 through the House of Lords. The qualification is still, therefore, largely dependent upon solicitors, as employers, to give the qualification further status by making it a pre-requisite to employment. This has never happened on a large scale (Sidaway and Punt, 1997: 15 and 31).
Conclusion

Following the disappointments of the Benson Commission and the failure to secure a Royal Charter, ILEX refocused its energies on strengthening ‘paraprofessional competence’ (Johnstone and Flood, 1982: 187) rather than continuing the project of raising its professional status. The 1980s and 1990s saw ILEX build its commercial strength with the purchase of new premises in Bedford and the establishment of companies to deliver and administer courses for non-qualified staff in legal practice. In May 1998, ILEX with EDEXCEL established the National Vocational Qualifications in Legal Practice. Yet during the 1990s there have been considerable difficulties within ILEX as council members and salaried staff have sought to reconcile the tension between commercial and professional pressures.

The Law Society and ILEX are two professional associations whose destinies have been inextricably linked. Despite the absence of significant formal ties between the two bodies, this chapter has shown how the Law Society has exercised a powerful dominating influence over the development of ILEX. A fundamental reason for that dominant influence stems from the powerful position of the Law Society which has been closely connected to powerful and business elites. Moreover, as the employers in the legal marketplace, solicitors have been able to dictate the standards which their employees must meet. This superior/subordinate status is mirrored at the level of the national, representative organisations. ILEX has consistently attempted to raise its status and further its professional project. The Law Society has consistently been able to restrict those attempts. However the changes in the legal system look set to allow legal executives greater rights and status than ever before. What has changed? We are seeing a fundamental weakening of the professional autonomy of the legal profession and the easy understanding the Law Society has traditionally enjoyed with the state is fading.

The following chapters will now explore the contemporary relationship between the Law Society and ILEX and the strategies of both professional associations to respond to this uncertainty within the legal marketplace.
Chapter 7: Strategic Choices facing ILEX

Introduction
ILEX has, over the last few years, enjoyed one of the most successful periods since its creation. The Courts and Legal Services Act 1990 has enabled Fellows of the Institute to be awarded extended rights of audience (approved 23/04/98 by S.I.1077/98). The Access to Justice Act 1999 awarded Fellows of the Institute (and barristers) the right to conduct litigation, a privilege which has long been the preserve of the solicitors' profession, and furthermore ILEX has found the ear of government to be more attentive than ever before.

These changes, together with other significant developments explored elsewhere in this thesis (Chapter 5 particularly) reflect a shifting market for legal services. How have the professional associations have responded to these contemporary changes? This chapter looks at the response of ILEX. It is based on interviews with the council members and their Secretary General on their perceptions of the contemporary challenges facing ILEX and their views on how it needs to reposition itself strategically. The interviews also reveal the cherished notions of legal professionalism held by the council members. The significance of the definitions of professionalism within ILEX will be considered in the light of the labour market for legal services and the strategic responses of the Law Society to the challenges it faces.

It was clear from council member interviews that ILEX has encountered major opportunities both for itself as an organisation and also for its members. Overwhelmingly council members felt that they were on the cusp of a real breakthrough for legal executives. Furthermore, they were united in their approach to the challenges facing ILEX. However, it was far from clear that the same unity existed between the grass-roots and national membership. Tight control of the membership and exclusive control of the profession's work are classic characteristics of a professionalising occupation (Larson, 1977: 40-52). Yet it is clear that ILEX still faces difficulty in exercising this degree of influence over its membership. Moreover,
the council members were strongly attracted to the classic professionalism associated with the Law Society yet recognised the need to move their organisation forward regardless of old assumptions about professionalism in the legal marketplace. This tension proved difficult to resolve.

Organisational Strategies within ILEX

Laffin identifies different types of professional association (1998: 218-9). ILEX aspires to the accoutrements of the ‘traditional professional associations to which a substantial number of practitioners belong such as the British Medical Association’ (1998: 218). Throughout its history ILEX has consistently looked to the Law Society for its template of what a professional association should look like (see chapter 6). However while ILEX may emulate a classic professional association in terms of its structure and articles of association (although lacking a Royal Charter), it represents an auxiliary profession. Given its auxiliary nature, it might be expected that its leadership would be less encumbered by classical assumptions of professionalism. However, it appears that the ILEX leadership still cherishes assumptions of classic professionalism, not widely shared among legal practitioners.

Laffin identifies four strategies by which professional associations have sought to respond to changing conditions: conserver, prospector, advocate and passive (1998: 219). ILEX is broadly pursuing prospector strategies, seeking to identify new opportunities for its membership, making new professional claims and attempting to recruit new members. However, it combines this strategy with many of the value systems of the older professions which are more commonly identified with the conserver approach ‘which have few reasons to change and plenty of reasons to resist change’ (Laffin, 1998: 219). The conserver approach sees the association continue to rely on claims to exclusivity of knowledge and to reiterate the boundaries between the profession, other professionals and the laity. Additionally ILEX’s situation is complicated given that its conversion to prospecting is somewhat belated. Much of its recent history has seen it in a passive position ‘caught in the bright headlights of change ... unwilling, or unable to respond strategically’ (Laffin, 1998: 220). Indeed,
the archives explored in Chapter 6 reveal that ILEX has been ‘unable to respond strategically’ because of the controlling power of the Law Society.

Passivity Rewarded

Thus, ILEX has only recently had to confront the tension between conserver and prospector strategies. For much of its history the organisation was not in a position to influence the legal services marketplace, such was the control exerted by the Law Society. Following the failure of its applications for a Royal Charter, ILEX increasingly focused on developing commercial companies to produce educational schemes for other workers in solicitors’ firms. Johnstone and Flood note that this strategy of ‘raising paraprofessional competence’ was the only option available to ILEX (1982: 187). While ILEX has had some success commercially, the focus on the professional side of the association declined. It simply adopted a ‘passive’ strategy and consequently its interests were largely ignored during the legal services debates of the late eighties and early nineties. Although the Courts and Legal Services Act 1990 designated ILEX as an awarding body for the further rights of audience, attempts to have the organisation approved met with little initial success.

The present opportunities facing ILEX (increased access to government, extended rights of audience, rights to conduct litigation) have essentially been part of the government’s wider strategies for reforming the legal system and legal services. These new rights had little to do with government responding to any coherent strategy from ILEX; this is clear from a brief selection of statements from the council members:

At the moment it seems as though all the prizes are dropping onto our feet.
We’ve got the extended rights of audience. We’ve got the government telling us that we want you to have right to conduct litigation… . Whereas under the Conservatives, we’d been trying for 7 or 8 years so it’s quite nice to have these things given to us… . It could well be that is just that we are means to an end in

1 See further Irvine’s (1998) press releases and the Consultation Papers such as Modernising Justice (including OFT paper) all suggest that the Government’s principal motivations in removing restrictive practices in legal services have been to increase efficiency, competition and to save money.
their political agenda... . So yeah, we may well be the puppet of the Labour Government at the moment, but whilst it’s suitting us to travel along and its opening up opportunities for our members, then fine. *Interview 4, ILEX*

I think that [ILEX] is in the right place at the right time [for these opportunities]. The Institute was formed, I think, in 1963. So it’s been going for thirty odd years. I think it’s reached a maturity and stature where it was just in the right place at the right time when Lord Woolf came along with his wonderful reforms. We’ve come of age just in time to take on these new responsibilities. I think that’s the situation. *Interview 6, ILEX*

We have been fortunate that we have a government that wants to extend rights beyond solicitors. So that’s worked very well really. But now we’ve got certain extended rights, or further extended rights. But we haven’t made strategic choices. *Interview 9, ILEX*

Thus, ILEX’ focus on recent years has not been on advancing the professional claims for its membership and the impetus for the reform of legal services has come from government. Nonetheless, ILEX has been gradually improving its organisation and refocusing its efforts. These shifts in its outlook have allowed it to take advantage of the government’s plans. As one council member noted:

ILEX was definitely far more insular in the past. Now [the council members] represent ILEX and not just their members. Before it was ‘we’ve got so many members, this is our role, this is our status and that’s fine’. It wasn’t as entrepreneurial, if I can use that word, to go out and get things. There’s been a change of personnel and now we’re spending far more time at headquarters on council business. It’s far more professional and a tremendous amount of time is spent on administration, running the place at Kempston. I’ve got to look after the members of [my constituency] but more and more I’ve got to participate in meetings of the council where we’re looking at other things. We might be looking at an Act as it goes through Parliament. It is indirectly on behalf of membership. But that’s the way it’s going. *Interview 8, ILEX*
Even so, external forces are shaping the system of legal professionals, rather than any internal forces, such as the development of new professional knowledge or skills (Abbott, 1988: 91-6). The approach that ILEX is now taking to meeting these new challenges offers important clues as to how the landscape of legal services could develop. However, the past emphasis of the association has had an enduring influence upon the organisational difficulties confronting ILEX.

Organisational difficulties confronting ILEX

The council members were unanimous on the broad challenges facing ILEX. However axioms such as ‘ILEX should look after its members interests’ concealed deeper tensions about how exactly the organisation would achieve its aims and objectives. The contradiction posed by some council members’ aspiration to see ILEX as a gentleman practitioner’s association (best suited to conserver strategies) and the prospecting that other council members believed was necessary is acute. Furthermore, the reliance until now on developing educational and commercial interests at the expense of the professional project sits uneasily with the leadership’s attachment to a traditional view of professionalism. These conflicting views of ILEX as a commercial trading company or a professional association contributed to paralyse ILEX, and still haunt the association today as it faces a legal services marketplace in transition.

Notably, the newly appointed Secretary General (appointed late summer 1998) identified a need for clarity over ILEX’ aspirations, as she lamented the absence of a ‘shared vision of where ILEX should be in 3 years time or in 5 years time.’ This absence was evident right across the council itself, the various ILEX companies, the national leadership and the grass roots membership. But, since the interviews with ILEX council members were conducted, a strategic document was published in 1999. It attempts to formulate a shared and coherent vision for ILEX. It is not a particularly radical document, in terms of its aspirations, but it is consistent about ILEX’s aims

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1 Interestingly, much of the drive to regenerate the professional project and prospect for further rights appeared to emanate from the Secretary General.
and objectives with clear assertions, running throughout the document, of the primacy of the professional project within the organisation (1999: 5).

The ILEX companies were developed at a time when the organisation focused principally upon commercial/educational concerns at the expense of its professional aspirations. This historical drift away from the representative/regulating agenda, is described by the following statement:

For various historic reasons there has grown up a tendency for them [the companies] to operate separately, which is a nonsense really because the companies have to be there to support what the Institute does. Being very commercial is all very well because they have to make money, but they seem to have developed in some areas too much of an independent outlook. Interview 1, ILEX

Other council members were concerned that the subsidiary companies often forgot that ILEX (the professional body) was supposedly in ultimate control. They concluded that the commercial aims and departmental politics of the full-time staff had to some extent obscured what ILEX (the professional body) was attempting to achieve, a belief re-iterated in the strategy document (1999: 8, see also Chapter 4 of this thesis).

ILEX' current strategy (which can be detected before the publication of the strategy document itself) has involved a re-discovery and re-assertion of the 'professional project' of ILEX and a concern that the commercial/educational activities should no longer overshadow the professional project. The interviewees explain:

From an economic point of view students are very important and it may be that we ought to be looking at other sources of income. The important thing for me is how many people are Fellows, because that's the professional part of the membership. We may want to have a different focus if we get the rights to litigate, and then perhaps turn our focus to the professional sections of the membership. But we can't do that until we know where our other sources of
income are going to be coming from. Or it might mean slimming down our operations - it's pretty slim already. *Interview 1, ILEX*

Obviously we like the fee income that we get through our trading companies, but we really want to be able to get people into the Institute through the professional route. That's what we'd like. We'd like to be able to build up the numbers. I think the more rights that we get, the more standing that we get, hopefully more people will see that it is a good qualification to come on and get. *Interview 4, ILEX*

Some council members also raised the professionalisation of the council's work as a key issue. They felt that the workload of council - preparing for meetings, reading documents etc. - was growing increasingly burdensome given their other responsibilities, not least their work within their respective firms. Yet they felt that the previous approach to ILEX business was too relaxed and inappropriate to the demands of the contemporary legal market. This shift in the workload for the council members is symptomatic of ILEX's move towards prospector strategies in search of greater professional status. They also linked the need to 'professionalise' the work of the council to the new rights that ILEX had been awarded. They recognised that a purely voluntary model of service to the profession was insufficient to deal with ILEX's greater prominence:

I think that if the right to litigate goes through, then there is going to have to be a body on the council who are going to have to be semi-professional council members, rather than as we are... The control has got to be there so that each member [of ILEX] is governed by a body with a disciplined system - they've got a group who keeps an eye on the changing of the law and so on. There would have to a bit more on the professional side I suppose. If they [Fellows] have the right to litigate then [ILEX] has got to go up a gear. *Interview 3, ILEX*

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1 The pressure on the culture of professional voluntarism, is also charted by Laffin and Entwistle (2000: 213-4).
Never volunteer, that’s what I say. If I knew the volume of post [about council business] we’d be getting…. Huge volumes of post. [And] last year, there were a number of extraordinary council meetings over and above what you would normally go to. I had to have a quite a few days off work because it’s a long way to Kempston. *Interview 6, ILEX*

I think the way I can see it progressing and proceeding is that it has almost got to become a full time responsibility for those who are on the council of ILEX…. To be perfectly honest, we’ve also got to balance work and the family etc. In my opinion you can’t do everything. What I’m saying is that probably the time has come when we’ve actually become almost a full-time council. So that we’re going to be well prepared and strong in the face of these changes. Because with the best will in the world, what I’m saying is that it’s a different ball game than it was twenty or thirty years ago when you were just representing the members… not being disrespectful to former council members, the current council members are more involved and more professional. So in other words, they are making themselves more proactive instead of just sitting around studying a pile of papers. *Interview 8, ILEX*

**Grass-roots Apathy**

The council members unanimously reported a serious problem of grass-roots apathy. This problem is critical, as it could affect the legitimacy of any new organisational strategies. Many council members felt exasperated by the apathy – although admittedly some members were quite happy and felt that they could do their job more easily without the demands of an over-enthusiastic membership. Despite the importance of a national association to a profession’s collective mobility project (Larson, 1977: 69-77), the national association and the wider membership of a profession do not necessarily speak with the same one voice (see particularly the Law Society in Chapters 3, 5 and 8). However, ILEX’s problem is that its grass roots remain silent. Far from challenging the national leadership, they appear to find their national association irrelevant. The trend has been for many recruits simply to use
ILEX as an educational or examining body and fail to maintain any post-qualification involvement.

Interestingly, the council members themselves had all been active branch members before they joined the council. As one council member put it: ‘a lot of council members had been branch members and you sort of grow up with ILEX as you go through council’, another described it as a ‘natural progression really’. However, too few ILEX members would appear to regard even activity at the branch level as natural. Although the council members emphasised that ILEX existed to protect and promote its members’ interests, the effectiveness of ILEX and its approach remains questionable as long as the membership remains apathetic. It may be that the agenda and policy of the national institution have little relevance for those in everyday practice. The extent of the council members’ concerns is evident in the following statements:

I suspect ILEX does have some difficulty in reflecting the needs of the membership, because the members don’t communicate with it very much… . They communicate when there’s something that they’re not happy about or if something goes wrong - but then you’d expect that. There isn’t, except in pockets, a great deal of branch activity… . There isn’t a great deal of response to the ILEX journal. I mean there’s no big letters pages or anything.¹ I don’t know whether that means that they are all quite content with what we’re doing and how we’re doing it or whether it’s just apathy or whether they just don’t think that ILEX is very important. Interview 1, ILEX

It depends if they read their journal! [whether there’s a good level of communication between the national level and the grass roots] Although we’ve got branches, there are very few members who actually bother to turn up and

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¹ The rare occasion over the last three years (a time of unprecedented professional success for ILEX) when the letters page in The Legal Executive Journal ran to two pages (September 1999: 44-5) prompted a Fellow to applaud the issue as ‘the best that I can remember’ as a result. However, the correspondent also bemoaned the continued presence of the ‘useless motoring feature… [which was] an insult to those… who find that their salaries fall below the level required to purchase many of the vehicles featured’ (November 1999: 42). The ‘useless motoring feature’ is perhaps a contemporary version of the ‘gentleman’s smoking concerts’ of the past - an aspirational distraction from the professional project.
support branch events. I think there is a little bit of apathy out there. I know everyone says 'What does the Institute do for me?', well then, 'What are you doing for your Institute?' A lot of people do tend to treat it just as an examination body and when they get their piece of paper just think 'Ah, that's all I need from them. I don't need to be involved.' Which is silly really, when you look at what we've achieved. The main contact with members is through the journal and council members are always available to members if they want to contact them. The national conference is always sold out, but then 350 out of a membership of 22,000 is not huge. . . . I think in any profession you are going to get people who take an interest and people who just want to get on with their lives and can't be bothered. *Interview 4, ILEX*

To be perfectly honest as far as [this branch area] goes, the members are fairly apathetic. Put it this way, I, as a council member, am not constantly bombarded with requests for information, complaints about the Institute and so on... to be honest with you, I don't have a great deal of input as council member for [this branch area] from the wider membership.... I would have to say, and I'm sorry to say this but they are apathetic and know very little of what's actually going on in the council. I mean they shouldn't necessarily be totally unaware because now we have the situation that we have a Legal Executive journal that feeds certain information to them. [But] it is fairly limited. *Interview 8, ILEX*

ILEX now have a working party to look at ways to re-energise the grass roots through branch activity, and re-developing the branches was a central feature of the 1999 strategic document (1999: 6). However, most council members assumed that once the avenues of communication were there it was up to the local membership to use them. All the council members emphasised that avenues were open for the membership if they wished to contact a council member and each council member confirmed that they would be very happy to deal with such enquiries.

The apathy of the grass-roots is linked to many of the central contradictions about ILEX, its role and its strategies. As the council members noted, the membership does
not believe that the organisation has a great deal of relevance to their working lives. The central strategy for dealing with this problem is to make ILEX relevant again to legal executives, by giving the title Fellow of ILEX increased rights (and responsibilities). As one council member emphatically stated, 'They'll be forced to [re-energise their faith in ILEX] in a way because we’ve introduced CPD, so they’re going to have to take notice of us'.

Of course, as some council members helpfully pointed out, the Law Society faces similar membership apathy (and worse). The ill-tempered contested Law Society presidential election of the summer of 1999 saw a turnout of 21.7%, and the more polite contest of 2000 saw a turnout fall to 18.6%. Such statistics, far from being a reassurance for ILEX, simply appear symptomatic of a declining relevance to their members of legal professional associations generally. As the smaller, subordinate professional association, ILEX faces even greater pressure to demonstrate its relevance to its membership, in order to maintain its influence with policy making circles.

The Role of ILEX

The council members broadly agreed over the role of ILEX. There was little variance from the following response:

I think it should be what it is - a professional body. I think that it should have the function as it does of regulating its members, or promoting its members and the work that they do and ensuring that its members have access to information about changes in the law and best practical practice - all the things that a professional body should do. *Interview 1, ILEX*

The council members and Secretary General felt that the role of ILEX was inherently defined by virtue of its position as a professional body. It was interesting to note that

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5 The Law Society' Consultation paper and current President propose to establish 'a larger and more representative Council that would create an electoral college with the credibility to elect the Deputy Vice-President, who would then be expected to proceed (with safeguards) to the top office - avoiding the disruption and risks of national elections’ (LSG, 14/09/00: 22). It would also avoid the embarrassment of such low turnouts in elections.
in defining ILEX's role by virtue of its claimed status as a professional body, a number of the council members did so by relying upon classic notions of what a professional body should do.

We are not, and never have been, a trade union. Interview 2, ILEX

That really is the foundation of the Body, looking after the interests of those who have studied through the Institute in their career as legal executives. Interview 8, ILEX

Other council members, while still asserting that ILEX' role was inherently defined, constructed definitions of its role that owed more to a 'prospector' professional association, than one concerned with simply conserving.

The role of ILEX, is obviously [that] it's a professional body, it maintains the standards and it's really got to see where the avenues are for increasing the position of the legal executive in the legal profession. Interview 4, ILEX

Well, [the role of ILEX] is to promote ILEX basically. What it's about is that it's all very well having the recognition that we've got but it's got to continue to promote ILEX. Interview 7, ILEX

The differing conceptions about what it means to be a professional body can be seen more starkly when the strategies that ILEX is intending to pursue are examined in more detail.

There was tension within the ILEX council about how best the interests of its members should be represented particularly in the light of the changes within the Access to Justice Act 1999. Broadly, the dilemma was whether to consolidate the gains that they had recently made (which were, as noted earlier, the gift of Government, rather than as a result of a hard fought campaign) or to push for increased rights for their members, particularly for those described as the professional end of the membership - the Fellows. Opinion can, therefore, be seen on a sliding scale, between those wishing to play 'Grandmother's Footsteps' and those preferring to participate in 'British Bulldogs'. Furthermore, some council members found themselves torn between both approaches. Although the council spoke with
unanimity about their desire to see the highest possible rights for their membership, there was considerable variation about how best to achieve this. The uncertainty about how best to secure their membership’s professional status reflects continued uncertainties in their relationship with the Law Society.

Whether to conserve or to prospect is a key tension for ILEX. The formulation of *Moving Forward, Staying Ahead* to co-ordinate the future development of ILEX was particularly important as an attempt to get ILEX to speak with one voice through offering a coherent strategy for legal executives. The ILEX council’s perception of how legal executives should position themselves within the system of legal professionals and whether collectively they determine to forge ahead to extend its jurisdictional boundaries will allow us to consider on what basis the occupational project of legal executives will progress. These two council members illustrate the divergent views within ILEX:

Well it’s difficult really. I think what we’ve got to do is not push ahead too quickly... but make sure that somehow the Law Society is aware of what we are doing. But if they see that we are [taking business from solicitors], I think that would be a real problem. *Interview 9, ILEX*

This is the big argument that we’ve had recently. I’m of the camp that says that we should get along and do all this because it’s a good opportunity. But some people have said ‘oh no, we can’t... it’s too dangerous’. Someone piped up and said ‘Well, the Institute didn’t do very much for its members 15 years ago when the Licensed Conveyancers... when that side of the monopoly was broken.... ’

And this council member was saying that we don’t want to miss the boat again. Now we’ve been offered these opportunities on a plate, of breaking the Law Society’s monopoly, we don’t want to miss that opportunity again. *Interview 6, ILEX*

To add further confusion, but perhaps also to highlight the fundamental tension felt among council members, several of them found themselves unable to reconcile the tensions and advocated both conserver and prospector approaches. Rather than this
simply being a matter of them contradicting themselves, it once again highlights the dominance of the Law Society, and the elusive nature of the Law Society’s power over ILEX. Without a clear conception of the possible limits of the Law Society’s control, and with uncertainty about the Law Society’s response, most prospecting that was advocated was necessarily very cautious.

I suppose the main thing is that we are trustees of the assets of an Institute of professional standing and its really ensuring [those assets are preserved], whilst trying to make progress and expand the rights, we obviously have to take a careful approach as well.... It’s taken us thirty odd years for us to get to where we are today. We’ve got to make sure that don’t lose that by making some really disastrous decision. *Interview 4, ILEX*

The current proposals mean ‘Open Sesame’ as far as we’re concerned.... And we don’t intend to sit here quietly and do nothing.... So our strategy is going to be based on what’s on offer and then going for it.... [But] I suppose personally I have always held the view that you can’t go all the way because otherwise this is going to be questioned by solicitors. But, having said that, if the Government gives us an inch, then we’ll whip in and say here we are. And proceed as far we can because the Law Society is obviously going to take from the Bar isn’t it?... Proceeding where we are encouraged to proceed and certainly, if we see a gap ourselves, saying ‘How about us?’, but at the same time having a considerate approach. *Interview 2, ILEX*

It was noted above that the belief in either conserver or prospector strategies could be linked with the council members’ perceptions of the place of legal executives in the system of the legal professions. Those members of the council advocating more bullish strategies are those more certain of ILEX’ strength, who are on the whole less concerned with traditional notions of professional labelling. Those council members who are seeking to conserve the current position, largely appear to be those revealing strong empathy with solicitors and the professional status quo.
However, a simplistic link between a belief in a particular organisational strategy and a sense of 'subordinateness', ignores more subtle explanations of the council members' views. Those council members most strongly in favour of an aggressive prospecting strategy, were those who were relatively recent recruits to the council (over the last couple of years). There are a number of possible explanations, and it is not simply a generational issue, some veterans of the council were, in fact, comparatively young themselves. However, it may be that the council veterans who largely advocated a cautious or pragmatic approach have more experience of the realities of negotiating with government and the Law Society. Their greater experience at the highest levels of the national organisation may have led them to conclude that caution and negotiation are the best tactics to secure the future of ILEX. However, an alternative explanation may be that the subordination of ILEX is far more pronounced at the national level than within the workplace, especially as boundaries between jobs may have become increasingly blurred over recent years. The newcomers to the council, with less experience of working within a subordinate relationship between themselves and solicitors, find it difficult to understand the longer serving members' caution. They simply see opportunities for legal executives and find it difficult to understand why their colleagues are failing to support their calls for more aggressive prospecting.

The divisions within the council are not as stark as this discussion implies. It is more a matter of a continuum of views. However, the tensions and concerns behind the various positions held along that continuum help us understand the choices confronting ILEX as it struggles to find a new position for itself and its members in the system of the legal professions. Furthermore, if there are tensions within the council between the national level experience and the experience within workplace, where does this leave the professional project of the membership who have no experience of the national association and demonstrate very little interest in it?

**Next Steps for ILEX**

One of the central reasons for the apathy of the membership and the lack of professional status of legal executives has been that Fellowship was not seen as
necessary to enable the legal worker to do the job they were employed to do. As one council member noted in discussing the Institute's plans to introduce CPD for its Fellows and lamenting the lack of any real sanction for people who declined to undertake the CPD:

I think that it has been the [lack of] a protected identity [that has been one of the major problems for legal executives over the years]. I think a lot of people just qualify and then let their subscriptions lapse. Which is sad really, because they're missing a lot as well. I think that the Law Society have got it pretty tight because a solicitor cannot practise without a practising certificate – they're tied in. Whereas our members aren't tied in. It would be nicer to be tied in. To a certain extent it might encourage people to be for us rather than against us. Now the ultimate sanction would be to take away their membership…. But that may not be a threat to them. They may be in a job where it doesn't matter whether they are part of the professional body. Interview 4, ILEX

Despite, the government granting legal executives greater rights than ever before, it has only gone so far. During the Access to Justice Act's first passage through the Lords, Lord Kingsland moved an amendment (tabled by ILEX) to have the name 'legal executive' protected in law. However the government declined to incorporate the amendment into the Bill. This remains a long term objective of ILEX (The Legal Executive Journal, July 1999: 44).6

Council members were also keen to highlight the fact that there was no recognised pay structure for legal executives, a consistent complaint of the grass roots membership, and seemingly one of the few topics to stir them from their apathy (see Legal Executive Journal, September 1999: 44-5). One council member sought to distance ILEX from such demands, by arguing that such matters were for trade unions and not for a professional body. More recent recruits to the council, however, see a fair pay structure for Fellows as imperative if ILEX is to advance. Such a pay

6 It is also a concern of the membership, with letters on the subject, appearing in the July, September and November (1999) issues in the usually moribund 'Viewpoint' feature of The Legal Executive Journal. One correspondent expressed 'little confidence' (The Legal Executive Journal, September, 1999: 44) in a Past President's strategy (endorsed by the 1999/2000 President) of 'collecting together evidence of misuse of the term 'legal executive' which misuse has been detrimental to the public [to use]... when other legislative opportunities arise' (The Legal Executive Journal, July 1999: 44).
structure would, however, be very difficult to implement without legislative or Law Society support for such a code.

Even so ILEX is continuing to work hard to raise the professional status of legal executives through the measures contained within its strategic document and limited lobbying activities such as its submissions to the Office of Fair Trading, advocating partnership for legal executives (The Legal Executive Journal, August 2000: 3). The aim is to place ILEX in a position to take advantage of government plans but also to influence the legal services agenda.

The nature of professionalism within the council of ILEX

Chapter 6 revealed ILEX as a professional association firmly in the shadow of its big brother profession. The early members of the SMCA and then ILEX looked to the Law Society as a model of a professional association (as indeed have many academics), for example in the structure of the council and the format of their professional examinations. This defined ILEX as a regulating/representing association, but left it vulnerable to the controlling influence of the Law Society. However, one of the central reasons for the Law Society’s strength - its relationship with the state - is fracturing, seemingly leaving ILEX with opportunities to further its own professional project. At the same time, legal professionalism is being re-defined in the marketplace and this thesis is also concerned with how ILEX and the Law Society respond to this redefinition. Are the leaders of ILEX still imbued with classical professionalism which confirms their own ‘subordinateness’ or are they more in tune with the evolving nature of legal professionalism than the Law Society?

Increasing Professional Strength

Although many council members acknowledge that the Law Society may not be particularly happy if its membership were to lose business to future firms of legal executives, many argued that the Law Society was no longer in a position to control

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1 See Carr-Saunders and Wilson (1933: 19-51). Both Larson (1977: 85-6 and 95-6) and Abbott (1988: 247-79) consider the English legal profession (as well as its American counterpart) and the Law Society as case studies within their more general theories of the professions.
ILEX and that ILEX was moving from a position of subordination to one of equality with the Law Society. Once again, uncertainty over the continuing power of the Law Society meant that the ILEX council members hesitated over asserting this 'equality'. Interestingly, the council members' responses have a striking similarity of language.

The changes to legal services are going to give them [ILEX] more of a controlling element, i.e. like the Law Society are. It will be like Police, Ambulance and Fire Brigade and AA being like the fourth service. It wouldn't be like that then, it'll be as I see it, the Institute, the Law Society and the Bar Council in equal standing. There'll be parity. Interview 3, ILEX

Legal executives are now one of the main stratas of the law without a doubt, ... you've got three strands which are barristers, solicitors and legal executives. Interview 6, ILEX

I tell people now that ILEX is the third arm of the law like the AA. We're a force to be reckoned with... . We are an independent body. We've got to work with the other agencies and that includes the Law Society and the Bar. We're there in our own right as it were. Interview 7, ILEX

We are now recognised as the third arm of the law. So you've got barristers, solicitors and legal executives. Interview 8, ILEX

In effect they are confirming the party line position that legal executives are now the 'third arm of the law', asserting that in practice there is very little difference between the work of a solicitor and that of a legal executive. The council members appear even more certain of the valued place of legal executives in the workplace.

Twenty years ago you used to get letters saying 'I'm being paid very badly, what can you do for me'. You don't get that so much now. If people want another job then they'll move on. They've got a qualification, a piece of paper that they can hand over. Interview 2, ILEX
[My firm] don’t pay you any more just because you are a solicitor. I’m actually paid more than some salaried partners because I’ve been here a long time. They just look at the work that you do. Interview 3, ILEX

There are a lot of legal executives who earn more than many assistant solicitors. I earn more than some of the salaried partners here... I’m on the notepaper and treated as an Associate, treated as a quasi-partner. So I’m involved in the decision making processes. Interview 4, ILEX

There’s certainly parity [between legal executives and solicitors within the firm] We have responsibilities. Interview 8, ILEX

[ILEX] has brought standing, as a member of a profession of law...Even within this firm I have far more responsibility than many of the assistant solicitors. Interview 9, ILEX

These experiences ring true with the experiences of senior partners and legal executives in practice interviewed as part of an earlier pilot study for this research. I have complete conduct of my files. From the beginning no-one ever sees my files. But to comply with the Law Society regulations, the senior partner would take responsibility, but they don’t ever check my files. That’s because I’ve been it for so long. After I’ve seen a client, I open the file and do everything myself... There’s very little I don’t know about family law. You will see with other legal executives that is usually the case... I can’t see that there is any difference because solicitors in this firm and legal executives get paid on performance. It all depends upon how good you are really... If you class everyone as lawyers regardless whether they’re legal executives, solicitors or barristers you should still expect a standard of performance. That they are solicitors is no badge of quality. Legal executive in small firm, pilot/workplace study

Legal executives in this firm do not see themselves as paralegals...Legal Executives are not cheaper than solicitors. We’ve all got our salary rates. Good
Legal executives are paid as much as solicitors. *Partner in a large commercial firm, pilot/workplace study*

Similarly *The Legal Executive Journal* carries reports of legal executives being employed as Associates, earning comparable amounts to solicitor partners (June 1999: 4) and legal executives are highly valued in some of the top city firms (*The Lawyer*: 15th May 2000: 3).

A strong belief that ILEX holds parity with solicitors and barristers may lead the profession toward taking an increasingly aggressive approach to the pursuit of further rights for its members, breaking with the deference that has characterised the association to date (see particularly Chapter 6). However, when the statements of the ILEX council members are examined in closer detail, deep status insecurities are evident among the council members. The stock phrases that emerge from the interviews such as ‘third arm of the law’ and ‘earn more than’ could be seen more as a rehearsed patter for a careers convention rather than an assertion of ILEX’s status within the system of legal professions. It is necessary to look at some of the other assumptions about professionalism expressed by the council members to develop a more complete picture. This is not to deny the council members’ belief in the professional strength of ILEX, rather it is to highlight these status insecurities.

**Continuing Subordination**

Despite some upbeat assertions, most council members accepted that it was not yet fully possible to place legal executives on an equal footing to solicitors. They had to recognise that their professional strength at both an institutional or a workplace level still fell a long way short of the position held by the Law Society and solicitors.

The Secretary General [who joined ILEX from the Policy Directorate at the Law Society in the late summer of 1998] gave her view of the relative strength of the various professional associations within legal services and the casual way in which the Law Society treated ILEX:

> At the Law Society, we didn’t consult the Institute on Policy Development. You know, for example, looking at the changes to legal aid. The Law Society would...
always go to the Legal Aid Practitioners Group, LAG, the Bar. It was just automatic and the Institute was never consulted. So there is a lot to be done at a professional level… . There is certainly not the collegiate relationship as with the Bar. With the Bar there is a much more ready recognition of equality than there is with ILEX… . I was at the Law Society for ten years and often it just wasn’t remembered that ILEX was here and may have a point of view.

ILEX is not yet on a par with the Law Society and the Bar, any more than you would dial ‘999’ to reach the AA.

The council members themselves, revealed considerable tension between their claims to ‘earn more’ and ‘have as much responsibility as [solicitors]’ and their descriptions of workplace frustrations. The following statements illustrate a perceived subordinate status, heavily influenced by the realities of the workplace. It is worth noting that it was the litigators (those who stand to benefit most under the Access to Justice Act 1999) who were most acutely aware of their current limitations.

90% of solicitors’ firms do not have legal executives on the headed notepaper. They do not want to know about legal executives... Whether they see us a threat, whether they see us as someone who is going to take their business away from them I don’t know. But they don’t recognise us, they don’t want to know anything about us. They just want us to stay in our cubbyholes, keep our heads down, work hard and make lots of money. They don’t want to recognise the Institute and they don’t want to have anything to do with the Institute... I just think that frankly they employed a clerk to do a job and they never saw you as anything else. Interview 6, ILEX

We’re at the sharp end of it. We do the day to day work. It personally grieves me that I have to go off and instruct a barrister to conduct a case. I dealt with the case from day one. Right from the police station I’ve been talking to the client. Who knows more about the case than someone who’s been with the client right from the time when he’s been arrested. Interview 7, ILEX
This frustration at not being able to take a case to its conclusion was widely shared. Another council member confirmed the difficulties that legal executives faced when conducting litigation in court (see also pilot study) and appears particularly frustrated by the perceptions of his subordinate status within the legal profession and wider society:

Until I became a council member I never put my Fellowship certificate up on the wall. I never did. I wasn't holding out that I was a solicitor. I just never put them up.... With the rights of audience it has always been a bit of an embarrassment for me when I come to a Wednesday hearing and I can't do it. So basically I have to then pass the case to a solicitor.... Now with the Rights of Audience [being awarded]that will end. When it ends I feel I may be able to see every case through to the end. Then I may look at it and feel that I can put my certificate up on the wall.... Then I'd be proud to say 'Yeah, I'm a Fellow of the Institute'. Up till now the one thing I say when I am questioned about it is 'yeah, well... [tails off non-committedly].' Interview 3, ILEX

Thus, similar frustrations about status in the workplace, similar to those identified first by Johnstone and Hopson (1967: 402-3) and Johnstone and Flood (1982: 180), remain today and can be further illustrated by a brief selection of letters to the journal.

We are trainee legal executives, shortly to be admitted as Fellows. Our employer considers that a newly qualified solicitor should receive a higher salary than a Fellow. However a newly qualified solicitor gains two years' experience in practice, when qualifying, whereas a Fellow, on average, will have seven years' experience. Does this occur in other firms in the experience of other Fellows? (July 1999: 44)

It has been, and continues to be, my unhappy experience that as far as solicitor employers are concerned, Fellows are not to be compared with solicitors, either in terms of salary or working conditions. Fellows are expected to carry out

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1 This was a sentiment shared by CAB workers who expressed frustration and not being able to take a case to its conclusion when they had to refer to either a solicitor or caseworker (Francis, 2000: 68-70). It is interesting to note the job satisfaction expressed by the 'subordinate workers' when taking a case into the realms of the 'superordinate' profession's jurisdiction.
similar work and perform to the same high standards, but not to be rewarded. Solicitors do not consider that we are entitled to be treated as equals. (September 1999: 45)

... the person replacing me was a qualified solicitor. The Chairman and solicitor conducting the hearing on behalf of the respondents both had the view that a Legal Executive should not have been in charge of the Conveyancing Offices, hence the need to replace me with a solicitor. At the tribunal I found myself explaining what a Legal Executive's role is... I informed them that we were as good as solicitors and that we specialised - to be given the reply 'well, that's your opinion.' I don't know about other members but is it not time that Legal Executives were given more credit? After all, the examinations are not easy to pass and you cannot replace years of working experience with that of someone who has never worked in an office at all. I am sick of having to continually justify my role. (June 2000: 4)

The council members were particularly concerned over how the Law Society would respond to the award of the rights to conduct litigation (s.40, AJA 1999), although the Law Society had been silent on the matter during the Bill's passage through Parliament. The place of the Law Society at the forefront of the concerns of the council members can be seen from the following statements.

I think that [the Law Society's support] is very important. At the end of the day the majority of legal executives work in solicitor's practices anyway. We'll have to see how it develops. But at the moment there is support for ILEX from the Law Society, we'll just have to see how things go. I wouldn't like to say

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1 Interestingly, although this correspondent signs off as a 'Student', she refers throughout her letter to herself as a legal executive, this despite the fact only Fellows being entitled to describe themselves as legal executives. The confusion of the title 'legal executive' even appears to run through the ranks of the membership of the Institute. The inaccuracies of the Benson Commission (1979) and Lord Irvine (1999) are perhaps easy to understand in this context.

10 The Law Society was more concerned with fighting the Government's proposals for legal aid (LCD Press Release (23/04/99) 'Lord Chancellor accuses the Law Society of scare-mongering'), and the Lord Chancellor's threats to limit the Law Society's regulating and representing roles (ss. 47 & 51 AJA 1999).
which way. Whether we travel the same way for ever and ever I don’t know.

*Interview 7, ILEX*

The only problem that could arise is if the Law Society decide that the assistance that they’re given to ILEX has got to stop. They may see a threat to solicitors. Whenever there is a threat you see professional bodies move against that threat... One of my concerns is that the Law Society may, in time, decide to withdraw their support to ILEX... there is that potential problem from the Law Society.

*Interview 9, ILEX*

I suppose the challenge facing the Institute is whether they actually go independent as the third arm of the law. As you’ll have found talking to the other council members... you’ll have found that really we’ve been tied by the Law Society. The challenge for the Institute is whether to grasp the nettle as it were and go out on their own. And therefore become really independent of the Law Society... We’ve had links with the Law Society over all these years and that might continue. But I can see that if the Institute wanted further powers, then conflict might happen. *Interview 8, ILEX*

It is worth noting that the lack of real independence from the Law Society, to which the council member alluded, was made known to the author through the archive sources explored within Chapter 6, not during the interviews with other council members who continued to repeat the mantra of independence.

Interestingly, ILEX’ wariness about, and pre-occupation, with the Law Society, is reflected by the loyalty of some council members to their firm and appreciation of the position of the solicitors as employers.

I’m probably one of the old school in a sense. I sit here and I say that I am thankful for education and paying for food through Legal Executives. But on the other hand I wouldn’t have been able to have done that if of course the persons hadn’t been around, i.e. solicitors of the Law Society, to give me employment. And so therefore, I’m betwixt and between in a sense, because, thinking, ‘Right, I’ve had this training and this opportunity etc. etc., and saying
thank you very much but now I want no more ties with the Law Society.‘
Hopefully it won’t happen like that. Interview 8, ILEX

People are going to get very upset aren’t they. Solicitors are going to think ‘So why have we bothered qualifying’. This is something that I can obviously see from all angles... Because these people are still our employers as solicitors. Rights to conduct litigation is going to create [problems], [it] may lead to businesses opening and solicitors, I think are going to feel a bit of pinch there. Interview 2, ILEX

However as all council members were quick to point out, the plans to award legal executives the right to conduct litigation under the Access to Justice Act 1999, have the potential to irrevocably alter the employer/employee relationship between solicitors and legal executives. Although it appears, both from its silence during the passage of the legislation and the interviews with its council members (see chapter 8), that the Law Society does not believe that this will happen.

Classical professionalism cherished
A further way in which the subordinate status of ILEX may be perpetuated was in the council members’ consistent referral to a classic and largely self (and Law Society)-referential definition of professionalism. The recurrent emphasis on education, standards, control, an aspiration towards a closed profession and compulsory membership tie in closely with both a traditional model of professionalism (Paterson, 1996: 140) and the historical image of the Law Society as the role model of the professional association, as opposed to ‘commercialised professionalism’ (Hanlon, 1999). ILEX is now seeking to enhance its professional status and develop a greater voice in national legal debates. However it may face difficulties in the future if it continues to base its development on outdated notions of professionalism. It is clear from the statements of council members that a classical conception of legal professionalism still heavily dominates the thinking of the ILEX council members.

... something like a lawyer or a doctor. What do I mean by profession as opposed to a trade? I think I mean a job which deals with either skills or knowledge (and normally both) which are not necessarily easily understood by
the public. Or which the person using those skills or knowledge readily sets the structure of the job. It implies therefore a certain adherence to education and training, standards and ethics. *Interview 1, ILEX*

You want to go back to the end of the street and the Church and the law. Or [perhaps] compare professionals and artisans. I would emphasise code of conduct and education and training. Very much focusing on regulation. We can’t just go off at a tangent and please ourselves. *Interview 2, ILEX*

To turn it on its head, ILEX is a professional association serving the needs in that we are the governing body for our members. I don’t think that I can be more specific, the Institute is a professional body. I think that people would look to the Institute and its members as examples of professionals. Fellows are qualified lawyers, qualified professional bodies. The qualification is very important. Our part 2 exams are very rigorous standards. They are not easy. They are not meant to be. That’s why our Fellows are well-respected within the legal profession. ILEX would never want to see those standards drop. It’s a consistent level that we’ve had over the years. *Interview 7, ILEX*

This illustrates the two central problems confronting ILEX as it tries to find a satisfactory model upon which to organise itself and direct its activities. On the one hand, is the model of a commercial trading company model, selling courses etc. at which, in the past, ILEX has been quite successful. On the other, is the professional model, which has greater appeal to the professional leaders of ILEX. However, the professional model, under which ILEX is prospecting is still supported by an attachment to a classic model of professionalism which bears great similarity to that evident within traditional professional associations such as the Law Society. Yet, there are strong signs that this traditional professionalism is no longer as compelling as it once was among solicitors themselves (see particularly Chapters 3 and 5).

Hanlon has charted the emergence of a ‘commercialised professionalism’ within the largest firms (1999), and Lee has identified the disdain with which the largest law firms treat professional issues such as regulation and profession-wide shared interest (1999: 18-30). Flood has explored the impact globalisation upon the legal profession.
(1995 and 1996) and Sommerlad has revealed the loss of the autonomy of legal aid practitioners following the introduction of managerialist legal aid franchises (1995). ILEX does not appear to recognise the competing professional paradigms within the legal services marketplace. The strong orientation towards solicitors as a model, albeit an idealised model, is particularly stark in the following statement.

If you think of lawyers in the public eye, they get a very poor press generally. We have to bind together there, don’t we, to make sure that the public perception of all lawyers is changed. Because the public lumps them all together don’t they? Interview 2, ILEX

Interestingly, the Secretary General recognised the dangers of associating the Fellows too closely with the solicitors:

We don’t necessarily want our Fellows being associated with this Fat Cat pompous lawyer – this picture people have of barristers and solicitors. I think we would prefer to promote the down to earth hardworking specialist, who will do you a good job very efficiently. So I don’t want the Fellows associated too closely with other lawyers.

It will be interesting to see how this strategy will be reconciled with the classic professionalism set out by the other council members (and by herself as well) that seems to tie ILEX very closely to the Law Society.

The spectre of a fused profession
ILEX’s recurrent problem has been the denial of its professional status by both the legal profession and society at large. For years, ILEX has struggled to place Fellowship in a position that would make it a worthwhile career in its own right. All too often in the past, potential recruits have not seen the point of qualifying as a Fellow, or, if they have done, have seen it only has a stepping stone to qualification as a solicitor. ILEX has recently succeeded in gaining greater rights than ever before and some council members are keen to prospect for further rights. This raises a difficult tension for ILEX. On the one hand the stated aim is to push back barriers and remove differences between legal executives and solicitors. Yet, if there is convergence between the various legal workers, the momentum towards a fused profession, to homogenise education, training, representation and regulation, may be irresistible. In
that case ILEX itself may lose its relevance as a professional association, although it may well retain its more commercial role.

Thus, paradoxically, the council members are seeking to preserve the independent identity of legal executives yet seeking to reduce distinctions between the work of legal executives and solicitors. They may find that at the very point which they attract sufficient rights to the career of Fellow to make it a career in its own right, the job converges with that of a solicitor, thus beginning to erase the formal distinction between solicitors and legal executives.

Some council members did recognise that the work boundaries between solicitors and legal executives in practice are already blurred and concluded that the new rights meant there would be little difference between the work of the two professions in practice. This 'work place assimilation' emphasised by subordinate groups was also noted by Abbott (1988: 67) and Witz (1992: 44-50). These council members observed:

I don’t think that the [clients] bother too much whether you are a lawyer, solicitor, barrister or legal executive. It’s effectively ‘How much is this going to cost me?’ And we get this all the time now from members of the public who are more switched on and will go around getting quotes from various firms about a particular job. *Interview 5, ILEX*

I mean didn’t it happen with Chartered Accountants? I mean the Bees Knees was Chartered Accountants and then you had the Association of Certified and Chartered Accountants. Well they weren’t Chartered Accountants they were something a bit less. But now as the years roll on, who would know the difference? And I think it’s going to be the same in some ways with solicitors and legal executives. Within our very tight specialisations... If you go to a Personal Injury hack [whether he’s a solicitor or a legal executive], someone who’s done nothing else all his life and you say ‘can you advise my friend on her divorce and pension rights?’ he’ll send them elsewhere. *Interview 6, ILEX*
ILEX's own literature also makes explicit reference to the fact that legal executives are 'fully qualified lawyers' doing similar work to solicitors (1999: 1).11

Recognising that professional boundaries in the workplace are blurring, many legal executives do fear for their profession within a fused legal profession. The council members felt that their independent voice would be lost and ILEX would become a subordinate player within a formally fused profession.

I think the other [threat] is just generally if the Institute can't maintain a separate identity and opportunities for work in that [without] a separate professional identity then people won't attend our courses or qualify with us.... There is a danger that three professions, barristers, solicitors, and legal executives will all be doing the same thing. There won't necessarily be any reason for maintaining the distinction between the three branches. There may be a longer trend towards harmonising training for example and education.... The Law Society and the Bar have talked about it for a long time but have never agreed anything. But if everybody is going to advocates or litigators or be able to conveyancing. It should eventually lead to common education and training. And this is perhaps quite daunting for the [legal executives'] profession. Interview 1, ILEX

It may be that the public will get used to going to a particular person for a particular legal problem.... Everyone in the legal profession is tending to specialise and there are few of the GP practitioners.... It may well be that people won't worry. They'll say that I need to see this sort of person if I need to make a will, or this sort of person if I want to sue someone in the County Court. Maybe people will not just say 'I'm going to see my solicitor', maybe they'll be a bit more focused.... I suppose the only threat would be if there were moves to have one fused profession. Wipe out the Bar, Wipe out the Law Society, wipe out the Institute and just have one fused body who covers all lawyers.... I think the problem is that we would be relatively small player, so obviously, it wouldn't perhaps be to our advantage.... We'd probably be swallowed up by the Law Society or whichever body takes preference, which we would obviously

11 See also 'What do legal executives do?' (http://www.ilex.org.uk).
want to resist.... I don’t think that you could have a fused profession and then keep all the distinctions. *Interview 4, ILEX*

The council members are keen to stress the small difference between a solicitor and a legal executive. However, they are very conscious of the dangers for legal executives under a fused profession and all the council members stated were keen to resist fusion. Only one council member interviewed welcomed an amalgamation of the Law Society and ILEX. He recognised that if there were a vote he would probably not ‘be on the winning team’, but affirmed that he would be definitely be interested in the proposal.

I think the Law Society will, if possible, take the Institute under their wing. We’ve started our CPD section since January. It’s all moving the same way as the Law Society. If I get the Rights of Audience, I’ll be doing the same as the solicitor next door – apart from being a partner. So what’s the difference?...

There was wind about at one time that there was going to be an amalgamation [between ILEX and the Law Society]. Myself, I wouldn’t mind that... It’s not something that I’d oppose without looking at it. This is a whisper of some sorts. But I could see that if the Rights to litigate come out then the Law Society could see that they could have lost a lot out of it. And wouldn’t it be better if we had the Institute joining in with the Law Society?... You’d be putting the bodies together and I think it would give the Fellows a bit more clout. *Interview 3, ILEX*

Optimism and Opportunity for ILEX

The single theme that emerges from the interviews with the ILEX council members is that despite the fears and tensions expressed over a variety of issues, there is a broad optimism about the future. Essentially things are better than ever before for legal executives:

I do that feel that now is a good time to be a legal executive. Everything we’ve ever done is coming together. *Interview 2, ILEX*
In the last two years, I think things have improved dramatically and the Institute is now getting a name. *Interview 3, ILEX*

It’s as good as you can get at the moment. For legal executives who want to progress, there’s nothing really holding them back other than themselves. It’s a very good time to be a legal executive. *Interview 4, ILEX*

This optimism can be attributed to a number of reasons. One issue that gave them particular cause for optimism was that they felt that there was now an improved working relationship with the Law Society.¹²

I think ILEX and the Law Society are definitely working towards the same ends. Access to justice is a common aim. Client care is a common aim. To do a good job. The common aim is there, the better job we do, the better recognition we get from our employers, the better pay we get, everyone is happy, I hope. I would like to think that we have more in common than in conflict. It may not have been true at one time but I think it is now. *Interview 2, ILEX*

We have a good relationship [with the Law Society]. Very good really. We have a committee [JCC] upon which our officers and senior council members meet. We tell them what we want to and they tell us what they to tell us. We discuss areas that we might want to push. The Law Society is very supportive. I’ve got a very good relationship with [the current Law Society President] and their officers. I think they see the Institute as good, as professional. *Interview 4, ILEX*

At the moment we have a very good relationship with the Law Society. We have the Joint Consultative Committee, we have joint discussions. And that’s a very good meeting. Most of the time the Law Society members are very understanding. In fact we learn a lot from each other, whereas two or three years ago there were some problems between us. *Interview 9, ILEX*

¹² Evidenced again, by the new Law Society President’s first major speech given at ILEX’, annual conference (Law Society Press Release, 18/09/00).
The council members welcome the improved working relationship and support that they perceived ILEX as receiving from the Law Society. They saw their increased recognition by the Law Society as stemming from their increasing professional strength and as part of a rising professional status. Even so, some council members still retained a suspicion of the Law Society’s motives.

The council members also pointed to their relationship with government as an indicator of the increasing opportunities for the Institute. They felt that they were now dealing with a government that was far more responsive to the needs of ILEX. It is worth noting the bullish pride that the ILEX council members seem to have now that they appear to have the ear of government.

We are now recognised by government ministers. I mean for example, when the Access to Justice Bill came through I got a call from Geoff Hoon’s office asking for a meeting. He was also making the same phonecalls to the Chairman of the Bar and the President of the Law Society. I imagine a few years ago when government was thinking about making radical changes to the legal profession and legal education they would not have thought about ringing up ILEX. We are virtually now accepted as being one of the legal professions. Interview 4, ILEX

We had a meeting the other day with Lord Woolf when he was put in as Honorary Vice President of the Institute. He gave a very complimentary talk in which he said that legal executives were now the third branch of the legal profession. There were barristers, solicitors and legal executives. It was very nice to hear him say that. Geoff Hoon, he said the same thing at our conference. At the highest level there is recognition. Interview 6, ILEX

That’s something that three or four years back, I would say perhaps nothing at all. But now we’re widely consulted especially on law reform. Virtually all the consultation papers that come out, we’re in there. We’re putting responses to these papers. We’re widely consulted on whatever it is. Interview 7, ILEX
The various criteria (state, workplace and public) by which the Institute is judging its success in the pursuit of its professional project is interesting because of the similarity with which it bears with the different arenas to which professional occupations pitch their claims (Abbott, 1988: 60-8). It is within the workplace that the claims of ILEX to take on professional work, formerly the exclusive domain of solicitors, appear to be making particular gains. However, ILEX council members still believe that there is a long way to go before the public accept their claims to professional status in the same way that their employers may be beginning to.

[The public perception of legal executives] is still not what it should be. I think they [the public] regard them quite low down the scale to solicitors. I definitely feel that. I feel that some clients will say ‘oh can I see a solicitor’. That would be quite hurting to some extent. I can see how they have that image because I feel that the Institute has not [had a great profile]. In the last year or so it has got much better. Interview 3, ILEX

I think if you went and stood with a clipboard in the [local] shopping centre and asked the shoppers whether they knew what a legal executive was, I fear that not many of them would know. They’d just look blankly at you, but they’d know what a solicitor was... With us there is no exposure at all. Interview 6, ILEX

I don’t think that you can ever be complacent and say that we’re recognised. I think that the public out there don’t really appreciate what a legal executive is. I mean as an illustration, clients come in, see my certificates on the wall and then want some explanation as to what they are. I’m talking generally of course, but I don’t think that the public really appreciate what a legal executive is and does. Interview 8, ILEX

Conclusions

Legal executives are a classic subordinate profession living in its big brother’s image, which is starting to seek its own direction. The forces that have created this turmoil within legal services come from the twin pressures of the state and the market and not from any internal dynamic within ILEX. But ILEX has now been spurred into action.
by the new opportunities for itself and its membership. However, several tensions remain within the Institute, in particular over its strategies and its relationship with the Law Society.

Indeed, the relationship with the Law Society overshadows much of the discussion within ILEX council. ILEX is keen to emphasise workplace assimilation with solicitors and yet its own council members are strongly resistant to the notion of formal fusion between the two professions. The council are keen to prospect for further rights (albeit cautiously) for legal executives, while retaining the status quo of the semi-autonomous professional association, yet they face the dilemma that if this strategy is too successful it will undermine the rationale for their existence separate from the Law Society.

The other serious problem for ILEX is its failure to engage with its membership. Most council members remain strongly attached to an image of classic professionalism with little relevance to the vast majority of the membership. The dominance of this image in their thinking means that ILEX has difficulties in grasping the rapid changes in the legal services marketplace and responding to them realistically. Despite, too, the many bullish statements about the professional strength of the Institute, the Law Society looms large in their minds. Questions must be raised about the extent to which ILEX will be able to free itself from Law Society dominance as long as this attitude of servitude persists.
Chapter 8: Strategic Choices facing the Law Society

Introduction

Although historically solicitors were regarded as the junior branch of the legal profession, over the last 25 years the Law Society has made great strides towards parity with the Bar. Indeed, it can now claim to be the main professional body representing and regulating lawyers. However, conversely, the profession has never been more embattled than it has today. It has faced criticism of its handling of complaints against solicitors (Davies, 1999) and suffered setbacks under the Access to Justice Act 1999 (see further chapter 5).

This thesis is concerned with the relevance of the ‘power theories’ as an explanation for the strategies utilised by a legal profession now operating within an externally regulated and highly competitive market. Chapter 7 explored the responses of the leaders of the legal executives’ profession to these changed circumstances. That chapter demonstrated how crucial the Law Society was to ILEX. Accordingly this chapter will consider the new challenges and consequent strategic choices confronting the Law Society and how its leaders are seeking to respond to them. The chapter will draw upon interviews with a sample of Law Society council members and salaried staff.

Despite a previously close relationship with government, from the later 1990s particularly, the Law Society has found itself under serious challenge from the government. The challenges have presented the Law Society with several pressing strategic choices to resolve. And not least, combined with new conditions in the market for legal services, an identity crisis over what type of professional body it should be. Should it redefine itself as, for example, a learned society or a specialist provider of membership services? This chapter will explore the tension within the

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1 For example, the government’s announcement that the Lord Chancellor was reserving powers to himself to prevent the Law Society’s using its fees for campaigning activities, closely followed the Law Society’s advertising campaign in national newspapers attacking the government’s legal aid reforms. A number of council members, perhaps with the benefit of hindsight, saw the Law Society’s campaign as foolhardy.
Law Society over the nature of legal professionalism in a changing labour market and political environment. The Law Society interviewees recognised the powerful pressures towards the fragmentation of the profession, though they remain divided over the future direction of the Law Society. They did accept that the Law Society had to reform its internal governance, yet the reforms to date have left many rank and file council members feeling disenfranchised. Council members were strongly attached to the traditional roles and values of a professional organisation regulating and representing its membership. However, in contrast to the reported concerns of the membership (Lee, 1999; and Sommerlad, 1995), council members largely prioritised the regulatory role. Chapters 6 and 7 emphasised the important point that ILEX’s strategic options were shaped by the Law Society’s decisions. Yet revealingly ILEX’s position and professional project barely registers on the Law Society interviewees’ radar. The asymmetric power relationship between ILEX and the Law Society has survived the major changes within legal services.

Organisational Strategies

It is useful at this point to refer, again, to the four strategies Laffin (1998) identifies, by which professional associations have sought to respond to changing conditions. The Law Society, over the last ten or fifteen years can, like ILEX, be seen as adopting a ‘passive’ strategy ‘caught in the bright headlights of change... unwilling, or unable to respond strategically’, or perhaps at best a ‘conserver strategy’ (Laffin, 1998: 219-20). The Law Society notably failed to develop a strategic response to the many changes that have taken place; the developments within legal practice, the inexorable rise of the big law firm, the fragmentation of the profession, the struggle in the High Street. Over the last three/four years Law Society senior staff and some senior council members have begun to develop a more active strategy. This shift raises the question of how easily can an organisation, that has remained locked into ‘passive’ and ‘conserver’ strategies for so long, switch to pursue more active ‘advocate’ and ‘prospector’ strategies? Its organisational ‘instincts’ may still incline to conserve.

2 Advocate strategies see marked levels of activism from associations, as they attempt to establish themselves as ‘significant policy actors, by becoming more like think tanks, producing research and commentaries on public policy matters’. As well as a means of establishing their policy expertise, it is also seen as a means of attracting and maintaining membership (Laffin: 1998: 119).
Arguably the Law Society still lacks strategic focus. As one council member conceded,

I think the Law Society has got to stop trying to do everything itself.

*Interview N, Law Society*

The fact that both the Law Society and ILEX have had to rethink their reasons for existence and function in the legal services marketplace is no mere coincidence. They both operate within the system of the 'conservative' legal professions and, furthermore, Laffin and Entwistle argue that the classic (royal charter type) professional associations (the model to which ILEX, at least, aspires) are inherently conservative and find it difficult to respond quickly and creatively to rapid changes within their jurisdiction (Laffin and Entwistle, 2000: 216).

However the Law Society is now stirring. It has witnessed considerable internal debate, and significantly, drawn up a list of its strategic priorities (Law Society, 2000a), before presenting its recommendations for change to the profession (Law Society, 2000d). How has the profession responded to the new challenges, especially to its established jurisdiction, when many of the traditional strategies stressed by the ‘power theorists’ have lost their compelling character? This chapter address this question.

**Internal Governance**

Despite the many external pressures on the Law Society, one of the most important concerns that emerged from the interviews was that the internal governance of the Law Society had to be reformed before the external pressures could be tackled. The changes that have been put into place, to date, signal that the organisation is attempting to respond flexibly to these challenges; although the extent of support for this reform across the Law Society council remains unclear.

The Law Society’s corporate structure and the reforms that taken place are set out in greater detail in chapter 4. With such a labyrinthine decision making structure, it is not difficult to see why, when compounded by the innate conservatism of law, the Law Society remained ‘passive’ despite swift and radical change in the marketplace.
There was, therefore, broad unanimity among council and staff that something had to be done about the internal governance to shore up the Law Society’s claim to be the legitimate leadership of the profession. But in practice the reforms have led to a greatly increased centralisation of the decision making process (for further details see chapter 4) that has caused widespread bitterness and dissatisfaction within the council. Those not involved in the decision making feel seriously aggrieved. This is particularly understandable because a consistent motivation for the council members to stand for council was the desire to become involved in the governance of the profession. Those aggrieved over the way in which the Law Society is now being run include an alliance of both older and more recent recruits to the council. It would, therefore be inaccurate to conclude that the executive committee is full of the old guard or has been taken over by young tyros. Interestingly the salaried staff of the Law Society were far more sympathetic to those council members on the Interim Executive Committee, closely involved in the ‘decision-making’. It may well be that this is because the salaried staff have an interest in seeing such centralisation, through ensuring a more efficient decision making process for their policies to be implemented. Such centralisation and staff involvement in the process bears striking similarity with Laffin and Entwistle’s account of the decline of voluntarism in public sector professions (2000: 213-4).

It is worth looking in detail at some of the council members’ objections to the Interim Executive Committee. Not only are the substantive basis of the objections clearly set out, but the strength of feeling is very evident:

We have at the moment the IEC, which isn’t working. It’s taking too much power to itself and is acting ultra vires. I think it is utterly astonishing that the three office holders should select members of the Law Society council and then take more power to themselves than they have been given to the council. They are just re-writing and second guessing what everybody else is doing. That’s a major problem. There’s going to be blood on the floor before the year is out... I think that back-bench council members need to be more involved... People are very angry. The IEC consider themselves unloved and misunderstood. The
council consider themselves to be uninvolved... council at the moment feels that it is just rubber stamping what is decided by the IEC, and that's not on....

Ownership and communication, that I think is the key element. People do not come onto council simply to snooze in the back row. They come onto council because they want to become involved. Interview F, Law Society

I'm involved in no committees since the re-structuring took place... . There are seventy plus council members. They all have different points of view. But there is a tendency, for the other side's point of view not to be heard.... There is a small clique, and you get this in every organisation. There tends to be people who want to run the show. There's a lot of discontent on the council at the moment. Many people feel that they are wasting their time.... A member who had been elected [recently] felt that much of what she had done had been wasted. They felt underused and therefore undervalued. There is centralised decision making going on rather than involving the whole council. Interview H, Law Society

We have enormous battles going on within the Law Society. We are trying to set up a management committee scheme which has upset a lot of the council members. Everything that is done by the IEC is regarded with great suspicion and resentment and sometimes if you wanted to get things approved at last years' council, the best thing to do is to get the IEC to speak against it!... Some of the council members who used to be running key committees feel very disenfranchised... You'll hear all about the inequities of the Executive Committee from X. X feels that there ought to be reconciliation counselling between members of the IEC and the rest of the council. At one stage, if something was approved by the IEC it would be rejected by the rest of the council. It did happen and there was a lot of bitterness and it actually caused a lot of problems. Some quite sensible stuff did get rejected. Interview M, Law Society
The picture of conflict, tension and bitterness seems to sit at odds with the description of the process by one of the members of the Interim Executive Committee itself.

I've been very impressed with the council’s willingness to move forward, in a year that we have dramatically changed the way that the council operates. It was very dramatic and it really is quite fundamental change. They have been willing to embrace that change and have supported it. So they are a pretty good institution... They saw the need for change and they have embraced that change wholeheartedly throughout the whole process. Interview O, Law Society

Despite the internal arguments, the council approved the permanent Executive Committee, job descriptions for Office Holders and the appointment of a Chief Executive in October 1999 (see further chapter 4). It is unlikely that this occurred because of a sudden Damascan conversion by the dissenting council members, but simply a realisation that the internal governance issues had to be dealt with. The tension within the council over the internal governance reform reveal the scale of the difficulties that the Law Society has faced in attempting to adopt more active ‘prospector’ and ‘advocate’ strategies.

Motivation to join the Council
One possible explanation of the resentment among some rank and file council members is that they had joined the council to get involved, to govern. Whatever problems they felt the Law Society had, they at least believed in the fundamental importance of the Law Society. As we shall see later, the broader membership appears more sceptical about this fundamental importance.

Interestingly, divergence in perception between leadership and membership, also emerged in the interviews with the ILEX council members. Like ILEX council members, Law Society council members are a breed apart from the rest of the profession. Despite a representation (to some degree) of the wider fragmented profession, they are united in their broad support of the Law Society, and have always been involved in professional activism, be it at local Law Society level, or perhaps
through been invited to advise on a special interest panel. There is remarkable consistency about the motivation to join from all shades of opinion within the council. I saw the advertisement in the Gazette, even then I was someone who used to read the Law Society Gazette.... I saw the advertisement and I thought ‘This looks interesting, it will either be extremely interesting or unutterably boring.’ I looked upon it as an opportunity to participate in the governance of my profession and to give something back to a profession that has certainly nurtured me. Interview F, Law Society

It’s something that I’ve wanted to do for a long time. I’ve been involved in local societies for a long time. I’ve always had it in mind that I would stand for council when X retired. I suppose essentially I’m very much someone who likes to be where decisions are being made instead of having them handed down. Although I’m not a political animal by nature..., I just like to be where the decisions are made. Interview G, Law Society

I suppose like most solicitors outside of London, we all sit round and complain about what the Law Society is doing and so I was challenged to stand for council and try and do something about it.... It’s really about trying to make the Law Society see what happens in the sticks.... I’m the sort of person who needs to be involved in what’s going on rather than just working. I’ve always been involved in the local law society.... I complain about things and I feel that if you complain you ought to try and do something about it. Interview J, Law Society

I was involved in the [Special Interest] Group of the Law Society and I got some sense about how the Law Society worked and I thought it would be interesting to get involved at a more strategic level. Interview O, Law Society

These statements all reveal a desire to be involved and to feel they were actually making a difference to the way in which their profession was governed. They, also, illustrate considerable uncertainties over what is the appropriate role of council
members in running a professional body. In particular, what should be the role of the individual council member? Many saw themselves as providing a means of communication between Chancery Lane and the membership, others saw themselves as a check on the Executive, others saw themselves as important legislators who should be given a role in the decision making process. One interviewee sums up the situation:

the role of the council and the council members hasn’t been clearly delineated. There isn’t a job description... Because there is no clear job description, there is no clear accountability as to what they are supposed to do. I think because we have never put this into a context, as though they were contracted to the Law Society, it has left the initiative very much with them. I think what we are trying to do now right now is pull it back and have very clear job descriptions for each layer. Interview C, Law Society

The Law Society is already considering this question of job descriptions. But these role uncertainties reflect deeper tensions over the type of professional association that the Law Society should be. Clearly, if the Law Society were to move towards a learned society model, for example, then the roles of individual council members would be very different from those implied, for example, by a provider of specialist membership services. The current proposals to reduce the number of council meetings to 6 per year, while increasing the council from 75 to 120 members to provide an electoral college for the office holders (Law Society, 2000d), will further alter the role of the council member. In part, this centralisation of the decision making process, is perhaps symptomatic of the increased importance of salaried staff within the decision making of professional associations. Voluntarism is increasingly untenable, and to ensure effective advocacy to government (particularly), salaried staff with the time and expertise to develop the profession’s position on an issue, take an increasingly proactive role in the formulation of policy (Laffin and Entwistle, 2000: 213-4). The Law Society’s appointment of a Chief Executive, to replace the, essentially administrative, Secretary General is prime example of this policy (see further chapters 4 and 9).
However even with the current loose interpretations of a council member’s role, there are difficulties in actually filling vacant seats. Several council members described how they had been elected following an uncontested election. A major reason why potential candidates do not put themselves forward is the burdensome nature of the work of a council member. All council members interviewed reported serious difficulties in balancing their fee-earning work in practice and the work of the council. Furthermore some had reported difficulties with their Partners, who had not appreciated their service to the profession at large. Council members make considerable personal sacrifices to participate in the running of the profession and unfortunately for the Law Society, insufficient numbers of solicitors appear to have a similarly strong sense of professional obligation either to support the work of the Law Society or stand for council. These problems of professional non-participation are clearly related to market pressures within legal services leading to increased competition amongst solicitors, and a declining sense of attachment to ‘one profession’ (see further below).

The unrepresentative nature of the Law Society Council

The High Street practitioners’ belief that the Law Society only represents the City firms, and the City firms’ belief that the Law Society only represent High Street practitioners is well known (see, for example, Devonald, 1994) and will be discussed in the later section on the Law Society’s role. However, regardless of this perception, there are important issues over the representativeness of the Law Society council.

Although the largest city firms are represented on the council, most council members come from smaller practices. Although this reflects the overall ratio of solicitors’ firms in practice, it fails to accurately reflect the fact that most solicitors now work in large firms (see chapter 5). The Law Society council has essentially remained representative of employers in small/medium sized firms at a time when increasing numbers of its membership are employees in large firms.

Indeed, the 1998/9 President was a senior partner from Clifford Chance, while the 2000/1 President and Vice-President are senior partners with Irwin Mitchell and Davies Arnold Cooper respectively.
Another issue over the representativeness of council members is their geographical distribution. The number of practising solicitors in an area determines the size of the constituency in an attempt to forge a link between the number of solicitors and their representation on council. However a strong south-east bias has emerged within the council, albeit accurately reflecting the number of solicitors practising in that region. The larger firms generally practise in that region and it is easy to see why the perception develops in other areas of the country that the Law Society is principally concerned with the interests of the City.

The volume of work placed on council members is a further obstacle to a representative council. It is very difficult for an assistant solicitor to meet their fee-earning requirements and be active in the council. Therefore, the typical council member is an older white male, who has reached a point in his career, perhaps as senior partner or consultant when the pressures of fee-earning are more manageable (Lee, 1992: 36). Several council members did acknowledge the unrepresentative nature of the council that this situation produced. Notably, the female council members were most keenly aware of this, for gender was another way in which the council failed to represent its profession.

Council is totally unrepresentative of the profession. It still is the case that most people on the council are middle aged white men who are certainly partners and many of them are consultants with their firms. They are at a certain stage in their professional life. There is still a large number of them that fit that description. Extraordinarily a large number of them also fit the same physical description. If you had to describe the average council member, he would be less than average height, middle aged, with grey hair, slightly overweight with glasses. That would describe 30-40 people on the council and is one of the reasons why I can't tell them apart!... It is still the case that there is not a single assistant solicitor on council. That is totally unrepresentative. Interview

G, Law Society

4 Although, in contrast see Lee, 1999: 31-47 and Hanlon, 1999: 138-9 for suggestions that 'more manageable' may now be a relative term.
The difficulties that women face in reaching the upper echelons of the legal professions has been well documented (see particularly Sommerlad, 1994 and with Sanderson 1998). Abel notes the lack of women on the Law Society council throughout its history leading up to the mid-eighties (1988: 172-6). More women are now enrolling as solicitors than ever before. However there has not been a comparable increase in the number of women obtaining partnerships. Therefore, given the Law Society council is composed of partners and consultants women are clearly going to be under-represented. Women are still having to struggle as a minority within a dominant male culture. Moreover, the common indictment of local law societies and Chancery Lane as gentleman’s clubs with well-stocked wine cellars appears unattractive to women. Furthermore the council is not particularly representative of ethnic minorities within the profession (although equally, there are concerns about the wider representation of ethnic minorities within the profession. Interestingly, Kamlesh Bahl was set to become the first female President of the Law Society, and the first from an ethnic minority. Forced to resign, following allegations of harassment, there was suspicion voiced by the Society of Black Lawyers that the allegations had been ‘designed to remove the threat of the first Asian woman to take up the Presidency’ (The Lawyer, 10/01/00: 12).

The Role of the Law Society

Fractured relationship with the Grassroots

One key problem facing the Law Society, and reported by interviewees, was that, at best, the Law Society faced massive apathy with membership apparently believing the Law Society to be an irrelevance. At worst, some council members felt that members loathed the Law Society to the extent that the latter believed their working lives would be better off without the Law Society. As with ILEX, some argued that ‘there are always going to be some who don’t like what you’re doing’, or asserted that their support ‘perhaps wasn’t absolutely necessary’ for the work of the Law Society. But most council members acknowledged that member apathy was a problem and an obstacle to their leading the profession in new directions.

5 One female council member speculated that ‘the profession would be horrified to learn how much money went into stocking the wine cellar’.

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A fractured relationship with the grassroots casts serious doubt on the ability of the professional body to act for and on behalf of the profession as a whole. Without the support of the profession as a whole it is difficult to see how initiatives from Chancery Lane, such as raising the standards of Client Care, can succeed. The extent of the problem with the membership is illustrated in these interviewees’ comments:

The profession sees the Law Society, in general, as being out of touch. It looks at the activities of the Law Society over the last two or three years and probably shows horror at what it sees. I’m a great believer in elections, … But the standard of discussion, in particular at the last election, leaves a lot to be desired. And so people say ‘A plague on all your houses and are not interested. And it’s a sad day when only 21% of the profession bother to vote. Interview H, Law Society

I would say that at a very rough guess 80% of the profession are totally oblivious to most of what the council does. Because of various things that have happened in the past, some of them, inevitably, bad decisions. And other decisions that had some purpose to them and were badly reported…. I think the profession does not really know what the council does. I’ve been appalled in the past because I’ve always had a very good relationship with my council member, but I’ve asked Secretaries of local law societies and they will say that they never hear from their council members. So that is a real problem if people are not keeping in touch. But those council members who never turn up are still getting elected even though the people never see them, so those people who elect them don’t think that it’s significant what happens in council. Interview G, Law Society

Even so, a large minority of the interviewees were less convinced that this posed a serious problem. Indeed, some saw positive advantages in limiting the need to refer decisions constantly to the membership. Tellingly, those who held this opinion were

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\[4\] Robert Sayer, President between 1999-2000, labelled his rival candidate as a ‘pillock’, and likened another colleague on the council to a ‘piece of dog turd’ (The Lawyer 07/06/99: 4).
the decision makers, that is the staff and the members of the executive committee. However, their comments focused more on the necessity of securing the members’ positive approval for Law Society policies, rather than addressing the problems of a membership utterly opposed to many of the core goals of the Law Society. This belief is perhaps a further aspect of the Law Society’s increasing prioritisation of the regulatory aspects of its role (under pressure from the state). As the Law Society leadership feels compelled to strengthen its regulatory functions, the membership is growing wary of supporting an association which is becoming more ‘oppressive’ from their point of view. Yet, the leadership of the Law Society perhaps see such support as less necessary as they prioritise regulation, than it would be if they were seeking support for a representative strategy. While this may be so, there would little to be gained in having a strong regulatory framework if sections of membership choose to ignore aspects of the regulation, such as the large law firms (see Lee, 1999).

Council members, simply, suggested that communication problems were a reason for the breakdown in the relationship with the membership. References to unopened Gazettes littering the offices of solicitors, were frequently made and the Law Society web site though attractively designed, is not the most user-friendly guide to the uninitiated (of which, many are solicitors, certainly according to Susskind, see The Lawyer 19/06/00: 36, and Wall and Johnstone, 1997). Communication is an important issue. Indeed, it is ironic that it is such a problem for the Law Society as an organisation in dealing with its membership, when at the same time it is campaigning for greater levels of client care amongst solicitors. However the more significant reasons for the problems with the membership are those alluded to above - the council members’ prioritisation of the Law Society’s regulatory function. The memberships’ grievances strike at the very heart of the role of the Law Society and the professional project of a classic profession as conceptualised by the power theorists.

1 See for example the 2000/1 President’s plea for solicitors to learn to say sorry (LSG, 28/09/00: 22)
Regulation or Representation

Over recent years there has been massive public criticism of the Law Society’s ability to self-regulate effectively. Davies (1999) and Seneviratne (2000) provide an overview of some of these criticisms. The problems reached crisis point in 1999 with the Lord Chancellor reserving powers, within the Access to Justice Act, to remove the Law Society’s right to self-regulate. The issue of self-regulation has unsurprisingly emerged as a top priority of the Law Society (2000d and, LSG, 28/9/00: 22).

The ‘power theorists’ (Larson, Freidson, Johnson etc., discussed in Chapter 2) argued that the historical hallmarks of professionalism (homogeneity, self-regulation, exclusive knowledge base, control of education and training etc.) are in effect strategies professions invoke to further their project - that is, to secure market and status gain for the profession collectively. For Freidson, these characteristics exist as rhetorical devices to convince the elite that the occupation deserves professional status and the autonomy in its work. Larson conceptualises strategies such as self-regulation along similar lines, regarding them as ‘specific resource elements’ for a profession to draw upon to further its professional project. In short, the power theorists maintained that self-regulation rather than being a burden on a profession, actually strengthens its claim to professional status and allowed it to further the profession’s interests unhindered by external regulation.

When we talk of a profession who self-regulates, essentially what is being described is a profession regulated by its own professional body. The treatment of self-regulation by the Law Society may be an important indicator as to how this classic profession is adjusting to a competitive market and a hostile political climate.

Almost all the interviewees acknowledged that there were problems with self-regulation, but favoured retaining regulation within the profession. Most felt that the current problems were soluble, such as the practitioners’ failure to get to grips with

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1 This was compounded by the suspension and then resignation of the Director of the OSS, Peter Ross, following the publication of a letter from him in the Times suggesting that no new cases could be taken by the OSS for a year. This contradicted the Law Society’s official position and he was suspended.
the need to provide appropriate levels of client care and a shortfall in funding for the OSS. They were adamant that the regulation of the profession was in the public’s interests, but were even more certain that the profession’s best interests lay in retaining both regulation and representation.

I think that [the roles] all hang together fairly well. I mean people obviously highlight the potential conflict, or what they see as conflict between the regulatory role and the trade union role. The complaints handling has been separated out.9 The rule making has to be done in the public interest and there are a lot of independent scrutinisers to see that does happen. So I don’t myself see, in practice, a big conflict there... I think on the whole it’s seen that it would denigrate from the Law Society’s effectiveness if we split up into different roles, because they do feed off each other and there are useful spin offs from the roles which keep involved with each other. There is a lot of pooling of information within the Law Society which is useful to all the functions Interview E, Law Society

The Law Society would define its own role as being first trade union and secondly regulation and complaints. I personally am at ease with that dual role. ... So far as the complaints handling goes, I do not regard it as an essential component of what the Law Society does. However, I believe that apart from the management of the volume which has been a problem, I believe that the way that we do it is perfectly sound. Especially the way that the lay element is incorporated. I am very anxious that if complaints handling were ever taken away from the Law Society and given to a quango or some other government body, it would cost a very great deal more. And if it cost a great deal more and was not at least as good, if not better, then the profession would justifiably complain... I don’t think that the public interest element and the trade union element sit at all uncomfortably together, because whenever we exercise our

trade union function we do so very much with the public interest function in mind. *Interview F, Law Society*

I think that the fact that we’re the regulatory authority which everyone has to join gives us the critical mass to carry out the other activities and it gives us the authority, so I’m not desperately keen to split it… There is a certain logic in having the two roles, but there is also a dichotomy. Because I’m a lawyer I take the view that if you’ve got something that’s sort of working, it’s a bit crazy to start splitting it up… the Government wants to do it because they think it will weaken the Law Society. *Interview M, Law Society*

Well, [the Law Society’s role] is a combination of a number of things. We need to represent our members and make sure that we’re abreast [of what’s happening]. We need to be an organisation that stands up for justice and the proper development of the law because that’s the stock in trade of our members. We need to be an efficient and effective regulator. We are quite complex, it isn’t one or the other, it is all three really…. I don’t think that [the roles] are mutually incompatible. *Interview O, Law Society*

The few interviewees who did dissent from this position, argued that the tension identified by others as being ‘not easy’ to manage, was fundamentally irreconcilable. The statement below illustrates this opinion.

I think that it should either be a regulator or a representative body. I didn’t think that when I first came on council, but I really believe now that it can’t effectively perform both of those roles. I think there is too much tension and conflict, so it’s got to one or the other…. [And] I think that it’s probably better at regulating. Probably. *Interview N, Law Society*

Interestingly a number of those who stated that they still supported self-regulation, did concede that their personal support was shakier than it had ever been. They expressed ambivalence about the position, before coming down on the traditional position of supporting this classic tenet of professionalism.
The interviewees were conducted against the backdrop of the Lord Chancellor threatening to remove the privilege of self-regulation unless it improved its complaints handling procedures. Understandably therefore, throughout the statements of all interviewees there was a strong emphasis on standards, regulation and training, particularly from staff members, in an effort to demonstrate that the Law Society was capable of keeping its tacit bargain with the state. The focus on regulation as a major priority for the Law Society was justified primarily in relation to raising the public profile of solicitors. That is, promulgate demonstrably good standards of regulation throughout the profession, and then the profession's standing will rise, thereby allowing them to put their case forward on a range of issues.

This sense of complementary roles, and building up a critical mass through acting as a regulator as well as a representative body (described by the power theorists) is clearly present in the interviewees' statements. They believe that the Law Society's ability to represent and lobby for its members' interests would be severely compromised if it did not retain self-regulation. Notably, this does not appear to be a view held by the membership (see particularly Lee, 1999: 29).

The distance between the Law Society and its membership is most marked on this issue of regulation. Academic research, reports in the legal press and the experiences of the council members strongly suggest that the solicitor/Law Society relationship is one bordering on outright hostility on the part of solicitors, and perhaps weary exasperation on the part of the council members. Many solicitors (both high street and City) see the Law Society's regulatory role, not in the terms set out by the power theorists, but actually as a hindrance on their ability to get on and earn a living. The City firms wish to compete on a level playing field globally and against other professions, and for the smaller firms struggling in a shrinking high street sector, stringent regulation compounds the desperate financial situations in which they find themselves (see further Lee, 1999: 25-9, Sommerlad, 1995: 178-80, and Devonald,

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10 David Lock MP, Parliamentary Secretary at the Lord Chancellor's Department, visited the Office for Supervision of Solicitors and noted improvement while re-iterating that the profession still had some way to go (Law Society Press Release, 10/10/00, www.lawsociety.co.uk).
They do not see the Law Society doing anything to help them, they see it in term of its policing and punitive functions.

You get practitioners who believe that the Law Society is determined to put them out of business because it doesn’t like small businesses - that sort of thing. Be that right or wrong, the perception of the profession traditionally has been that the Law Society is unable or disinterested to represent its view and that’s why you’ve got things like the Sole Practitioners’ Group… . The Law Society is therefore seen very much not as body with whom one shares professional concerns, but very much more by those 10,000 businesses as the regulator - the body who restricts their ability to practice. Therefore the Law Society, in terms of what the Law Society means to individual firms is seen more and more as the ‘It’s a regulator and it’s a bloody nuisance’ rather than a body that is there in our overall benefit whilst having to act in the public’s interest. Actually, when you think about it, acting in the public interest ought to be acting in the profession’s interest… Interview I, Law Society

Regulation and discipline of the profession is a very difficult thing to do because it makes you unpopular with your members… . There has to be a monitoring and policing of those standards. That is not a role that is going to make you popular with everybody. Some people resent continuing legal education when they are senior lawyers but it is necessary. Interview P, Law Society

I think at the moment the question would be, is the Law Society actually obstructing what we want to do. Is the regulatory structure so obstructive that it makes it difficult for us to practice or compete on a level playing field… I would be asking those sort of questions if I was in a city firm… . I think a lot of the smaller firms expect their hands to be held, ‘This appalling thing is happening to me, why isn’t the Law Society doing something about it?’ They’ve still got the same issues about level playing fields… . I think most of the smaller firms, provincial solicitors actually see the Law Society as a hindrance. There is still, I think, a great deal of fear. A letter arrives from the OSS, and it’s ‘Oh my gosh, what’s this!’ It’s quite funny, a week or so ago my
Partner went on holiday and s/he had a phonecall from the OSS and s/he was in an absolute panic. ‘I’ve got this message to phone the OSS. What have I done? What have we done? What have you done?’ It was nothing at all, just about another chap in the area practising without a certificate, but that was the first reaction. I suppose the OSS is the thorn in the flesh of the High Street practitioner because it’s not working at the moment. *Interview N, Law Society*

There is a gap between the membership’s expectations of a trade union/representative association and the leaders’ view of what the professional association should do. It was mentioned above that in terms of the Law Society’s priorities, ‘Standards and Quality’ was a consistent theme emerging from the interviewees. They felt that tightening standards through closer regulation would answer criticisms from government and the public. This emphasis was evident throughout the majority of interviews and is illustrated by the following brief selection of statements and the continued official statements emerging from the Law Society (for example, Michael Napier’s pledge to focus on client care, Law Society Press Release, 08/09/00, and Law Society, 2000d). The contrast with the members’ expectations is stark:

> If you’ve got, I’m afraid, a small inefficient firm that does not comply with the Law Society’s practice management standards and doesn’t have a franchise, then I don’t see how that firm can exist on public money been paid to it… It is a pretty bitter pill to swallow and people need to be encouraged to swallow it calmly and rationally and not expecting us to wave a magic wand to save them… We haven’t got a magic wand and we can’t expect public money to be spent running an inefficient firm. That gets us into trouble. It’s unsustainable. *Interview M, Law Society*

> Whilst we can help people to stay in business, we should be putting the force of our efforts into raising the standards of those who are in business now. For example I would be a good deal tougher about regulation and put more information in the public domain about which solicitors are good, bad and...
indifferent. For example I might take a tougher stance on whether the restrictions to the practising certificate should be published. In other words, there would be a bit more stick. *Interview I, Law Society*

Despite a consensus emerging from the council, the broader membership seems unlikely to share such enthusiasm for ‘a bit more stick’. Presumably they would like to belong to a profession that is respected by government and the public and is known for high standards of competence and probity. However, it seems that they would consider themselves capable of achieving such standards without the interference of the Law Society. Indeed, there is a belief that the Law Society gets in the way of their delivering quality and practising profitably.

Smaller firms might argue that they already provide quality services without having to accord to excessive regulation from the Law Society. Equally so, and an argument that is heard more regularly, could be that following increased regulation from both the Law Society and external sources such as the Legal Aid Board, their capacity to deliver quality services is actually inhibited (Sommerlad, 1995, 1996 and 1999). The larger firms could perhaps justifiably assert that they already provide quality, efficient services because the market demands that they provide services of that standard. If they did not, their clients would go to another provider where the quality was guaranteed. (See further Hanlon, 1999 and Lee, 1999). Essentially both types of firms argue that regulation too restrictive, for the market will sort out most problems.

The distance between the Law Society and the membership is a serious obstacle for the profession nationally as it seeks to respond to changes in government and public perception. The homogeneity of a profession has been conceptualised as a powerful resource, and the difficulties posed by its loss are nicely summed up by the interviewee below:

If your own caucus of membership is frankly deriding you the whole time, then it’s much more difficult to be credible when you have to be with outside organisations *Interview I, Law Society*
Threats to the Law Society and solicitors

The Law Society faces threats from the state in the form of the powers reserved by the Lord Chancellor under the Access to Justice Act and from competitive pressures to its work jurisdiction from claims assessors, accountants and from its auxiliary profession, legal executives. Glasser (1990) and Hanlon (1999) in particular have focused on the fragmentation of the legal profession and have questioned whether the Law Society can effectively represent the increasingly diverse sectors of the profession. The Law Society has always set great store by its ability to represent and regulate all solicitors. If the Law Society came effectively to represent and regulate a smaller group within the profession, then its power would be seriously curtailed.

The fragmentation of the legal profession

Fragmentation poses a number of challenges for the Law Society. Organisational dilemmas, such as questions of how resources ought to be marshalled to meet the needs of a diverse membership, must be resolved. Fragmentation is also producing situations where the professional leadership faces difficulties in arriving at strategies and policies that are neutral in relation to the interests of different sectors. Such a situation is not easily reconcilable with the idea of a homogeneous professional project. Fragmentation could also cause considerable difficulties in dealing with the public. The problem that ILEX have faced in ‘branding’ legal executives, may over time, plague the Law Society as it attempts to explain to the public (or perhaps importantly today, employers) why legal advisers doing very different jobs in very different ways are all solicitors.

The nature of the problem is well summarised by the following statement:

A lot of commercial organisations can make a number of strategic decisions about which markets they will niche in and in doing that they realise that there sectors they will not operate in. The Law Society is slightly different in that it has a captive membership but it is very diverse - from the smaller single practitioner to the multinational corporate organisations. So that is a huge challenge. In many ways the Society could be seen to not be satisfying any of
those needs.... And meeting the needs of one sector can actually not be meeting the needs of another.... I think it probably can [reconcile the needs of a high street practitioner with global practice]. I mean part of it is all about managing expectations.... I think we’re at a real changing point in the approach of the Law Society. I think that in the past what we’ve had is a profession of 70-80,000 solicitors and we’ve had one approach irrespective of what those individuals may need or their practices may need. So I think having a lot more sophistication in terms of how we segment our market and start talking about in those terms will actually help us enormously as an organisation. Interview A, Law Society

The days of the homogeneous body of generalist sole practitioners have long gone, but doubts remain as to the extent to which the Law Society has adjusted to these changes (see Glasser, 1990; Sommerlad, 1995: 180; and Hanlon, 1997: 822). The Law Society has not fully taken account of the diverse profession it purports to represent and regulate. However the leaders of the profession now recognise the need to develop strategies to take account of diversity.

Most interviewees felt that the problems raised by fragmentation could be overcome. They conceptualised the problem as an administrative and organisational problem rather than a fundamental structural problem. There was a belief that there were core values of being a solicitor and although the diversity of the membership did sometimes produce communication difficulties, essentially the threats posed by stratification could be solved through the evolution of a more responsive professional association. The definition of the problem as resolvable within the existing professional structure was one that was expressed particularly strongly by the policy officers and Executive Committee members. However they were not the only interviewees who felt that the Law Society was still capable of speaking for a broad Church. Incidentally across the whole raft of issues covered in the interviewees, it was largely the ‘decision makers’12 who expressed optimism about the future.

12 By ‘decision makers’ I refer to those central to the Law Society’s decision making structures, Office holders, executive committee members and salaried staff.
[I believe that the Law Society can be effective] for all groups of solicitors. I don’t think for all solicitors, because I think about 25% of them will be violently opposed to whatever you do. If you’re talking about the Institute of Chartered Surveyors or whatever, it would be about the same equation…. I don’t think that you can be all things to all men, you will never appeal to every lawyer. On the other hand, I don’t subscribe to the view that we can’t, for example, have a real value and worthwhileness to city solicitors…. But I believe that there’s enough within an 80,000 group that we can make a strong appeal to. Interview C, Law Society

I think that some [solicitors] are specialist, some are niche, some are international, some are local. I think that it’s quite important for us to recognise and value that diversity. There can be the many specialisms under the one umbrella. And there’s nothing wrong with that, it’s a strength. Interview O, Law Society

The role of the Law Society should be to lead the profession and to do all those things that no solicitor of whatever faction, city, international, high street, niche, criminal, civil, family could possibly do effectively themselves. I don’t subscribe to the view that the Law Society is irrelevant to the needs of some solicitors. [But] the outside world don’t accept that being a generalist means that you are an expert at everything so you’ve got to have specialist accreditation. At the same time we have to represent a broad church and we have to recognise that there are variations in abilities and styles of practice…So there is a tension there. Interview P, Law Society

The issue of fragmentation was taken most seriously by rank and file council members and those from smaller practices. Some of these interviewees had suggestions for combating fragmentation, which would allow the Law Society to maintain control of a broad and yet diverse Church. Their desire to develop more formally recognised sectional groups within the Law Society, is one that did have
some support from the decision makers as well, and it seems that there may be some momentum towards the establishment of such sectors. The establishment of sectors such as one for City of London solicitors has been supported by Michael Napier (President: 2000/1) in his election campaign (*The Lawyer*, 19/06/00: 4).

Rather than an acknowledgement of an organisational difficulty of targeting need, the responses below, indicate a fear of a more fundamental problem. These interviewees seem to suggest far less commonality amongst solicitors:

I think there are tremendous challenges, not least because we are such a diverse profession. I mean you’ve got sole practitioners who are doing work in a sparsely populated area and then you’ve got Clifford Chance, and yet we’ve all got the same qualification and are apparently doing the same job, and yet we are on different planets in truth. And that’s the main challenge for the Law Society trying to represent people with such diverse needs and backgrounds. I mean what Clifford Chance need from the Law Society and what a sole practitioner in a small village wants are two totally and utterly different things… I don’t have the answer [to the question whether the Law Society can give both Clifford Chance and the Sole Practitioner what they want] and I think if I did I would either be made President of the Law Society next year or I would be consigned to outer darkness because I would be seen as a threat to everybody else.

*Interview G, Law Society*

One of the problems of the profession now is that legal practice is so diverse. You’ve got the mega firms which are doing the mega work and they are very different animals to the high street firms who are trying to service the legal needs of the people in its area. It’s so different. A city firm will be given a job and will throw four people on to it immediately whereas the high street practitioner will take it in and desperately try to read it up in the evening. So there are enormous differences in the work and the resources available and yet they are both solicitors and they are doing their best to provide legal services.

*Interview M. Law Society*
I predict that the profession will de-structure . . . I think that there are a lot of people round here who think that we will end up with lots of subsets of a profession. Because the regulation that we need in place to control criminal practices is not perhaps appropriate for a large international corporate practice. Rather than apply the same standards across the board, perhaps we ought to start to say ‘Well litigators are a sub-profession and we will manage them in this way’. To some extent the medical profession has done this with its Royal Colleges. I wonder whether with our various accreditations and our panels of firms that we are moving towards a Royal College set up . . . . To my shame, I’d like to see the Law Society remain in control of it. I have to say I think this is an emotional response on my behalf because I am within the organisation of the Law Society. If I had to justify it from an intellectual basis I’d say it was to protect the public. Interview L, Law Society

The advocates of increasingly prominent specialist sections do go some way towards answering the question posed by Hanlon (1997) and Glasser (1990) about the ability of the Law Society to maintain its position as the professional body for all solicitors. However, even those who advocate increasing the role of the sectional interests still remain largely convinced of the commonality of solicitors.

This commonality is far from assured. The Law Society is keen to stress what it describes as the core values of a solicitor, a point that was heavily emphasised by the President’s speech at the Law Society’s 1999 ‘Law Festival’ in Disneyland. However, such an aspiration is difficult given the diversity of types of work and professional knowledge in the profession. Perhaps the starkest divide, as alluded to above, is between the work performed by the largest city solicitors and the small high street firm. Increasingly firms such as Clifford Chance are packaging themselves as legal advisers to business while the small general practitioner is still carrying out work more associated with that of traditional solicitors.

13 A venue which provided significant opportunity for critics of Law Society initiatives, to label them ‘Mickey Mouse proposals’ etc.
The possibility that the large firms might leave the Law Society is seen as a very real threat to the Law Society. Significantly, once again, the representatives from smaller firms were the interviewees who felt most strongly that the major city firms have little in common with the rest of the profession. Members of the Executive Committee and salaried staff, while conceding that there had been problems with addressing the needs of the largest city firms, were still convinced that there was a place for them within the Law Society. The concern over the position of the largest firms was exacerbated by the Lord Chancellor’s decision to reserve powers to remove the Law Society’s right to levy a compulsory membership fee. Without this compulsion many interviewees openly doubted that those in the largest firms would retain membership of the Law Society. Yet, the majority of those interviewed felt it important that these firms should remain members of the Law Society and that their departure would be a threat to the Law Society. Some members went further and felt that the largest firms even now could survive and do the same legal advice work without calling themselves solicitors and tying themselves to the Law Society. The difficulties faced in attempting to retain the large firms within the Law Society are clear from this brief selection of statements.

The large firms in the vast majority of cases, don’t get anything from the Law Society. They can manage their own affairs on the insurance market far more satisfactorily, probably more cheaply. They don’t need advice on information technology. They don’t need advice on European affairs, they have their own European offices. They have their budget, the larger firms, that is bigger than that of the Law Society. *Interview H, Law Society*

I think the City firms in the London Law Society... do talk about a lot of things together. I think to a certain extent that there were ground rules but that’s been broken by the American firms. You’re seeing now that firms like Clifford Chance... are now becoming a global law firm to which the Law Society is only the regulatory authority for London and they will be moving in a way partly beyond our control, moving in different circles... The big American firms are globalising with the best of the big London firms and there will then be a big
fight between them and the accountants as to who provides legal services. The Law Society is irrelevant to that. Interview M, Law Society

I mean the big city firms have no time for the Law Society as it is. They only tolerate the Law Society because of its statutory powers that the Law Society has to educate, to admit solicitors and to regulate them thereafter. If the statutory powers did not exist, the big city firms would have left ages ago. If the Law Society had to become a volunteer organisation such as the BMA which relies on recruiting members to get their subscriptions, think that we’d be a very small organisation. Interview K, Law Society

Lee explicitly discusses the Law Society’s irrelevance to the largest firms (1999: 18-30). Both partners and assistant solicitors within these largest firms felt that the Law Society had little to offer them and consequently they did not feel bound by Law Society regulation. There is real uncertainty within the council about whether the big firms could easily be accommodated within the Law Society in the future. Interestingly a representative from one of the largest city firms, who was also a member of the executive committee, was clear that the Law Society could still play a valuable role for the largest firms. The message from the council appears to be a strong desire to represent and regulate the different sectors under the broad banner of solicitor.

The Law Society clearly has a problem in how it reconciles the interests of all layers of stratification within the profession. Abbott described how some degree of internal stratification within a profession might allow for the facade of homogeneity to be presented to the public more effectively (1988: 119). However, too many layers of stratification would ultimately make the maintenance of such a facade untenable. It is the council members from small to medium sized firms who have increasing difficulty in seeing the large city firms as part of the same profession. Inevitably different sized firms will have different priorities about what they would want from a professional body. However, difficulties for that professional body emerge, when the membership begins to doubt that they all share the same occupational interests and identity.
Interestingly, a number of the interviewees from all swathes of opinion, including a representative from one of the city firms, felt that there were no noises from the city firms about their imminent departure. Despite their complaints about over-zealous regulation affecting their opportunities in the global market, large firms might actually benefit from their presence within the Law Society. Through their membership of various committees and their work on the Law Society’s law reform programme, the city firms may believe that they can actually wield additional power and influence.

An example of such power, has been the ability of the city firms to dictate the curriculum of the LPC so that it now prepares the ground, predominately, for commercial practice. The likelihood is that as long as they feel that they can get something out of it then they will continue with their membership. They are in a position to balance the advantages and disadvantages of membership of the Law Society. But it is clear from the statements of the interviewees that the large firms are in a minority among the wider position in being in a position to make such decisions.

While the Law Society is not yet operating within a voluntary membership environment this suggests that the large law firm participation within the Law Society is optional/part-time/selective (Lee, 1999: 29). This selective participation may of course be further altered, as the cost/benefit of the large firms’ subjugation to Law Society control in the light of further changes within legal services, for example the arrival of multi-disciplinary practices and globalisation.

Before discussing the market threat to the profession in the form of increased competition, the comment of one small rural practitioner is worth considering. Whilst in a clear minority, the statement does illustrate the difficult decisions the Law Society has to make about its role and its target membership.

Of course it remains to be seen whether it’s a good thing for the medium sized and smaller firms if the big firms do go out of the picture. It seems to me that a lot of the Law Society resources are directed towards satisfying the requirements of the very large firms. That may be to the detriment of the smaller firms.... It

Interestingly this has proven insufficient for the needs of some firms who have banded together to establish a commercial LPC (The Lawyer, 21/02/00: 11).
[could] cost firms financially but in terms of Law Society services it may actually help. If the big firms go out of the picture they may be able to focus their activities on the medium sized and small sized firms. So it would not necessarily be a bad thing. *Interview G, Law Society*

Stark choices such as these will dominate the coming years of the Law Society

**The Curse of Competition**

Genuine competition has been gradually creeping into legal services over the last twenty years or so. In the mid-eighties the conveyancing monopoly, so long the financial mainstay of solicitors, was broken and others were encouraged to practice, such as licensed conveyancers and estate agents. There was also relaxation in the rules against advertising for services. Some firms have embraced the market conditions with gusto, others particularly the smaller firms in the high street have faced considerable difficulties. Competition is threatening their livelihood and their sense of profession (see further chapter 5).

All interviewees were concerned about the difficulties faced by the smaller to medium firms. In addition to the way that the competitive marketplace has affected working practices, the poor morale present in some sectors of the solicitor’s profession was clear:

General business conditions threaten the high street. The banks got tough with solicitors for a while, especially medium sized firms. Especially after the property market collapsed and a lot of solicitors got into difficulties then. They found that the banks were quite willing to pull the plug on them which was a new experience, suddenly calling in overdrafts.... I think they feel that they have been sucked more and more into the marketplace, looked on less as professionals, more simply as market - traders...their standing has slipped and they don’t feel that they have the same respect that they used to. *Interview E, Law Society*
Nobody expects to be cocooned in an age of competitiveness, but the profession is demoralised... . People here are working at the coal face and they are not earning a fortune, believe you, me.... . A professional man should be paid a professional fee. We are not paid a professional fee for much of the work that we do and we're expected to deliver a professional service.... . I don't see how at the end of the day, you can make a profit unless you are paid a fee and with prices fixed and block contracting coming in, people will quote silly prices.... . People will go to the wall. *Interview H, Law Society*

Stratification within the profession could be managed through formal sections within the Law Society. Yet the fragmentation caused by competition is potentially far more serious, for it creates fragmentation within existing sectors of the profession. One of the principal reasons for this has been the increased pressures of practice, so that solicitors do not regularly drop in on their local law society to share news and gossip. Other firms of solicitors within a locality or sector or not viewed as fellow professional solicitors but as competitors for business (Sommerlad, 1995: 179). This implies that a classical notion of professionalism is incompatible with competition. Controlled competition was important in underpinning professional solidarity and identity (Larson, 1977). The following statements give some sense of the fragility of the profession:

I think things have changed very considerably over the last 15 years. It's a lot to do with competition. Up to about twenty years ago, individual firms practising wherever, were of course in competition with each other but it wasn't over competition. You didn't have advertising and you didn't have marketing promotions, you weren't poaching people from across the road [both staff and clients]. Therefore when it came to professional matters through the local law societies and so on, people came together perfectly comfortably and pulled together and expressed their views. The Law Society felt that there was this coming together of local firms within the local law society and that came through to the Law Society. I have absolutely no doubt that since one has had the over-competition, you see it in the local law societies which are dying on their feet, you have great difficulty in getting people to participate. They are
much more reticent about exchanging their views and experiences because in a sense they don’t want to tell their competitors their strategies. Very much we have become a group of 10,000 independent businesses [rather than one profession]. Interview I, Law Society

Some local law societies are very weak and are dying on their feet... Lawyers are so busy now that the old socialising and wanting to meet other lawyers to discuss things has gone, partly because it’s so competitive now - you don’t want to say anything that will give your competitors an advantage. Interview M, Law Society

The fragmentation within the profession caused by competition is perhaps even starker within the city and commercial sector. The success with which these firms have embraced competition also raises doubt about any claim to homogeneity - even within this particular sector. Because of the level of competition between the firms, staff are frequently poached and clients are ruthlessly wooed (Hanlon, 1999: 142-6). And the nature of their multi-million pound businesses make it even less likely that resources and information are pooled amongst firms (see chapter 5 particularly). It is for these reasons that many of interviewees felt that the largest firms were unlikely to unite together and break away from the Law Society. If the time were to come when they moved away from the Law Society’s control, it was felt that this would be achieved on an individual firm by firm basis, without any new collective association emerging to represent their interests.

The other aspect of competition that solicitors face is competition from other groups of professionals. We have seen that there are moves to liberalise considerably legal practice, relaxing the rights to conduct litigation among other issues. Furthermore, the opportunity for solicitors to form multi-disciplinary practices with other professionals seems inevitable (see chapter 5). It would be reasonable to assume that as the solicitors’ profession was weakened by the loss or potential loss of some many of the key strategies identified by the power theorists, the leaders of that profession would be particularly concerned about attacks on the profession’s work jurisdiction. In fact the
interviewees were remarkably relaxed about any possible threat from other groups of professionals. They acknowledged that accountancy could take some work from solicitors in the city sector, principally because they were doing similar types of work already. However they largely saw the inevitable introduction of MDPs as an opportunity for all levels of the profession, high street as well as city.

There was a strong belief that the core jurisdiction of solicitors would be safe. In part they intended to protect this through the way in which the rules on MDPs were constructed. When the new rules are drawn up, the Law Society intend to ensure that solicitors would be the dominant force within any partnership. This shows that the profession still has control of its jurisdiction and the leaders have the confidence to achieve the necessary results for the profession within that jurisdiction (particularly if such rules are backed with statutory force). However, their view is that there is enough work to go round amongst all professionals and that ‘solicitor’ still has a certain cachet, a mark of quality.¹⁵

**Pressure from the state**

Chapter 5, set out the pressures the Law Society currently faces in its relationship with the state. The Access to Justice Act 1999, while containing a number of important new rights for solicitors, for example extending their rights of audience, also contained a number of specific threats. Principally the twin threats to remove self-regulation and to restrict the Law Society’s ability to levy a compulsory membership fee. Hughes’ conception of ‘licence and mandate’ explores a profession’s relationship with the state (1981: 78-80). The profession has to convince the state that it is sufficiently responsible to be entrusted with the mandate to control its work. The Law Society has historically been conceptualised as a powerful lobbying group. Sugarman (1996) identifies the Law Society’s close relationship with government as a central reason why solicitors have always enjoyed such a powerful position within the society. Furthermore, the links between the legal profession and the ruling elite were

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¹⁵ The one group that the Law Society did express unease about were companies such as Claims Direct. The council hoped to press for further regulation of this sector, to ensure that solicitors faced a level playing field and ‘the public are protected.’
also highlighted within Chapter 3. There are clear signs that the Law Society no longer enjoys such a good relationship with government, and the terms of its ‘mandate’ are being altered. Solicitors lost their historic conveyancing monopoly when the profession’s traditional ally, a Conservative government, turned on it in the mid-1980s. If anything, the council members seemed even more embittered about the position of the current government. They did not feel particularly included within the government’s legal service policy making, rather they felt impotent in the face of government attacks on them. There was an ongoing bitterness about the Lord Chancellor’s actions during the passage of the Access to Justice Act, and most felt that whatever plans or strategies the Law Society might wish to formulate would be irrelevant if the government decided to something else. The size of the government’s majority and its programme of reform was one of the most frequent occasions for pessimism and despondency from the interviewees. The following statement is illustrative of the mood in the Law Society.

I think the Law Society is actually heard less under this Government than under the previous Government, because I think it’s a very arrogant Government that has proved it can do what it wants to do with or without the Law Society. I don’t think the Law Society can do much about it. Interview N, Law Society

The Law Society and ILEX

Institutional relationships

In Chapter 7 we saw that the ILEX council members explicitly and implicitly deferred to the Law Society. Its position was seen as a potential constraint on their aspirations, while paradoxically also the yardstick against which to measure their own professionalisation.

Significantly, Law Society council members knew little about the Law Society’s relationships with ILEX and about ILEX strategies or views. Only those who had more specific contact with members of ILEX, either through membership of the JCC, or perhaps through some work on a particular committee felt able to pronounce with confidence on the relationship. Conversely all ILEX council members, even those
who had no direct contact with the Law Society, held strong opinions and views about the Law Society.

The Law Society interviewees saw the relationship as cordial but distant. They seemed happy to endorse ILEX’ view of itself as an independent professional association, but they respected that independence less. This was a typical view:

I think that [the relationship between ILEX and the Law Society] is a constructive relationship because I think that the work of the legal executive and the paralegal is becoming very important to solicitors and they want to take on paralegals who have got proper training and a recognised qualification…. The Law Society and ILEX are working towards similar ends. Interview E, Law Society

Even so, there were some hints that the relationship had in the past been occasionally difficult. Some Law Society council members considered that things had recently improved from a difficult situation in the past, for instance.

I’m not sure that the relationship has always been comfortable and I think that’s a bit of a shame…. I’m very comfortable with the relationship, I think there is plenty of room for legal executives. We can co-exist happily together… but I am not sure that has always being the nature of the relationship as far as the Law Society has been concerned. I think because it has tended to be a bit isolationist. I don’t think that it has always recognised ILEX as it should have done. I think things have changed…. I think that we’ve got a lot of things in common and we should work together. Interview D, Law Society

I think the [Law Society’s stance] has moved from distinctly patronising to a genuine recognition of a professional body which is determined to ensure standards at a very important level of staffing of legal practices. I think that it is a very healthy relationship and I would say that with few exceptions the patronising element has disappeared. I mean there is no doubt that it existed. Interview I, Law Society
Most saw the need to build on existing links and to forge closer working relationships between the Law Society and ILEX. However, most of the Law Society interviewees saw a closer working relationship with ILEX as being a stepping stone to fusion. Although, as one council member candidly admitted:

I see no reason why the Law Society and ILEX - let us be blunt - I see no reason why the Law Society should not absorb ILEX. Interview F, Law Society

The absorption of ILEX by the Law Society was something of which the majority of interviewees were in favour. It is not a maverick policy formulated by Robert Sayer at the 1999 Law Festival (Law Society's Gazette, 3rd November 1999: 1). As one senior interviewee, a member of the executive committee, commented:

Obviously ILEX is an entity that takes great pride in itself, but at the end of the day there has got to be common standards applied to all things which are done in common... I think there is potential for problems if you have a number of institutions who overlap and who are all separately governed and managed. Interview P, Law Society

The asymmetric power imbalance explored in chapter 6 remains strong. Law Society interviewees were comfortable, in control and appeared confident that the power they exercised over ILEX still remained. The power imbalance in the relationship between the two professional bodies is well illustrated by the following statements:

I wonder what the Law Society looks like to ILEX. I wonder whether we would look like the upper middle class to their lower middle class. I just wonder, because generally one is only aware of power in a relationship when one is the unfortunate recipient of someone else’s abuse of power. I wonder whether ILEX feel that... I suppose I’m reflecting on occasions when I’ve had dealings with ILEX, I wonder whether I bought into that structured hierarchy. We just don’t see ILEX as a threat. Interview L, Law Society

I think it’s quite amusing actually because we have this joint committee with ILEX... which is very much ILEX saying ‘What are you up to?’, wanting information on what the Law Society is doing. They all seem to come across as being terribly chippy. And I don’t think they need to be. They might have had
to be in the past. They are still fighting for status and position and authority and I don’t think they really need to do that now… . They seem almost paranoid, they probably aren’t at all, but that’s how they are perceived. *Interview N, Law Society*

**The threat to solicitors from legal executives**

Again, the interviewees saw little labour market threat posed by legal executives. The extended rights of audience and the rights to conduct litigation will give legal executives significant opportunities to increase their range of practice (see Chapter 5). However, the Law Society interviewees did not see the current change within legal services as shifting the division of labour between solicitors and legal executives. Part of the explanation for this relates to the interviewees’ continuing belief in ‘solicitor’ as a brand, carrying more weight in the public’s eyes than ‘legal executive’.

All the interviewees accepted the party line: FILEX was a qualification recognised by the Law Society, legal executives were valued colleagues in the workplace and a good FILEX with thirty years experience would be better able to perform a particular job than a newly qualified solicitor. However, there was an underlying assertion of clear professional boundaries: legal executives were good, but they were not that good: 16

These are just personal opinions, but for the individual I don’t know how much added benefit there is to having the Fellowship within your practice where you’re working… I think if you were to ask the man or woman in the street what a solicitor was and then what a legal executive was. I think you would get a definition in terms of a solicitor that more reflected reality… . So to that extent in the general public’s eyes there would be probably be a difference. *Interview A, Law Society*

FILEX was an important qualification, but for many of the interviewees, its importance lay in its status as a stepping stone to qualification as a solicitor. The prevailing view was that as long as solicitors employed legal executives they

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16 See further Abbott (1988: 67) and Witz (1992: 44-50) for further discussion of such occupational demarcation.
represented no threat and that they would be unlikely to strike out on their own in practice, because of the massive overheads involved in setting up a litigation practice from scratch. Some legal executives in Chapter 7 expressed a desire to move into the bottom end of the legal services marketplace. However with such a market so hostile for their own high street membership, Law Society interviewees found it hard to believe that firms of legal executives would have much success operating in such a sector.17

To sum up, when ILEX is considered by Law Society council members and staff, it is done so in a cordial but unconcerned manner. For many, professional commonality meant inevitable fusion of the legal profession, although this is not currently an explicit priority of the Law Society. The significant reason for the relaxed attitude of the Law Society to professionalisation of ILEX, is the continued employment of legal executives by solicitors. While this situation remains, any improvement in the training or rights held by legal executives is unlikely to be to the disadvantage of solicitors. ILEX remains a subordinate professional body representing an auxiliary profession.

The Future of Legal Professionalism: The business of lawyering or the profession of solicitors?

Hanlon (1999) sees the largest city firms as moving to take account of their lay clients increased expertise and sophisticated demands, and are adopting what he described as a 'commercialised' professionalism which may be difficult to reconcile with the classical professionalism associated with the Law Society. For example one City firm advertises itself as:

Davies Arnold Cooper is determined to run itself like a business rather than a traditional firm of solicitors. We urge our staff and partners to consider themselves first as business people seeking to make a profit, secondly as lawyers. Senior Partner, http://www.dac.co.uk/human.html

17 Interestingly most interviewees, when asked the open question about the possible impact on legal practice of the opening up of rights to conduct litigation, focused primarily on the situation regarding the Bar. Incidentally they couldn’t see a significant challenge emerging from that quarter either.
Chapter 5 identified the emergence of the city firms as the largest employer of trainee solicitors and of assistant solicitors. It is within this sector that the next generation of lawyers is being trained and the new notions of professionalism are emerging. The high street general practitioner is fading into history, and the classic model of legal professionalism associated with this style of practice is rapidly losing relevance for the vast majority of both solicitors and consumers of legal services.

Even so, classic professionalism still exercises some influence across all swathes of opinion within council. Council members emphasise classic traits such as expert knowledge, standards, self-regulation, higher calling, public interest and common interest. These beliefs were evident not only in their responses to a specific question of *What do you understand the word 'profession' to mean?*, but from the interviews in their entirety. It is telling, that although, for many, the question provoked some consternation and an assertion that they didn’t really know, the responses were remarkably similar with surprisingly little difference from representatives of large or small firms. The statements below serve as a brief illustration.

I think a profession is a chosen career where you have to have a specific qualification for it, otherwise you can’t practice. Where that has a recognised position in society and where the qualifications will have some involvement at a higher level than just the sponsoring body - Government will take an interest in relation to it,... on behalf of society.... A statement of values - what is acceptable behaviour and what is unacceptable behaviour.... It's the higher obligation bit that would be the thing that clinches it for me. The idea of a profession as a strong influence on the wheel of society. *Interview C, Law Society*

In a sense I think that profession does mean, does involve self-regulation. Profession does mean a person who is a member of a body which sets its own standards. It ensures that people are equipped to meet them, by providing training and education and which then must have a significant role in policing those standards.... Obviously it carries with it therefore, the fact that you are
independent, in the sense that you should be independent of Government.

*Interview I, Law Society*

[A professional] is a person who has been trained properly. It's a person who has integrity. A professional person will do things in certain way and will not stoop below that. They should have the integrity to be above fraud and to be above all those things. Integrity is the main thing. *Interview J, Law Society*

If you are a true professional it means that you are carrying out a vocation or a calling which is mixed up with your livelihood, where to do so successfully should and does require you to operate to levels of excellence or professionalism. The two are synonymous both in the quality of work you do and the integrity you bring to bear. I think professional also for solicitors, doctors, accountants, anyone I can think of, requires the incorporation of objectivity to a higher degree than some other callings. I think the burden of professionals tends to be advisers, shapers and guiders... The implementation of it leaves scope for variance and guidance. So you've got this heavy burden of providing advice that people rely on so objectivity must come in there. Honesty, integrity, it's all in there. Pride in reputation and perhaps to round it off, pride in being a solicitor or whatever. ‘I am a solicitor. I am proud to be a solicitor.’

*Interview P, Law Society*

The statements reflect the desire of the Law Society to emphasise the distinctness of the brand of solicitor. They were all clear that a solicitor was a profession, and as such the client received the added value of integrity, objectivity, regulation and so on. While some representatives from large firms expressed classical definitions of professionalism, such views do not appear to be widely held across this sector (Hanlon, 1999; Lee, 1999). It may be that the members of the Law Society council already have a far greater sense of belonging to one profession than perhaps do many of the membership - or rather they have a sense of belonging because they hold a classic conception of professionalism, otherwise they would not be active in the Law Society.
Despite, considerable consensus over what ‘profession’ meant, there was
disagreement about the relevance of professionalism to the marketplace in which they
all had to work. Increased competition and commercialism within the legal market
had made it difficult for those in many firms to balance what were seen as competing
pressures of commercialism and professionalism. It was predominately older
(certainly more ‘traditional’) members of the council, who came from smaller firms
who expressed particular concern over the difficulties of smaller firms in balancing
these competing pressures; they argued that in some ways the larger firms had
abandoned any pretence of professionalism as they understood it to be, for example:

My concern if you have a profession populated by individuals fixated with
making money, not so much with status but more with the hounds of commerce,
does that not lost touch a bit with what the public have a right to expect from a
profession?... The litigation society has changed what a profession is and
what a profession can be, and I think that’s a shame. Learned professions are not
what they were and perhaps professions are becoming less polite as a result.

*Interview F, Law Society*

Part of the tension over the last ten, fifteen years has been that partly we’re a
legal profession and we see a value in preserving that. However to a certain
extent we are also businessmen and providing legal services and hence some of
the rules about not touting for business and not poaching clients have gone. You
are positively encouraged to tout and advertise and be as competitive as you can,
which is rather against some of these ideas of being a professional and been a
gentleman and not stealing someone’s clients.... [I think] the profession as a
whole has been very, very uncomfortable with the change. It’s a sea change and
some people still find it difficult... *Interview M, Law Society*

However a larger number on the council, the younger members and the ‘decision
makers’ recognised the changes in the legal services and saw no real difficulty in
reconciling their brand of legal professionalism with the commercial pressures. There
is a majority view that legal professionalism, perhaps in a slightly amended format
can exist within a commercial marketplace.
It is a very conservative (with a small c) profession and it can sometimes get quite defensive about change. All that’s to do with sophistication in terms of running themselves as businesses. There is an inherent conflict in some parts of the profession between are we are business and are we a profession and actually marrying the two together. Getting better at client care would help…. I think there is a growing recognition that solicitors firms are businesses. And you can see that by things like the growing use of practice managers, growing recognition that they are excellent lawyers but they need help in running their businesses. *Interview A, Law Society*

I think we have been focusing very much on being professionals, but the reality is that we operate in a very competitive environment. Most lawyers now recognise that they are a business but also a profession so that’s again where identifying those core values will help. We’re a business, but over and above that we can offer you these qualities and values, some of which are there and developing in the corporate sector anyway, like integrity…. I mean we can get very philosophical about this but the reality is that there are 10,000 firms, they are working and they are in business…. The reality is that they are coping like other small businesses. *Interview O, Law Society*

While retaining a strong sense of classic professionalism, the Law Society is moving to accommodate commercial considerations within its sense of professionalism. However the traditional emphasis on ethics, standards, and regulations remains, as well as some sense of a higher calling. Even so the Law Society leaders are looking for a fresh conception of professionalism appropriate to the new realities of the market. However, aspects of this new conception may still sit uneasily with ‘commercialised professionalism’ (Hanlon, 1999). The Law Society’s claim that solicitors can be professionals and business people may not yet be being made with sufficient sophistication to straddle this difficult dichotomy.
Conclusion: The Future for the Law Society

The Law Society has faced serious internal and external pressures over recent years, and the difficult times are far from over. However a sense of optimism did emerge from the interviews with the council members and salaried staff at the Law Society. Tellingly a far more positive and optimistic spin on the situation came from the 'decision-makers'. It may be that they are better informed about the current situation and the prospects for the future. On the other hand it may simply be a reflection of their belief in their own strategic judgement.

All of those interviewed were very aware about the current changes in legal practice and possible trends in the future. All identified the continuing influence of IT on the delivery of legal services and many referred to Susskind’s work on the subject (1998). They were largely of the same voice in their predictions for various sectors of legal practice. The outlook was seen as particularly bleak for the high street with the increasing dominance of larger firms. Many saw these firms as 'law factories' with large numbers of legal and paralegal workers working under the supervision of a small number of highly trained lawyer-managers. They saw no slowing down in the rise of competition in the marketplace.

Fragmentation as we saw above, figured largely in their concerns. There was considerable doubt about the way in which the Law Society might continue to be able to represent all solicitors effectively. There was support for the idea of developing the sections within the Law Society, so that for example, the Criminal Legal Aid Practitioners might feel that they had a truly effective voice within the Law Society. However even the proponents of such models insisted that the Law Society should retain overall control of all solicitors and the Society’s policy direction.

Just as the sectional interests might be emphasised at the expense of the overall coherence of the Law Society, so too many of the council felt that vertical, sectional divisions could be emphasised at the expense of horizontal, profession/auxiliary profession demarcations. Most interviewees also saw the blurring of the boundaries
in practice leading inevitably to fusion of the legal professions. And fusion on the
terms of the Law Society.

The Law Society President Bob Sayer flagged up the prospect of fusion at the Law
Festival in Disneyland (Law Society’s Gazette, 3rd November 1999: 1):

We already regulate the biggest single legal profession and we do it very well. If we regulate them all, we may as well represent them all. How about one legal profession, embracing lawyers of all types, not just solicitors, but legal executives, licensed conveyancers and barristers... . Every legal service. All provided by one unified profession regulated and represented by the Law Society.

Inevitably this proposal was derided as a ‘Mickey Mouse idea’ by the Bar, and firmly rejected by ILEX. However this proposal is not simply the idea of a maverick President eager to make headlines in the papers. The evidence of this chapter show that it has mainstream backing across the council, particularly for fusion between ILEX and the Law Society.

Almost all council members have accepted that the Law Society has to work with and not against the new fluidity of the legal marketplace. They have taken time to realise the implications of the changing marketplace and political environment. However the Law Society has now begun to adopt more active ‘prospector’ and ‘advocate’ strategies. It seems that the council as a whole still cherish key aspects of classic professionalism even as they move into a competitive marketplace, yet there must be serious doubts about its continuing relevance to practitioners and the public. Furthermore the Law Society faces the dilemma of how to respond to government demands for more effective regulation of the profession, without worsening the relationship with the membership. The Law Society could embrace ‘commercialised professionalism’ to a greater extent, but many on the council find this unpalatable. Alternatively ‘the third way’, which had strong support from council members, to give greater autonomy to sections, carries the dangerous seeds of possible fragmentation. The very act of surviving by accommodating diversity may, in fact, nurture balkanisation. These alternative strategies and the challenge of resolving this tension
between classic professionalism and commercialised professionalism will be considered further in the next chapter.
Chapter 9: Conclusions

There are effectively only two branches of the [legal] profession, solicitors and barristers. *Royal Commission on Legal Services* (1979: 411)

The Institute of Legal Executives now joins the Bar Council and the Law Society, both as an authorised body in its own right and as a fully-fledged part of the legal profession. *The Lord Chancellor, Lord Irvine* (23/04/98)

These contrasting statements from the legal establishment indicate the strides that ILEX has made over the last twenty years. However, considerable uncertainty remains about how far legal executives have progressed over the last twenty years. The Lord Chancellor himself, Lord Irvine, has still on occasion described the legal profession as only barristers and solicitors.¹

This thesis has analysed the advancing occupational project of legal executives as an auxiliary profession under the powerful shadow of a classic profession – solicitors. However, the recent major changes in legal services signal an opportunity for legal executives to further their project. The solicitors’ profession is facing unprecedented pressures from both the market and the state, pressures that fundamentally alter the profession’s ability to utilise strategies of the type stressed by the ‘power’ theorists. As Abbott notes, external changes, in this case legislative reform and new demands from corporate clients, act as powerful forces that disrupt stable jurisdictional settlements within a particular system of the professions. In the introduction, I raised the question of whether the solicitors’ profession, with weakened autonomy and fragmented relationships both within the profession and with the state, would be able to maintain the hegemonic power that it has been able to wield over legal executives. As yet, the solicitors have retained this hegemony and, as I will argue below, are likely to retain it for the foreseeable future.

¹ Incidentally Lord Irvine’s statement was made on the occasion of ILEX being granted rights to award further rights of audience to its members. There is a suspicion that the statement was motivated largely by the need for a positive press release.
This thesis draws on the work of both Larson (1977) and Abbott (1988), and employs the insights of those who have studied the legal profession from a sociological perspective to analyse the historical origins of, and the contemporary challenges facing ILEX. In understanding legal executives and their professional association, it is vital to consider solicitors and the Law Society, as the legal executives' attempts at professionalisation take place within the powerful sphere of the Law Society. This point was most strikingly reinforced in the historical research (see chapter 6) which highlighted the effective control that the Law Society has been able to exert over ILEX at various periods of its development, despite the absence of formal controls between the professional associations.

The contemporary relationship between the leaders of ILEX and the Law Society and the challenges facing the organisations have been explored. The underlying tension confronting ILEX stems from the attempt to balance the consolidation of its recent gains with prospecting for further professional rights. This debate and the dilemma over how far the council members felt that they would actually be able to push a prospecting strategy was carried out in the shadow of the Law Society. In contrast, the Law Society was far more concerned with its own internal tensions. The ongoing reform of the Law Society’s internal governance was the major concern of almost all those interviewed on the Law Society council. However, council members are also keenly aware of the external problems facing the Society. They recognised the tension between the Law Society’s regulatory and representative role, although they strongly endorsed the preservation of self-regulation, acutely aware of the watchful eye of the Lord Chancellor’s Department. However, the Law Society’s emphasis on strengthening regulation, principally under threatened coercion from the state, is placing severe strain on relationship between the national leadership and the wider profession. In direct contrast to the concerns of ILEX, ILEX barely registered on the Law Society’s ‘radar of issues’.

In the light of this evidence, I will now develop some concluding thoughts about the professional project of legal executives, the future strategies for ILEX and the Law
Society and offer some signposts towards the development of a ‘post-power’ theory of the legal profession.

Solicitors and legal executives: a fragmented hierarchy?

In assessing the professional project of legal executives and solicitors or in analysing their competition over professional jurisdictions, it may no longer be possible to speak of them in such general terms. Thus Flood argues that the legal profession should be studied on a sector by sector basis rather than as a single unified profession (1996: 201). Indeed, this sectoral or vertical perspective may be eclipsing in importance the previously rigidly hierarchical or horizontal relationships between solicitors and legal executives. Nonetheless, despite the growing fragmentation of the legal profession in functional rather than hierarchical terms, the subordination of legal executives by solicitors remains a strong feature of legal practice.

The controlling influence that solicitors have always held over legal executives was clear within the archive sources analysed in Chapter 6. Solicitors, during the time period studied in that chapter, were a powerful classic profession, in control of their market and buttressed by the support of a sympathetic state. They had control of their work, and were able to dictate and regulate its content. Conversely legal executives have never enjoyed such autonomy over their work. They have always been employed by solicitors. Yet, despite solicitors having recently lost many of the strategies which the ‘power theorists’ saw the profession employing for market and status gain, solicitors have in general been able to assert continuing subordination of legal executives.

Clearly, however, within a law firm individual legal executives may be more highly valued than individual solicitors. However where this success is achieved, it is typically on the basis of the individual’s particular skills or talents rather than by virtue of occupational designation. I would argue that the continuing employer/employee relationship means that both the public and the wider legal profession still perceive legal executives as subordinate. Of course, in any case, we have moved a long way from a key ‘trait’ of a profession being self-employment.
indeed the largest law firms pursue economic efficiency through employing armies of assistant solicitors. However, in the eyes of the public (and the wider legal profession), some solicitors are employed some of the time, whereas all legal executives are employed all of the time. The employed status of legal executives was the defining feature of their subordination throughout their history, and is still a defining feature of their continuing subordination today. ²

The reasons for their subordination, although derived from their employed status, must also be understood at a deeper level. It is not so much their employment that subordinates legal executives and limits their occupational project (it was noted above that many solicitors are also employed). Rather it is their use of their employers’ knowledge base. Not all auxiliary professions appear to be faced with the structural limitations to professionalisation that confront ILEX. Nursing is an example of an auxiliary profession which enjoys ‘relative autonomy’ in its work, or at least in its governance, certainly when compared to legal executives. It possesses its own Royal College and nurses can reach top management positions within the NHS hierarchy. One of the key reasons for the relative success of the professional project of nursing and one of the central ways in which it differs from legal executives is that it has enjoyed some success in developing its own distinct discourse.

Nursing operates within the field of medicine, under the ultimate control of doctors, however from its earliest origins, nursing has attempted to create its own distinct discourse, as argued in chapter 2. Witz (1992: 142), notes that one of the reasons why nursing became a female professional project (together with the widespread exclusion of women from medicine), was the establishment of a discourse of nursing, based upon essentially ‘feminine qualities’. However, the discourse of nursing developed, incorporating theoretical ideas about patient care and treatment, distinct from the knowledge base nurses share with doctors. It is argued, drawing on the importance

¹ See for example the case of Barclays Bank Plc v. Coleman and another [2000] 1 All ER 385. Although, the Court of Appeal held that the advice of a legal executive was valid legal advice, it was clear from the judgement that it was the fact that the legal executive was acting ‘with the authority of his principal’, that determined the validity of the advice.
that both Larson (1977) and Abbott (1988) place on a standardised cognitive base, that this has allowed nurses considerable autonomy over aspects, at least, of their work.

In contrast, legal executives have not been able to develop their own distinct knowledge base. ILEX members (indeed non-members such as paralegals, outdoor clerks etc.) work exclusively within the realms of the discourse of law as constructed by their employers. It could be argued (although increasingly less so) that the distinction between barristers and solicitors is perhaps more obviously one of two bodies of professional knowledge, for example the specialist advocacy skills claimed by the bar. However, legal executives still operate exclusively utilising the professional knowledge constructed by solicitors. The Part II examinations of ILEX, for example, bear striking similarities to the old solicitors finals examinations (replaced by the LPC). Moreover, in their claims for increased professional status, the council members of ILEX, asserted that legal executives were doing the ‘work of a solicitor’. The claim has never been made that legal executives possess a distinctly different cognitive base which is better suited to the resolution of a task within the legal services jurisdiction. Indeed such a claim cannot be made, because legal executives share the cognitive base of solicitors, or rather are permitted to use aspects of the solicitors’ cognitive base. In this, they have a similar relationship to that between the professional engineering institutions and their auxiliary, technician occupational group (Laffin, 1989).

Why have legal executives been unable to carve out this distinctly different discourse? One of the main problems (which will be considered further below) is that unlike nurses, for whom registration was an early feature of the professional project (Witz, 1992), legal executives have never been able to protect the name ‘legal executive’. Without a shared protected identity, it was very difficult for a shared knowledge base to develop. Even if a standardised knowledge base had been developed, without the legal protection of their identity, legal executives were never likely to win recognition

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1 To complete Part II of the Membership Qualification candidates must pass in three substantive law subjects and one specialist procedural paper. The subjects must be chosen in groups, which reflect the main specialist areas of solicitors' work (www.ilex.org.uk).
in the eyes of their employers or consumers. Legal executives, were simply employed by solicitors and so used the solicitor’s professional knowledge base. It is their use of their employer’s knowledge base, that is at the root of legal executive’s failure to develop their own shared distinct knowledge base or a strong collective identity.  

Larson argues that legal knowledge is an essentially conservative cognitive base because it is based upon institutionalised and rational resolution of conflict, and therefore relies upon stability (1977: 168). This inherent conservatism has been noted by other writers (see particularly chapter 3), and interestingly was also noted by the salaried staff of the Law Society when discussing the change they wished to implement across the profession. Bourdieu and Wacquant note that domination within a social field can be reinforced by the properties of that social field, thereby circumscribing the choices of those (particularly the dominated) within that field (1992: 24). In this context, legal executives have accepted their subordination, or at least have been prevented from professionalising through developing their own distinct discourse, because of their employers’ control of an essentially conservative discourse.

Just as occupational boundaries are blurring, giving opportunities to individual legal executives, perceptions of professionalism within legal practice, amongst all categories of legal workers are increasingly blurred. It is not possible, certainly in the light of Flood’s work to state categorically that all lawyers adopt inherently conservative forms of practice. Corporate lawyers are involved in ‘the management of uncertainty [where] the objectively knowable external world… is constantly shifting and unstable [and] needs to be monitored, repaired and reconstructed continuously’ (Flood, 1991: 67). The global law firms, marketing themselves as advisers to business are constantly adapting to pressures from clients and changes in the global markets (Flood, 1995 and 1996), and even the Law Society is starting to show itself capable of adopting quite radical changes (see chapter 8 particularly). The

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4 Furthermore, nurses worked in large organisations in which proximity made it easier to organise, whereas legal executives (certainly in the past) worked in quite small organisations so that it was more difficult for them to organise themselves.
relationship between solicitors and legal executives will be thrown into the melting pot of legal professionalism, where old professional boundaries are blurred with an emphasis upon individual performance rather than accredited qualification. The rights to conduct litigation awarded to legal executives under the s.40 AJA 1999, give rise to the intriguing prospect of self-employed legal executive litigators, finally cut free from the apron strings of their employers. Furthermore, the increasing momentum towards multi-disciplinary partnerships (MDPs), welcomed by ILEX as an opportunity for legal executives finally to be eligible for partnership, could further blur the boundary between solicitors and legal executives. The largest law firms (and to some extent the Law Society) now appear less concerned about old professional prerequisites such as 'exclusivity of knowledge'. The arrival of MDPs on a large scale would inject even greater fluidity into the professional knowledge bases within a MDP.

Even if legal executives are appointed to partnership under an MDP, it would be something of a misnomer to claim that a partnership between solicitors and legal executives was a multi-disciplinary partnership. It would simply be a way of raising the professional status of an individual legal executive to one of a solicitor, within the same discipline. At this point, the question must be asked (and will be asked several times again in this concluding chapter), what, then, is the point of employing someone who describes themselves as a legal executive, rather than someone who calls themselves a solicitor? One of the main benefits of employing legal executives in practice is that they bring a high degree of expertise to the job and yet are cheaper because there is no prospect of partnership. If partnerships were to become available, and the legal executive possessed very similar rights to the solicitor in terms of audience and litigation, what then is the point in preserving two distinct occupations? All that differs is the route to qualification. It could be argued that ILEX provides a valuable 'access' route into the legal profession, avoiding the A-level route (Dearing, 1997: 109), but increasing numbers of people are entering higher education and ILEX is explicitly rethinking its appeal to the graduate market (ILEX, 1999: 4). Furthermore, nothing intrinsically prevents the different route to qualification being incorporated more formally within Law Society requirements. If legal executives are
successful in asserting equality of expertise (and status) with solicitors, then this would probably be only a pyrrhic victory (from an ILEX perspective) as ILEX members and potential members may be able to join the Law Society rather than remain in the less prestigious Institute.

While it was always problematic to speak of the solicitors' profession as a homogeneous bloc, such homogeneity is now very limited. Different sectors of the profession with different concerns and notions of professionalism have emerged, there is cut-throat competition within sectors, and many practitioners' ties with the Law Society and, even the nation state are increasingly loose. These factors must all be taken into account when moves towards a post-power theory of the professions are considered, but what is emerging is an emphasis upon individual rather than collective mobility. The strategies of individual mobility may be employed at varying times by either legal workers, firms or functional sectors, taking account of different notions of professionalism according to the market's needs. Within this individual mobility it is of course conceivable that individual legal executives will continue to enjoy individual successes. However, even within the increasingly fluid professionalism in the workplace, as firms experience entrepreneurial and managerial pressures, economic efficiency will dictate that they employ greater numbers of subordinate workers. Sommerlad and Sanderson, fear that the dominant male paradigm within the solicitors' profession, will reinforce this subordinate role of employed assistant solicitor, as gendered, as a role for women (1998: 266). Legal executives will also struggle to avoid being cast in such a role. We have already noted the increased (numerical) feminisation of legal executives. If women solicitors are likely to find themselves subordinated, it is likely that an already subordinated group such as legal executives will find themselves facing 'double marginalisation', as women within the legal profession, and as legal executives within the legal profession, thereby compounding the difficulties facing the occupational project of legal executives.

\[\text{See Breitenbach, Brown and Myers (1998) on the 'double marginalisation' facing Scottish women within a Britain, dominated by both men and Englishness.}\]
Law Society and ILEX: relics of ‘traditional professionalism’?

Where does this leave the professional associations? The centrality of the professional association to the collective mobility project has been well charted (Larson, 1977: 69-77, and Sugarman, 1996). However, it has always been potentially misleading to identify a profession’s interests simply as those of the professional association, for the staff of associations and the controlling elite of council members typically develop their own interests. ILEX, particularly, has found it difficult to speak for all legal executives. The root cause has been ILEX’s inability to win statutory protection for the title ‘legal executive’ (or ‘managing clerk’ before it). Consequently, many people working within solicitors’ offices, performing tasks analogous to that of a legal executive, have never seen much point in pursuing the qualification. Even those who qualified as legal executives treat ILEX simply as a training and education provider, and fail to maintain contact with the Institute following their qualification. To combat this, ILEX has made huge strides in recent years in securing further added value to the Fellowship qualification through the attainment of rights to audience and rights to conduct litigation. However, it has still failed to secure statutory protection for the title ‘legal executive’, and there are signs in relation to the changes in legal practice and in its relationship with the Law Society, that it may never achieve the professional status to which it aspires.

ILEX’s relationship with its members is distant, with council members accusing their membership of ‘apathy’. Hanlon argues that the Law Society may face difficulties in regulating and representing an increasingly fragmented profession (1997: 822). It faces an increasingly discontented membership, particularly over the issue of regulation. The council is desperately trying to bring the membership into line with its own priorities on regulation. It feels that by tightening standards through closer regulation, the profession as a whole would improve, offering government and the public an improved profession. This model of a strong classic professional association regulating its members (albeit with a strong element of coercion from the state), is clearly set out in the Law Society’s recent consultation paper, which recommends ‘a renewed emphasis on the Society’s role as the setter and enforcer of
standards for solicitors' and recognises that it 'cannot be half-hearted on the subject of self-regulation' (Law Society, 2000d: 2). Such an emphasis is at odds with a profession increasingly trying on and discarding various shades of professionalism according to market needs. Notably, in contradiction to the strategies described by the power theorists, many solicitors (both high street and city) see their professional association as a hindrance on their advancement and not as a vehicle for collective mobility. The City firms wish to compete on a level playing field globally and against other professions, and for smaller firms struggling in a high street sector, stringent regulation compounds the desperate financial situations in which they find themselves. They are losing what attachment they had to national professional associations. The Law Society's heavy emphasis on regulation (and attempt to preserve self-regulation) is in stark contrast to its members who are pulled in a different direction by powerful market pressures.

Similarly claims to exclusivity of knowledge, so central to the power theorists such as Larson and Abbott, are no longer so important in practice. Competition and the market have increasingly entered the vocabulary of the leaders of the profession. However, such competition leads to tension and division even within existing sectors of the already fragmented solicitor's profession. As Sommerlad also notes, solicitors do not view other firms as fellow professional solicitors but, increasingly, as competitors for business (1995: 179). This compounds the estrangement of the profession from the professional association. If practitioners no longer believe they are part of 'one profession', then it becomes increasingly difficult for a professional association to defend the achievements of the collective mobility project.

Despite the turmoil in the relationships between the professional associations and their membership, the relationship between the Law Society and ILEX is relatively stable. Despite improvements in ILEX' position, its leadership remains imbued with notions of classical professionalism. Ironically these notions serve ideologically to restrain

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1 By leaders, I refer to managing partners of the largest firms in addition to the council members of the Law Society.
them from asserting themselves against solicitors and the Law Society. This
defERENCE has become institutionalised over the years.

The shadow of the Law Society cast itself over ILEX' contemporary discussions over
whether to prospect for further rights or to conserve their current gains. The debate is
necessarily always framed in terms of the Law Society's responses. Even those on the
ILEX council who advocated a prospecting strategy seemed to struggle to specify how
far that prospecting strategy should and could be pushed against the continuing, yet
elusive, power of the Law Society. This focus on the Law Society, while
understandable (and perhaps even necessary) from a historical, jurisdictional and
strategic perspective is serving to confirm the subordination of ILEX. In failing to
move their concerns and their assumptions about professionalism beyond the Law
Society, ILEX are likely to make it very difficult for themselves to ever move
forward, particularly when such moves could lead to conflict with Law Society.

In contrast, the Law Society council members and policy officers were far less pre­
occupied with ILEX, either as a threat or even as an issue to take into account. The
differences between the two councils in terms of their strategic concerns are acute, and
powerfully confirm the Law Society's domination of ILEX. The ILEX council
members' concerns were largely parochial: 'How will the Law Society affect the
possibility of further rights for our membership?' In sharp contrast, the Law Society
interviewees were more wide-ranging, speaking in broader terms about issues such as
fragmentation, globalisation and the growth of information technology. I am not
suggesting that Law Society council members are more intelligent and better able to
think strategically than ILEX council members. Rather, the activities of the
superordinate profession are the necessary focus of an auxiliary profession locked into
the cognitive base of its lead profession (and employers). However, this inability to
develop a strategic focus makes it very difficult for them ever to launch a professional
project independently of their lead profession (particularly one that has enjoyed
century long hegemonic control). This is the central contradiction behind the
professionalisation efforts of an auxiliary profession under traditional
professionalism.
However, contemporary changes within legal practice, suggest that *traditional professionalism* incorporating competence, high status, public protection and autonomy (Paterson, 1996: 140), has either declined or evolved. Both the Law Society and ILEX are struggling to come to terms with the changes in legal practice, although perhaps (as alluded to above), the Law Society has a better appreciation of the challenges. The changing nature of professionalism with which the two organisations have to grapple is clear from the following statements:

> My concern if you have a profession populated by individuals fixated with making money, not so much with status but more with the hounds of commerce, does that not lose touch a bit with what the public have a right to expect from a professional? . . . The litigation society has changed what a profession is and what a profession can be, and I think that’s a shame. Learned professions are not what they were and perhaps professions are becoming less polite as a result.  
*Interview F, Law Society*

Davies Arnold Cooper is determined to run itself like a business rather than a traditional firm of solicitors. We urge our staff and partners to see themselves first as business people seeking to make a profit, secondly as lawyers *Senior Partner, http://www.dac.co.uk/human.html*

Similar assumptions are echoed by the ILEX council members focusing on regulation and a service ideal (discussed in detail in Chapter 7). Since its establishment in 1963, ILEX has been chasing the phantom of traditional professionalism. The tragic irony for the organisation is that just as many of its leaders see it as within reach of professional status, the very nature of professionalism is changing. The ILEX council showed little appreciation of this shifting nature of professionalism. Its rank and file members may be adopting assumptions of ‘commercialised professionalism’ (Hanlon, 1999), or coming to terms with increased managerialism in practice (Sommerlad, 1995, 1996 and 1999), yet ILEX continues to aspire towards a *traditional professionalism*. The traditional professionalism still cherished by ILEX confirms their subordination in relation to the Law Society and leaves them badly placed within the legal services marketplace.
In contrast, while many Law Society council members still cherish ‘conservative’ assumptions, others, particularly those now grasping the reins of power, recognised the need for a rethinking of professionalism. This search for a new professionalism is reflected in the Law Society’s official reports and briefing papers. Yet the Law Society is still only feeling around in the dark, trying to get some sense of the direction in which it needs to progress. The challenge for the Law Society’s leadership is how to make its professionalism relevant in an environment when vast sectors of the profession consider it increasingly irrelevant.

Professional associations have an in-built time lag in adapting to new conditions at a practice level, because of the requirements of membership consultation (and alteration of Royal Charters) before significant change can be implemented. Laffin and Entwistle note that public sector professions have had difficulty rationalising their professional projects because of the restrictions of Royal Charters, and ‘an active minority of conservative practitioners’ (2000: 216). The Law Society and ILEX face similar problems. In this vein the Law Society is reforming its corporate governance to allow it greater flexibility to react to contemporary changes (Law Society, 2000d). However these proposals are, at the time of writing, still before the profession for consultation.

Strategic Choices for ILEX and the Law Society: next steps and alternative scenarios

The Law Society’s current agenda, seen in the interviews with the council members and in the official reports such as the corporate plan (2000a) and the recent consultation document (2000d), broadly advocates reform of the existing structures and policies. There are plans for further reform of the Law Society’s corporate governance, with the aim of reducing input from council to six meetings a year, and greater responsibility placed upon a Main Board and senior management (Law

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7 These reforms (see further chapter 4 and below) appear to be taking better account of contemporary legal practice, although such centralising moves have caused tension on the Law Society council (see further chapter 8).
These strategies bear a striking similarity with those identified by Laffin and Entwistle among professional associations generally (2000: 213-4), and are an effort to address the institutional time lag faced by professional associations. The assumption is that the Law Society can appeal across the fragmented profession, through more sophisticated use of functional sections (Law Society, 2000d: 3). The further underlying assumption is that fusion with the Bar and ILEX will eventually occur. The drive towards sections and fusion is not necessarily contradictory as the existence of sections could facilitate fusion with a declining emphasis on occupational accreditation. The Society envisage that through the use of sections, possibly under the umbrella of fusion, it may be able to move from a model of homogeneity to, what I would term, managed heterogeneity.

Despite the appeal of the preservation of the status quo and the opportunity that a model of ‘managed heterogeneity’ presents in allowing the Law Society to answer the questions posed by Hanlon (1997: 822), such a strategy could leave the Law Society with serious problems. Although the Law Society has had recent success in overhauling its complaints system, which may pre-empt the immediate threat from the Lord Chancellor to self-regulation, there remains an inherent contradiction in the regulatory/representative model. This contradiction is particularly acute in the light of a reduced belief from the both the state (and wider society) in the profession’s ability to guarantee the public interest. The state is likely to compel greater and greater (self) regulation, while shirking the ultimate responsibility and expense of taking it off the profession’s hands (Seneviratne, 2000: 52). A move towards heightened regulation (which the Law Society council supports, see chapter 8 and Law Society, 2000d: 2), while the representative function is retained, will place strains on the relationship with the wider profession, particularly if a voluntary membership environment were to emerge. These strains could lead to the large law firms leaving the fold, believing that their interests were better served beyond national and discipline boundaries.

The Law Society has considered and rejected the General Medical Council/British Medical Association model of a separation of the regulatory and representative roles.
of the profession, arguing that it has not 'rendered the medical profession immune from recurrent criticism relating to standards' (Law Society, 2000d: 2). However the Law Society's belief in 'a renewed emphasis on the Society's role as the setter and enforcer of standards of solicitors and improvement in the Society's effectiveness as a representative body' (2000d: 2) appears wracked with tensions in the current climate of legal services.

A slightly modified model (to the GMC/BMA model) could see the state assume responsibility for regulation. However the Law Society would face problems in reconstituting itself completely along BMA/trade union lines, for in addition not only do solicitors face many employers, rather than a single employer (the NHS), the Law Society additionally represents employers rather than solely employees. Furthermore, without the regulatory role, regardless of the outcome of the negotiations with the Lord Chancellor's Department about the use of the membership fee for campaigning activities, the arguments for compulsory membership would be considerably weaker. This would leave the Law Society as simply a learned society or a campaigning, special interest association.

Moreover, if the Law Society were to emerge as a solely representative association, it would still need to develop more sophisticated strategies to appeal to its fragmented membership and, as a policy advocate, to Government. There would have to be active and careful leadership of the heterogeneous profession, although some sectors, such as the large law firms, may decide that they do not need to be part of such a profession. The Law Society may wish to consider ways in which it could develop its appeal to the profession, perhaps building on some of the suggested services for high street firms (Law Society, 1999b). A possible strategy could see it drawing on the expertise of practitioners and policy officers to develop a reputation as a legal think tank to which legal service providers and policy makers could come for fresh innovative thinking. The Law Society has the (residual) status and resources to begin to develop such a strategy. In an environment where the old emphasis on exclusivity of knowledge has declined, the Law Society may face a struggle to retain influence with

1 At the moment the state shows little enthusiasm for such a role (Seneviratne, 2000: 51-2).
government. Professional associations have to adopt inclusive strategies to ensure that they are at the centre of the Government’s policy development. Insisting on professional demarcations will not serve the Law Society or its membership (cf. Laffin and Entwistle, 2000: 214-5).

The Law Society hopes that ‘solicitor’ still has some common appeal, and identifies these as ‘(a) a common regulatory framework and (b) a willingness to sign up to a professional body that commanded respect by virtue of its standing and performance’ (Law Society, 2000d: 2). Nonetheless, it would appear that greater sophistication is needed in terms of acknowledging the diversity of the legal profession.

ILEX is faced with similar, and yet potentially even harder choices. It remains committed to the preservation of ILEX as a separate entity, independent of the Law Society. Although the ILEX leadership advocates future strategies broadly similar to those of recent years, it is keen to increase the relevancy of ILEX to members, potential members, the wider legal profession, government and society at large. There is a commitment to continue to prospect for further professional rights and to urge the commercial companies to recognise the professional aspirations of ILEX.

If ILEX continues with its declared strategy of pushing onwards with a professional project, it seems that this will simply strengthen the case for fusion. In trying to differentiate its members from the growing numbers of un-credited paralegals in the legal services marketplace, ILEX have pushed for greater and greater professional rights in an attempt to assert workplace equivalence with their employers. However, the inherent problem in this strategy is that workplace assimilation raises questions of fusion (see Laffin and Entwistle, 2000: 216). Why preserve two professional bodies for two ‘types’ of workers doing very similar jobs? Moreover, while in the past, informal ties were enough for the Law Society to enjoy a controlling influence over ILEX, in order to strengthen is position as the pre-eminent voice of the legal profession, the Law Society may look to formally consolidate the asymmetric power relationships between the two professional associations. ILEX may still decide to
formulate strategies to preserve independence, but this is must be done with an appreciation of the momentum towards a fused legal profession.

An alternative strategy for ILEX is to abandon its professional project and reconstitute itself as simply a commercial organisation, providing both commercial courses in its own right, and acting as the examining body for those wishing to pursue the ILEX qualification. ILEX members could then join the Law Society. It may wish to ensure, through negotiation, that its members were granted representation on the Law Society council in order to secure continuing support for those who qualified through the ILEX route. Bearing in mind workplace assimilation, both organisations may wish to equalise the qualifications of solicitor and legal executive (apart from the requirements of further training for rights of audience/litigation) and simply stress that the legal executive route was an alternative route to the ‘same’ qualification. There are strong ‘access’ arguments for the ILEX qualification, which would also support the Law Society’s continued attempts to broaden the social base of its membership (Law Society, 1999: 35-41).

Bearing in mind, that fusion is currently anathema to ILEX, the consequences of preserving the status quo must be explored. The institutional subordination will continue and furthermore if fusion does occur, despite ILEX working to prevent it happening, it could occur at a time when it would not be on ILEX’ terms. ILEX could strengthen its position by bolstering its links with its membership. It could address the problem of persuading more of those who qualify using the ILEX route that the professional association is relevant to them. The Continuing Professional Development (CPD) ILEX has introduced may be an important aspect of encouraging this connection, however the continuing problem of what sanction ILEX holds over those who refuse to participate remains. ILEX’s current strategy of amassing evidence of the misuse of the legal executive title could be a step in the right direction.

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Further evidence of such momentum is seen with the announcement that the Law Society, the Bar and ILEX have formed a steering group to examine putting a bid together for National Training Organisation (NTO) status (*The Lawyer*, 04/11/00). It is interesting to note that many of those interviewed at the Law Society, felt that greater commonality of training would be the first step towards fusion.
towards protecting the title ‘legal executive’, but ILEX may find that it has to go much further in encouraging on-going dialogue with the government.

ILEX, like the Law Society, does not appear to be aware of the declining relevance of the professional association to the realities of professional practice. There is a strong sense that professional projects as modes of collective advancement are less important than they once were and the legal professional associations have to find their role within this framework, within which individual mobility is heightened. Knowledge boundaries between the professions and between professions and lay people are also blurring. Claims of exclusivity of knowledge are rarely made nor listened to. Yet despite many of the traditional strategies no longer being available to the professional associations, ILEX and the Law Society are still attempting to further their professional project, relying on those strategies described by the power theorists. Furthermore, ironically despite the critical origin of these theories, they are even used as direct policy guides for the Law Society (Lee, 1999: 30).

Towards a ‘post-power’ theory of the professions

The professions themselves are struggling to come to terms with a new world of work. Abel’s thesis, while correctly anticipating that many of the traditional strategies available to a classic profession are no longer be available, must be revised to take account of a changed legal professionalism. There is a need for a revised power theory.

In the past, the Law Society’s explicit use of entry controls was an effective method of maintaining the social composition and hegemonic power of the solicitors’ profession, while collectively advancing its claims to status in society (Burrage, 1996; and Sugarman, 1996). However, following the rapid expansion of higher education in the 1980s and 1990s, it is argued that this ‘gatekeeper’ role is now performed by the large law firms (see particularly chapter 5), which do not share the same collective ethos that the Law Society arguably once held.

10 A term employed in this context by Twining (1989: 3).
Hanlon charts the emergence of ‘commercialised professionalism’ within the powerful elite of the large law firms, whereby previous uncontested features of lawyering - including the criteria for partnership, the nature of the producer/consumer relationships and the growth of sophisticated marketing as an integral part of law firms’ work - have all seen radical change (1999: 123-63). Such changes suggest that, in exercising control over entry into a large sector of the profession, the entrepreneurial character of the elite firms does not seek to safeguard the collective status of the profession. Rather they are concerned with the individual firm’s position within a highly competitive marketplace and that dictates the emphasis of the criteria for training contracts (Lee, 1999: 32-6). Legal knowledge was also characterised as an inherently ‘conservative’ discourse (see chapter 3). It is interesting to note that these firms with a diminishing attachment to exclusive claims of ‘pure’ legal knowledge, also display greater creativity in practice and a declining deference to classic professionalism (Flood, 1996; Hanlon, 1999). Moreover these firms are increasingly employing non-legal professional knowledge in their work with finance and banking, a practice that will only increase with the establishment of MDPs, allowing lawyers to operate in partnership with accountants or other professionals. Furthermore, the introduction of competition across all sectors of an already fragmented profession has eroded the notion of ‘one profession’ amongst practitioners. Their concern and focus is now on the individual rather than the collective, and it is these firms producing the next generation of lawyers. Any post-power theory of the legal professions has to take account of this.

However, the new emphasis on individual mobility does not mean that all the strategies understood by the power theorists have been forsaken by professional sectors. Laffin and Entwistle, for example, in their study of public sector professions argue that there has not been ‘wholesale abandonment of the traditional professional strategies’ (2000: 213). Aldridge advocates a ‘post-modern style of profession’;

11 Interestingly, Arthurs argues that the deep divisions even within national legal professions makes it very difficult to conceive a global code of legal ethics (1999: 67). Boon and Flood, also note that at present international codes of legal ethics simply operate at ‘symbolic and ideological level’ (which is clearly important in itself) (1999: 56).
urging social workers to choose those aspects of professionalism that are most appropriate to their occupational project. She argues that social workers need to develop an institutional framework for the production of a body of theoretical knowledge about social work and yet still avoid the ‘less attractive baggage of “the profession”’ (1996: 190). A post-power theory of the legal professions must also take account of this selective and malleable brand of professionalism. Firms, sectors and legal actors are all capable of delving into the ‘pick ‘n’ mix’ counter of professional vestments, perhaps wearing the clothes of commercialised professionalism to suit a particular client,12 or employing ‘service ideal’ arguments when negotiating with government. This selective use of professionalism can clearly be seen in the attitudes of the largest law firms to the Law Society. Their treatment of professional rules was essentially on their terms. There was a ready admission that they did not follow strict Law Society rules, and yet were happy to use the Law Society when it suited their needs (Lee, 1999: 29).13 A more malleable form of legal professionalism may be developing, not perhaps continually evolving as a process of negotiation between the collective profession and the state14, in the terms described by Paterson (1996), but rather, a professionalism that shifts and changes according to the market’s needs at any one time.

Claims to expertise and accreditation of that expertise are still incredibly important. There has not been a move to a completely de-regulated assessment of expertise. Professional associations still flourish and still enjoy status and privilege. Furthermore in the Law Society’s case it still enjoys strong control of ILEX. However as Laffin and Entwistle note, ‘We now live in what has been called a ‘knowledge society’, in which expertise is increasingly important, yet paradoxically never before have claims to ... knowledge being so contentious’ (2000: 218). There is now massive fluidity over disciplinary boundaries; a fluidity which the legal professions are struggling to control through traditional collective strategies. Aldridge

12 Perhaps, a metaphorical version of law firm policy to change from their ‘dress down’ clothing when meeting particular clients (The Lawyer, 21/08/00: 21).
13 The council members and policy officers of the Law Society were well aware of this attitude (see chapter 8). There was acquiescence with this, or at least resignation that they could not do a great deal about it.
14 Indeed state restrictions are increasingly less relevant for many global firms (Flood, 1996: 173).
argues that even within a condition of post-modernity; ‘Expertise exists, but is situational. Any mandate or privileges based upon it must be continually justified and renewed’ (1996: 191). I have already suggested that classic professional associations such as the Law Society and ILEX may be hampered by an institutional conservatism which makes it difficult for them to respond flexibly to rapid changes in professional practice. However, the question that remains to be answered is, whether the difficulty that professional associations face in coming to terms with the blurred boundaries of professional knowledge is simply an institutional time lag - an inflexibility in responding to rapid change in the marketplace (Laffin and Entwistle, 2000: 219) - or whether it is a more fundamental problem. Professional associations developed to forge a collective professional identity based on a standardised cognitive base and were effective in policing the boundaries of professional knowledge. In their present conception, professional associations may find it very difficult to adjust to the new fluidity of legal professional knowledge. Rather than there being just a time lag in their response, ILEX and the Law Society may be structurally incapable of responding to the blurring of the boundaries. Their exclusive focus on the ‘conservative’ field of law, retention of outdated notions of professionalism and organisational inflexibility may well make it very difficult for ILEX and the Law Society to find their role in the redefined professional landscape.

Within a post-power theory of the legal professions the professional associations are likely to lose influence. It is perhaps easier to continually renew and justify situational expertise within individual mobility projects. This is perhaps one reason why the Law Society in particular, is moving to emphasise functional over hierarchical demarcation, giving interest sections (such as city firms) greater autonomy, while retaining the broad umbrella for those occasions when classical claims of professionalism are still valid. Clearly, it remains to be seen how successful this project will prove.

To conclude, it is possible that we will also see less frequent claims to a public service ethos in a profession increasingly dominated by the large law firms, leaving a more
commercially driven and statutorily regulated model of client concern. The post-power theory of the professions must emphasise more inclusive rather than exclusive claims to knowledge and perhaps increasingly individual rather than collective models of mobility.

And finally? ILEX and re-constituted legal professionalism
ILEX began life as the Solicitors' Managing Clerks' Association in 1892, conceived in the shadow of the Law Society. Its professional project has been limited by the controlling power of the Law Society ever since. Following successive failures in its applications for a Royal Charter, it abandoned its professional project to concentrate on raising ‘the standards of a para-professional competence’ (Johnstone and Flood, 1982: 187). In the 1990s, it revived its professional project, and has achieved significant successes securing further professional rights for its members. However, it has continued in a subordinate role to the solicitors’ profession. This subordination can partially be explained by ILEX’s failure to appreciate the changing conditions of professional practice at an institutional level. For too long it has pursued the phantom of classical professionalism, and now as it feels it has the phantom in its grasp, ILEX finds the phantom has been exorcised by pressures originating from both market and state. How ILEX responds to these conditions is partly in its hands and partly in the hands of the Law Society. While the future is indeed bright for individual legal executives, it is not quite so assured for ILEX.

The system of the legal professions has experienced great change in recent years and appears to be on the brink of further upheaval. The conditions which gave rise to classic professionalism have weakened and there now appears to be an increasing focus on individual rather than collective mobility. Therefore, in contrast to the approach of the power theorists such as Abel in the legal context, future attempts at understanding the legal professions must focus more on individual rather than collective projects of mobility and material gain. This appears to suggest a fundamental re-conception of professionalism, and it may mean that that future theoretical work should consider whether a post-professionalism theory of
occupational power is needed. Further work, both empirical and theoretical, perhaps focusing on the workplace arena, is clearly needed to develop such a post-power theory of the legal professions. This thesis has attempted to erect some signposts to assist that journey and, most fundamentally, has highlighted the severe contradictions and tensions facing ILEX and the Law Society as they confront their fading centrality within the system of the legal professions.

15 Such future work will therefore perhaps develop Abel's conclusions that the historically specific phenomenon of legal professionalism has fundamentally changed.
Appendix: Interview Schedules

Although the interview schedules are provided for information, the interviews were semi-structured and therefore did not always precisely follow the schedules set out below. For example, questions to salaried staff of the Law Society/ILEX differed slightly from those questions asked of council members.

Law Society Council members

The role of the Law Society

1) How long have you been a council member?

2) What motivated you to stand for council?

3) Do you have any special responsibilities on council?
   Membership of particular committees?

4) How supportive is your firm in relation to your work with the council?

5) What for you personally should be the role of the Law Society?

6) What challenges do you think that the Council of the Law Society faces in reflecting the needs of all levels of membership nationally?

7) How far do you think that the membership is aware of the work of the Council?

8) What are the main strategic choices that the Law Society has got to make?

9) What are the main threats to the continued strength of the Law Society?
   What would you like to see the Law Society do to strengthen its position?

10) Throughout its history the Law Society has on occasion had to fight “turf battles” against various competitors. Which groups of professionals can you see posing similar challenges for the Law Society today? How should the Law Society respond to those challenges?

11) To what extent do you believe that the Law Society is heard in debates of national concern?

12) What do you think the public’s perception of solicitors is?

13) What could the Law Society do to improve the public’s perception of solicitors? Is it more important to have the support of the government or the public?

Law Society and ILEX

14) Describe the Law Society’s relationships with ILEX?
15) What problems do you think that ILEX has faced over the years in attracting recruits? How do you think ILEX can attract more recruits?

16) How far do you believe that ILEX and the Law Society are working towards the same ends?

17) How important a role do you think that the Law Society should have in the continuing development of the legal executives profession?

18) To what extent would you describe Legal Executives as having comparable professional standing to solicitors?

19) To what extent do you believe that the ILEX qualification of Fellowship serves as an adequate guarantee of professional quality? Comparable to the LPC and law degree for example?

20) What effect do you believe that the proposals under the Access to Justice Act to alter the rights to conduct litigation will have on legal services?

21) How much of a threat to the Law Society do you think is posed by the grant of the right to conduct litigation to the Bar/ILEX?

**Broader professional and practice developments**

22) What shifts do you see in the way that the staffing needs of a solicitor's office will be met in the future?

23) What sort of role do you see paralegals playing in the future?

24) What do you see as the biggest changes in the organisation of legal services that could affect solicitors?

25) How far do you think that the distinction between all types of lawyers will become increasingly blurred as more and more people are doing increasingly similar sorts of work?

26) To what extent do you believe that, given the proposed changes in legal services it is important to maintain the distinction between solicitors and legal executives?

27) What do you understand the word profession to mean?

Any further comments
ILEX Council Members

**The role of ILEX**
1) Have long have you been a council member?

2) What motivated you to stand for council?

3) Do you have any special responsibilities on council? Membership of special committees etc?

4) How supportive is your firm in relation to your work on council?

5) What, for you personally, should be the role of ILEX?

6) What challenges do you think the Council of ILEX faces in reflecting the needs of all levels of membership nationally?

7) How far do you think that broader membership is aware of the work of the Council?

8) What are the main strategic choices ILEX is currently facing?

9) What are the main threats to the continued strength of ILEX? What would you like to see ILEX doing to strengthen its position

10) What problems do you think that ILEX has faced over the years in attracting recruits? How do you think that ILEX can go about attracting more recruits?

11) Describe ILEX' relationships with the Law Society?

12) How far do you believe that ILEX and the Law Society are working to the same ends?

13) How important a role do you think that the Law Society should have in the continuing development of the profession of Legal Executives

14) How far do you believe that the voice of ILEX is heard in debates on issues of national legal concern?

**Broader professional and legal practice developments**

15) What sort of role do you see paralegals playing in legal practice?

16) What do you see as the biggest changes in the organisation of legal services that could affect Legal Executives?
17) What developments would you like to see which would further raise the status of Legal Executives?

18) Do you think the professional status of Legal Executives is sufficiently recognised?

19) What do you think the public’s perception of Legal Executives is?

20) Are there any areas of work which you currently are not legally allowed to and feel that you should be?

21) How do you see staffing needs of a solicitors’ office being met in the future?

22) To what extent do you feel that solicitors have controlled the destiny of legal executives?

23) What do you understand the word profession to mean?

Any further comments?
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