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Response to the MoJ's legal services review call for evidence

This brief note responds to the MoJ's call for evidence in the context of its review of legal services regulation. It is based on past and current work of the Regulatory Policy Institute in both the legal services sector and more generally across sectors of the UK economy and internationally. It focuses on general principles rather than on specific detail.

The rationale for the review and the problem of 'simplification'

In the Ministerial Statement announcing the review it is stated that:

"The complexities of the current legal services regulatory landscape have been raised with Ministers by a number of different stakeholders and through the Red Tape Challenge, and Ministers have decided to undertake a review of the legal services statutory framework. The purpose of this review is to consider what could be done to simplify the regulatory framework and reduce unnecessary burdens on the legal sector whilst retaining appropriate regulatory oversight."

The first point to make is that whilst the goal of reducing unnecessary burdens and simultaneously maintaining appropriate regulatory oversight is sensible – recognising that the words 'unnecessary' and 'appropriate' require a good deal of interpretation – simplification should not enjoy a similar status, at least when considering issues at the level of the regulatory framework as a whole.

Simplification, I would suggest, only becomes a major factor if what is being contemplated is a much more centralized regulatory design. That is because, when decision making is centralized, the information processing capacity of a social/economic system is diminished, and matters then require to be simplified so that the system can cope. Centrally planned economic systems can't cope with economic complexity, but decentralized systems can. If pursued as a general goal in decentralized systems, simplification may lead away from better regulatory designs, since, for no very good reason, it restricts the sub-set of options that might be considered appropriate.

It is to be stressed that these remarks apply to the *system* or *framework* of legal services regulation, not to individual components of that system. Put simply, there is nothing *necessarily* harmful about a 'regulatory maze', as that term is used when looking across the spectrum of regulatory activity in the sector. However, when dealing with individuals providing and consuming legal services it does become more important that things are simple enough for them to be able to cope. At this level of detail, the information processing capacity of a single human mind, or of small groups of minds, becomes a

significant constraint, in ways that it does not at the broader level of an economic or social system or sub-system.

To give an example, it is reasonable to expect that, in any particular context, a supplier of legal services should be able to distinguish, or be able easily to find out how to distinguish, between compliant and non-compliant behaviour, without having to expend very substantial time and effort in doing so. It is remarkable how often this is not the case, particularly for small firms, not only in legal services but across the economy more generally.

In summary, whilst the 'user interfaces' with regulatory systems should be designed to be straightforward, good regulatory frameworks themselves can be very complex. The relevant tests should be to do functionality and efficiency – how well they do the job, and at what cost – not simplicity *per se*.

The relevance of changing circumstances

Complexity in economic systems tends to increase in periods of substantial change, as market participants seek out new ways of doing things and ways of adapting to shifts in the economic environment. At such times experimentation and discovery are of particular importance; and legal services markets are currently in the middle of such a period, not only because of the recent legislative changes but also, and much more fundamentally, because of the unfolding impacts of developments in information and control technologies in general, and of the internet in particular.

Oversimplification of regulatory arrangements can stifle experimentation by imposing unnecessary constraints on the market. A good, current illustration of such an effect is provided by the energy sector where the regulator, Ofgem, is mandating highly simplified tariff structures, contrary to the advice of more or less every economist with a pulse. The harm caused by this over-regulation (which is what forced simplification amounts to in this case) is heightened by the scope for innovation in the market. Billions of pounds are about to be spent on the roll-out of smart meters, one of the advantages of which is to make feasible new and likely complex, cost-reflective tariff structures that will facilitate more efficient use of energy; but the prospective return on that metering investment will be diminished if suppliers are impeded in their ability to experiment with new tariff structures.

I think it is reasonable to say that many (though not, of course, all) parts of legal services markets have been sluggish in their responses to the challenges of new technologies and of other changes in the commercial environment. There is still a long way to go in adapting to changing circumstances, and it would particularly inappropriate at the current time to do anything that, possibly in the name of administrative tidiness, would limit the ability of market participants and regulators to innovate or would reduce incentives to experiment and innovate.

By the same token, of course, where barriers to innovation and change are identified within the existing set of arrangements, their reduction and elimination merit high priority. This may or may not involve simplifications in the regulatory framework: there is no very rigid relationship between liberalisation and regulatory complexity or simplicity across economic

sectors, not least because whilst the removal of statutory impositions may 'free up' markets, freer markets tend to require more rules because they are usually characterised by greater numbers of participants and by greater diversity of activity.

The trade-offs can be briefly illustrated by the new provisions for the establishment of ABSs. By reducing constraints on the types of legal practices allowed to operate, the 2007 reforms have opened up opportunities for experimentation and innovation that would otherwise have been precluded. How successful the resulting experimentation/innovation turns out to be remains to be seen: it is still early days. The existence of ABSs does, however, complicate aspects of the regulatory tasks, at least as those tasks are currently conceived, leading to immediate questions for regulators, including the OFT as well as the LSB and the approved regulators, about the proportionality of the approaches that have been adopted. Principles of risk-based regulation might suggest closer scrutiny of ABSs than of traditional law firms, but the key question is: how much closer? Past a certain point, the benefits of additional scrutiny become an unjustifiable burden on new entry and innovation, and hence become anti-competitive. Ultimately, a judgment is required, and judgments are best made on the basis of experience. The problem for the MoJ, as for the regulators themselves, is that experience of the effects of these new organisations is still limited.

The burdens of change, including regulatory change

Change can be difficult to manage, and can be a burden to organisations. Regulatory change is no different in this respect, and one of the most consistent findings of Regulatory Policy Institute work over the years, across all sectors of the economy and including multiple projects for the Cabinet Office and BIS, is that it is most often *change* in regulations, rather than the overall *level* of regulation, that, on close analysis, tends to be what imposes the largest regulatory burdens, particularly on small firms. Thus, even in sectors where regulation may be extensive, if it is relatively stable organisations tend to develop ways of dealing with it at reasonable cost: the regulations become familiar; they are incorporated into a business's ways of working; organisations learn about the ways in which regulations will be enforced; and both enforcement and compliance can become relatively routinized.

Major changes in regulation disturb this process: organisations have to learn how to deal with a new regulatory environment, and learning is less easily routinized. The difficulties are exemplified by the response of one owner of a surface engineering firm interviewed in the course of a large-scale study of regulatory burdens for the Cabinet Office – an engineer qualified to doctoral level – who told us that he would love to be able to say that he complied [with the various applicable regulations] but frequently couldn't figure out what compliance required him to do. Significantly, the sector was going through a period of major reform of environmental regulation at the time of the study.

When it is unclear what compliance requires, regulation can appear arbitrary and can be a source of uncertainty, creating significant problems for economic performance. Regulation is part of the institutional infrastructure of a market economy, and, like property rights and statutes, it plays a central role in co-ordinating economic activity. When the 'rules of the game' become uncertain, arbitrary or unstable, co-ordination is undermined and performance deteriorates.

In general, the costs of regulatory change have been underestimated in the 'better regulation' efforts of successive governments, and the emphasis has been more on the overall level of regulation (most likely because that is how complaints are usually formulated, although the aforementioned Cabinet Office study found that, when challenged on the detail of the impacts of regulation, small businesses tended to shift the emphasis from the level of regulation to the disruptive impacts and uncertainties caused by changes in regulation). For example, a formula such as 'one in and one out' misses the relevant point; and 'one in and one out' is compatible with high regulatory 'churn' which can have damaging consequences. Whilst there has been greater recognition of the issue in the most recent period, I think it is fair to say that the 'something must be done about it' school of thinking – which tends to be characterised by a relative indifference to the indirect costs of doing things – continues to have excessive influence in the genesis of new regulation. Current energy sector regulation again illustrates.

Some degree of regulatory change is, of course, a positive thing in circumstances where the underlying technological and market environments are themselves changing, as is manifestly the case in the legal services sector. Regulators themselves have to innovate and adapt in order to sustain supervision that is 'fit for purpose' in changing circumstances; and liberalising regulatory reform – while it hasn't always produced the degree of 'simplification' or 'de-regulation' that some of its (over-simplifying) advocates anticipated and/or forecast – has, for the most part, increased the adaptability and innovative capacity of the markets that it has touched, to the benefit of economic performance in general, and of consumers in particular.

Like other sources of change, regulatory reform can also be a stimulus to better management: static market environments, even when competitive in their own terms, can lead to the development of business cultures that are not necessarily quick to spot and take advantage of new opportunities. Pre-reform legal services arguably was like this (except perhaps in those activities most exposed to international market influences) and my own experience is that there is a fairly wide appreciation among lawyers that substantial numbers of traditional law practices have been both sluggish in their responses to new opportunities (arising from technological change and liberalisation) and sometimes lacking in the normal commercial skills that might be expected of privately owned businesses.

Indeed, some of today's challenges probably arise from a longish history of legal practices operating in markets where the abilities to grasp new opportunities and to run businesses efficiently were not essential for survival, as they tend to be in more dynamically competitive markets. In consequence, and compared with many other markets, the capacity for managing change effectively was relatively undeveloped in many practices. If that is right, the sector might now be said to be operating in 'catch-up' mode and, perhaps belatedly, in a state of transition. It is likely that very many of the effects of the 2007 reforms, and also of technological change, are yet to be experienced.

Regulatory cycles

In periods of major transition in a sector there is much to be said for a twin-track approach to regulation which aggressively pursues the removal of barriers to adaptation and innovation, but is relatively light handed in other areas. My reading of the situation is that

this is not very distant from the underlying philosophy of current policy. A similar philosophy was implemented in earlier periods in the telecoms and energy markets, with considerable early success (although, as indicated above, later performance, particularly in energy, has become more problematic).

The shift from prescriptive regulation of conduct to enforcement that is focused more on the *effects* of conduct is therefore particularly appropriate, and I would strongly advise the MoJ to maintain this approach for at least the time being. Prescriptive regulation, particularly where a number of the prescriptions in place are geared toward an earlier and different set of market realities, tends to put unnecessary brakes on progress.

There is, however, a balance to be struck, since a focus *only* on effects can lead to highly uncertain and arbitrary regulation. I think there are some indications that this may be a problem in the way in which the 2007 reforms are being implemented in some areas. For example, the descriptions of 'principles-based, risk-based, outcomes focused' regulation to be found in some of the legal services regulation literature do not translate easily into interpretations of what it is that is expected of legal practitioners: the objectives cited appear too general and too open to interpretation to be effectively operational.

In practice, regulatory influence works through combinations of prescriptive rules, prohibitions, standards of conduct, and effects-based principles (e.g. the 'do no harm' of the Hippocratic Oath); and the most effective balance varies according to circumstances. As indicated, in periods of radical change and transition there is (or should be) a tendency to shift towards approaches more reliant on standards and effects, chiefly because the effectiveness of a particular set of prescriptive regulations is more sensitive to context, and hence vulnerable to being quickly undermined. Thus what might be appropriate in one particular sector and/or in one particular time period may be highly inappropriate in another.

In contrast a principles or standards approach – the latter based on harm caused – generalises more easily across different contexts. For this latter reason, modern competition law tends to rely heavily on defining standards of conduct and assessing their effects: the prohibition of abuse of dominance set out in Chapter II of the UK Competition Act and Article 102 of the TFEU effectively defines a single standard of conduct across the whole economy. It is unlawful to exploit substantial market power (a 'dominant' market position) in ways that cause harm to the competitive process and/or to consumers.

Where a standards/effects (rather than prescriptive) approach to regulation is dominant, it is nevertheless the case that, wherever possible, attempts are made to codify matters in ways that facilitate compliance. Thus, in competition law, codification takes place (a) by restricting the domain of policy to dominant firms, since only firms with substantial market power are expected to be able to cause sufficient harm to justify a system of supervision and (b) via a steady stream of court judgments in competition law cases, much in the manner in which common law evolves.

It is reasonable to suppose that over time, under the new regulatory structure established by the Legal Service Act and other statutes, regulators will seek to achieve such codification, through their decisions, through the issuing of guidance, and, in some cases, through formal

rule-making. What is going on here is a process of discovering new 'rules' that, from experience, are believed to contribute to the achievement of the desired effects across a reasonably wide range of potentially relevant circumstances.

Taking a very wide (historical) view, it might be expected that there will be cycles in regulatory activity as circumstances change and the balance between prescriptive rules and standards/effects-based supervision varies. Current circumstances point toward greater reliance on the latter, but I think it would be a mistake to think that this implies that prescriptive regulation will wither away or that regulators should always be rigidly 'outcomes focused'. To the extent that there are weaknesses in current legal services regulation, the problems may lie not only in the existence of too much prescriptive legislation left over from the *ancien régime*, but also with a lack of alacrity on the part of some approved regulators in seeking to codify aspects of the new arrangements, possibly under the misguided apprehension that such codification or detailed guidance is always unwarranted under the 'outcomes-focused' approach.

On the division of labour

Underlying some of these issues is the division of labour in regulatory activities. Market economies facilitate division of labour not only in material aspects of production but also in the production and dissemination of information, and this has potentially huge effects on productivity. Professional services firms are themselves examples of such a division of labour, being based on provision of services that are rooted in specialised information and knowledge.

One of the possible concerns about the current shape of legal services regulation is that it appears not yet to have promoted an efficient division of labour in regulatory enforcement and compliance. The same, general and imprecise objectives appear to be given to the LSB and to the approved regulators, and I note that when (to take an example) the SRA talks about compliance it seems to be implied that the relevant tests are derived from the implications of any particular aspect of conduct by a practitioner for the general objectives of the SRA. Looking at this from the perspective of a legal practice, the position seems to be not too far from an injunction to 'act for the best ladies and gentlemen, act for the best'.

Taken to its limit, 'outcomes-focused' regulation seems to me to require firms constantly to appraise the anticipated implications of their conduct for the public interest, using that term as short-hand for the set of regulatory objectives set out in the legislation. Not only is that a hopelessly infeasible task, the attempting of it would require substantial amounts of 'cognitive effort', that most valuable of human resources, which necessarily have to be diverted from other activities such as the actual practice of law.

In comparative terms, it is a form of regulation that seeks to operate by asking decision makers to 'internalise' public interest objectives. The most familiar historical example of this kind of approach in the UK lies in the nationalized industries, where the boards of public corporations were supposed to act as 'high custodians of the public interest'; and, although the language and the standing of those responsible is more elevated, there are some obvious commonalities with the roles of COLPs and COFAs under strict versions of 'outcomes focused regulation'. The system of public interest objectives for public

corporations did not work very well, and more fundamentalist applications of the approach, such as attempts to develop 'socialist man', failed spectacularly.

It is an old insight that pursuit of narrow objectives need not be inimical to promotion of much wider social and economic objectives. It is one of the founding principles of political economy; and in Enlightenment thought it is linked to the division of labour and the development of markets, although it is also an obvious principle of organisational design: employees are typically given narrow objectives in a structured context where each pursuing those narrow objectives leads to a better outcome for the whole.

My advice to the MoJ, therefore, is not only to seek a clearer formulation/identification of what the problems are that regulatory reform is attempting to address, but also to seek a clearer division of labour/responsibilities among regulators and between regulators and regulatees, with each being expected to have different priorities, pursued in different ways.

The economic rationale for legal services regulation.

The question of the economic rationale for legal services regulation was addressed in a Regulatory Institute Paper commissioned by the LSB. In considering it, we advised that the traditional 'market failure' framework favoured by many economists was inappropriate: it focuses on an off-the-point question (have markets failed?) rather than a to-the-point question (can regulatory changes improve the operation of markets?), and has a bias toward over-regulation because it over-diagnoses the incidence of 'failure'.

Historically, self-regulation has been the norm in the legal services sector. The positive side of this state of affairs has its roots in the collective self-interest of relevant groups of suppliers to expand the market for their particular services. In situations where there is an imbalance of information and power between a professional and her/his client (the power imbalance arising from the degree of dependence of the client's welfare on the performance of the professional in a particular context), there may be some reluctance of potential clients to enter into legal transactions. In economic jargon, transactions costs are high on account of the power and information imbalances.

In such circumstances, self-regulation can serve to lower transactions costs via a range of potential mechanisms that includes among others (a) removal from practice of those who, in one way or another, abuse their power over clients and (b) the establishment of compensation arrangements for clients who are adversely effected by unacceptable behaviour on the part of the service provider. In these ways, consumer confidence in legal services markets can be increased – the 'collective reputation' of practitioners is improved – and transaction costs thereby lowered. The benefit for practitioners at an aggregate level is a greater demand for their services.

The negative aspects of self-regulation derive from the fact that some of the instruments of self-regulation – such as control over who can and can't practice, which may serve to weed out malpractice – are a source of substantial market power. If there is one 'rule-book' that 'binds them all', control of that rule-book amounts to monopoly power. In the hands of the supply side of a market, then, control of a rule-book can be used to favour incumbent suppliers, most obviously by restricting competition, leading to adverse implications for

consumers. Malpractice may be reduced, but incentives to reduce fees and drive efficiency and service quality toward competitive levels will be absent. The outcome is transactions costs in legal services markets that are higher than necessary.

This kind of economic analysis focuses on generic competition and consumer issues, but these issues are linked to other matters of importance in the legal sector, such as access to justice. On standard analysis, unnecessarily high transactions costs in legal services markets constitute barriers to access to justice. As a Regulatory Policy Institute report for the Council of Bars and Law Societies of Europe (on the economic significance of legal services for the European economy) also emphasised, increased legal costs raise transactions costs in other markets (which are underpinned by the legal system), not just in legal services markets, and thereby constrain economic performance more generally.

Indeed, looking at the regulatory objectives of the Legal Services Act, I think there is a strong argument that only three are really relevant to operational regulation in legal services markets, being those concerned with (a) consumers, (b) competition, and (c) professional conduct. Even the third of these could be said to be derivative from the consumer objective, although its inclusion serves as a reminder of some of the significant distinguishing features of the sector that might warrant the establishment of a specific regulatory regime.

I say 'might' because it is not immediately obvious that such a regime is required. The underlying issues are chiefly to do with potential adverse effects of monopoly control of market rules, and UK legislation establishes frameworks of competition law and consumer protection that could, in principle, be used to address competition and consumer issues that may arise. It is notable for example that, in both the periods before and after the introduction of the Legal Services Act, the Office of Fair Trading has been active in seeking to eliminate restrictions of competition that have been caused by professional rule-books.

The approach that has been adopted

My own view is that there is benefit in going further than general competition law and consumer protection legislation, but not a whole lot further: and I believe that is what the current system is intended to do. If so, the regulatory design seems to be a reasonable one, with an oversight regulator of modest scale in the form of the LSB and a series of front line, approved regulators. Whilst the relationships among the latter look messy – for example, because aspects of regulatory structures have been carried over from an earlier period when distinctions between reserved and non-reserved activities were rather sharper than now – provided there is scope for change and development this should not be a major concern (see earlier comments on simplification).

This is not the only way the consumer and competition issues could have been tackled, but I think that it is a coherent and logical one, with the task of the LSB being to ensure that consumers and competition are not harmed by the use of the market power inherent in control over professional rule-books. The task *could* have been allocated to the general competition and consumer protection agencies, but the fact is that those agencies are more used to dealing with the exercise of market power at the point where goods and services are supplied to customers/consumers (i.e. where an actual market transaction is involved).

In legal services the market power problem identified takes a different shape: it arises from control over *rule-books* by the inhabitants of the supply side of the relevant markets. Whilst the competition authorities have picked away at this problem, particularly where rule books have been directly restrictive of normal aspects of market transactions (e.g. fee structures, advertising restrictions, etc.), a specialist regulator focused on this rather different problem, which has indirect as well as direct implications for market transactions, is, I think, a reasonable way to proceed.

Given these points, the rationale for and role of the LSB seems clear: it reduces to classic competition and consumer protection duties in a non-standard context where the monopoly problem stems from the market influence of rule-books, rather than the market influence of dominant firms and cartels. The more difficult issues are to do with the functions of the approved regulators.

Independent regulation and its meaning

In the development of legal services regulation there seems to have been some confusion about what is meant by the terms independent regulation and self-regulation, and some clarification may be in order.

In the utility sectors, the notion of independence is taken to refer to independence from a *sub-set* of influences that tend to emanate from the executive arm of government. I refer to a sub-set of influences because it is not generally the intention that independence should isolate a regulatory agency from influences that could be said to reflect the settled will of the legislature or of the people. The problem is rather that, in the day-to-day political struggles that takes place, the 'preferences' or priorities of government departments can be rather volatile and transitory in nature. The political laundry list of Good Things to Do might not show much change, but the priorities among its constituent elements can change very quickly in response to 'events' and media interest. Independent regulation is intended to dampen the impact of this potential volatility, and thereby mitigate the harm it can cause to business investment, by delegating some decisions to parties who are, or at least should be (the record is not unblemished), less responsive to transitory swings in political priorities and moods.

In discussion of legal services regulation, the word independence seems to have come to mean something rather different: it is often used to refer to the independence of the 'rule-making and enforcement activities' from the 'representative' activities' of the professional bodies. The first point to note is that this is not 'self-regulation' as it traditionally understood. Under (unsupervised) self-regulation, whilst there may be functional separation of the relevant activities in the sense that a specialised group of people might deal with regulatory matters, those people are nevertheless ultimately accountable to the profession, not to government, for their own conduct.

In the absence of other sources of challenge, a regulatory body that is independent of both government and the profession would be one that is relatively unconstrained in its exercise of substantial market power (through its influence over rules and their enforcement). It would enjoy a form of independence that Sir Humphrey Appleby might longingly dream of, but free-standing bureaucracies that are largely free of significant checks and balances are

not usually good news for consumers or for competitive processes. They have a tendency to expand in scale (measured in numbers employed or size of budget), to become inefficient, and to over-regulate. The end result of this process, taking account of the fact that regulatory costs are recovered from practitioners, may be legal fees that are not substantially lower than under unsupervised self-regulation with no separation of functions (i.e. where lawyers can collectively set fees if they so desire). The difference is that, instead of boosting the net incomes of practitioners, the economic rents arising from the unsupervised exercise of market power go to covering the costs of regulators and of regulatory compliance.

Under the current regulatory design, the task of preventing these things happening falls largely to the LSB, although there isn't *formal* 'accountability' in the usual sense (and there can't be such accountability if a form of self-regulation is to be maintained). Rather the supervision depends on a system of challenge and approval. As already stated, I believe this to be a viable regulatory design/framework, but have an impression that there is less clarity than would be ideal about the relevant division of labour and about the relationships among regulators. Thus, I note that there have been suggestions from approved regulators that the powers of the LSB should be reduced or abolished, which raises the question: how then is the monopoly power inherent in control of professional rule-books to be supervised? This is an area where I think that the MoJ could help matters be re-considering and clarifying some of the fundamental issues.

Is there over-regulation?

I believe that confusion about the meaning of independence in a system that is intended to be based on self-regulation, coupled with the fact that the most obvious reasons for opting for a 'self-regulation plus' approach are themselves relatively limited in scope (i.e. to deal with those issues of market power that are to do with control of rule-books), can be expected to give rise to tendencies toward over-regulation, and I further believe that there are some indications that this is the way things have been heading.

As stated at the outset, this short submission is concerned with general issues rather than with the detail of regulation, but let me give one example of where things might have been pushed too far. The regulation of solicitors provides for a number of specific protections for consumers which are supplementary to the protections afforded by general law. These include compensation from funds created by levies on the profession, mandatory PII insurance that is relatively broad in scope and is intended to ensure a further level of consumer protection, and a system of intervention that provides for closure of legal practices in ways that are also protective of consumers' interests. In addition, the SRA itself engages in detailed financial monitoring and operates a rule-book that is intended to supervise the financial conduct of practices, as indicated by one of its ten mandatory principles: [you must] *"run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles."*

Such financial supervision is highly unusual in a market economy – it goes beyond obvious matters such as protecting funds held by lawyers on behalf of their clients, and reaches a

level where the SRA actually assesses the business plans of new firms when deciding whether to authorise them.

The MoJ might reasonably ask whether, given the modest scale of the problems to be addressed, and given that the costs of regulation can be expected to fall chiefly on consumers in the longer term (in the form of higher legal fees than would otherwise have been the case), the degree of consumer 'protection' has become somewhat excessive, to a point where it is actually harmful to consumers of legal services in aggregate.

Consider insurance for example. If PII insurance is required for authorisation, an insurance company bidding to serve a potential entrant will itself seek to monitor financial risks that it perceives to be associated with the conduct of the relevant business, and the insurer will do so in recognition of the fact that he/she has money at stake in making as accurate an assessment as is feasible on the basis of the information that is available or can be readily discovered (insurance companies ask legal practices questions similar to those asked by the SRA). It is not immediately obvious why, given that it is known that insurers will be making such assessments (because of mandatory PII requirements), an approved regulator should want to duplicate that effort to the extent that it does.