



**INTRODUCTION OF PROPOSED STATUTORY
REGISTRATION SCHEME FOR ALL
PROVIDERS OF PUBLICLY FUNDED LEGAL
SERVICES IN NORTHERN IRELAND**

**Response of the Law Society of
Northern Ireland**

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Introduction

The Law Society of Northern Ireland (the Society) is a professional body established by Royal Charter and invested with statutory functions primarily under the Solicitors (NI) Order 1976 as amended. The functions of the Society are to regulate responsibly and in the public interest the solicitor's profession in Northern Ireland and to represent solicitors' interests.

The Society represents over 2,600 solicitors working in some 530 firms, based in over 74 geographical locations throughout Northern Ireland and practitioners working in the public sector and in business. Members of the Society thus represent private clients in legal matters, government and third sector organisations. This makes the Society well placed to comment on policy and law reform proposals across a range of topics.

Since its establishment, the Law Society has played a positive and proactive role in helping to shape the legal system in Northern Ireland. In a devolved context, in which local politicians have responsibility for the development of justice policy and law reform, this role is as important as ever.

The solicitor's profession, which operates as the interface between the justice system and the general public, is uniquely placed to comment on the particular circumstances of the Northern Irish justice system and is well placed to assess the practical out workings of policy proposals.

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The Proposed Scheme and the Role of the Law Society

- 1.1 As a professional regulator, the Society is committed to ensuring that the service delivered to clients by our members is of a consistently high standard and we have developed structures for complaints and inspection to serve this objective. Accordingly, we support in principle that quality assurance is an important aspect of providing a professional service. The educational and regulatory requirements to be satisfied to obtain the badge of solicitor reflect our commitment to excellence. The badge of solicitor as a quality assurance mechanism in itself is treated with the greatest regard.

- 2.1 Indeed, the Consultation Paper itself states at Para 7.1 that the Scheme “reflects standards that the profession are already required to comply with and are expected to be in general application across all legal services providers”. Accordingly, in terms of expertise, experience and efficiency it makes sense that the Society would take the lead in developing and administering any quality assurance standards. The Society notes in the foreword to the Consultation that the Minister recognises that the Scheme will be “complementary” to the role of Society, strengthening the case for the profession’s close involvement.

- 3.1 As we stated in our response to the Access to Justice Review in 2011, it is correct to state that in legal aid cases taxpayers retain a legitimate interest in the operation of the solicitor/client relationship. However, it is equally valid to ensure that new demands of administration are not placed on legal practices without demonstrable evidence that the expense is necessary and cost-effective. The profile of legal practices in Northern Ireland is that they are overwhelmingly SMEs in their local community and adequate ‘stress testing’ should be carried out to determine the likely costs of the Scheme. Accordingly, the Pilot experience should be used to set out a cost projection and the means that will be employed to prevent cost spiralling. This should be done as part of a comprehensive RIA on the Scheme before the detailed proposals are implemented.

- 4.1 It is with this principle in mind that we intend to tailor our response to the Department’s initial proposals on the Statutory Registration Scheme. As the Registration Scheme is developed, it must be subjected to stringent tests to ensure the burden it places on service providers is proportionate to the aim it seeks to achieve. Consequently, the Society is firmly of the view that the profession should be closely involved in the development and review of the Scheme, not least because it is proposed that the Scheme is to be funded by a levy on our members.

- 5.1 The Society notes that the equivalent scheme in operation in Scotland is wholly funded through the public purse whilst still prioritising practitioner involvement in its governance and administration. It is preferable that such a Scheme be publicly funded given the increasing cost pressures on legal practices from other sources, but if the Department insist upon a model funded by solicitors, it must make every effort to minimise costs to reflect the considerable amount of protections put in place by existing Regulations from the Society.
- 6.1 Where quality standards are imposed, an issue arises over how they are monitored. In terms of the legal profession, the Society sees itself as the body best placed to monitor compliance and deal with examples of non-compliance. This is because the Society is in a position to ensure regulation remains robust and cost-effective and we have prior experience of promoting the acquisition of specific quality standards such as Lexcel and ISO amongst the profession. The Society remains strongly of the view that it is for the regulator to administer accreditation requirements on a case by case basis. We are mindful that qualification as a solicitor requires the completion of detailed training and examination and the importance of this should not be diminished. However, where it has been felt to be appropriate, the Society has shown a willingness to undertake specific accreditation in the public interest.
- 7.1 For example, the Society has developed the Home Charter Scheme - a quality assurance scheme for domestic conveyancing business by all practitioners as a matter of regulation. This Scheme was used as a model for the Quality Conveyancing Scheme introduced in 2010 by the Law Society of England & Wales. In relation to Public Law Children Order cases, the Society maintains by way of Regulations a panel of solicitors from whom NIGALA select their own practitioners to be instructed on behalf of a child in those cases where a Guardian Ad Litem is appointed. This involves a rigorous assessment and a commitment to continuing professional development. On this basis, we believe the Society has a track record in administering and refreshing tailored regulation of the profession. In addition to the above, there are entry requirements for membership of the Society's Dispute Resolution Service and also with regard to solicitor advocacy and insolvency practice.

The Design of the Scheme- Proportionality

- 8.1 The Society notes that the proposals contained within the Consultation Paper provide only an introductory picture of how the Scheme will operate. We note at Para 6.7 of the Paper, the Department does not intend to undertake further consultation in advance of bringing forward draft legislation. The Society would caution that the detail of this Scheme will determine its regulatory impact and that further consultation is likely to be necessary in order to adequately gauge views on the operation of such a Scheme.
- 9.1 Significantly, the Access to Justice Review in 2011 stated the importance of implementation in a “proportionate risk based way that targets systems on those areas that matter most and does not add disproportionately to costs and administration of the Commission or the service providers”.
- 10.1 Another important aspect of ensuring that the Society take the lead in terms of regulation is to preserve the independence of the profession. Given that the Legal Services Commission will soon become an executive agency of the Department, it is important for client confidence that an independent profession is agreeing standards with Government and will help deliver a robust and accountable Scheme.

Accreditation Currently in Place and Phased Implementation

- 11.1 This point is supported by the Department’s position that any Scheme should be subject to a phased introduction to allow for ongoing review of its proportionality and cost-effectiveness. We agree with the need to take a co-regulatory approach whereby the Society ensures best practice following the broad template put in place by the governance of the Scheme.
- 12.1 In accordance with the above, the Society is of the view that the quality assurance mechanisms should be flexible, allowing for compliance to flow from Lexcel or ISO accreditation in order to reduce unnecessary duplication. A considerable number of firms have taken the step to introduce these standards into their management and their requirements are broadly in line with the mechanisms proposed for the Statutory Registration Scheme.
- 13.1 The Society would emphasise the importance of the pre-registration stage of preparation and ‘road-testing’ the proposals. It is important that the Department work closely with the Society and allot time to design an education programme to signpost the changes and requirements. This will

provide adequate time for adjustments to governance within firms to be made and an appropriate CPD agenda to be rolled out across the profession. Furthermore, it will create a window for providers to seek Lexcel or ISO accreditation in the alternative, an option some firms may wish to take if they have already given consideration to it in the course of their business or are aware of its operation through contact with colleagues.

Administration and IT Structures

- 14.1 In this regard, the Society considers that the IT and administrative structures put in place to resource the new Scheme should be thoroughly piloted prior to full implementation. We are mindful of the comments of CJINI and others concerning the inadequacy of current IT arrangements within the NILSC in terms of processing legal aid applications. The CJINI Report noted that a complete review of business processes was necessary in order to meet new challenges in administration. The Department has not set out in the Consultation how these improvements have been made and what procedures have been put in place to successfully contain the costs of the new Scheme.
- 15.1 Accordingly, the Society would welcome clarification on what proposals the Department have to ensure costs do not spiral and the administrative capacity of the Agency is adequate. The Consultation Paper talks of the importance of continual information sharing and 'Compliance Update' Reports. This follows the Society's own model of education of the profession as an ongoing exercise and we believe in an approach which operates in a collaborative way to address the practical challenges of implementing changes in business models on a continuous basis.

A Collaborative Approach and Cost Containment

- 16.1 With regard to the above, the Society considers it pertinent to include a 'practitioner's experiences' element to the Scheme. This would provide a feedback mechanism for the administrators to highlight elements of the procedures for applying for and completing legal aid work posing challenges in practice, including any suggestions for possible improvements. This is in keeping with the collaborative spirit suggested in the Consultation Paper and also reflects that efficiency and willingness to review procedures must flow from all those administering legal aid governance. The efficiency of the application and consideration process should form part of a transparently quality-assured set of procedures to ensure the Agency follows the practices it requires from firms undertaking legal aid work.

- 17.1 A significant aspect of a commitment to improving the governance of legal aid will look closely at the issues of duplication in terms of multiple forms requiring the provision of the same or similar information. The Society recommends that in terms of its business processes the Agency should initiate regular audits of its procedural requirement for legal aid applications with a view to consolidating these into a more streamlined and efficient process. This should result in savings in administration and meet the commitment to a collaborative and partnership based approach to regulating legal aid services.
- 18.1 In proposing for a fee-based model, the importance of existing costs on solicitors practices as business units must be taken into consideration. This involves the normal costs of running business including business rates, rent salaries and the payment of general overheads prior to significant additional costs already presented by regulatory requirements. It is in this context that care must be taken to minimise the cost burden of the proposed Scheme.
- 19.1 In addition to these normal business costs, cuts have been made to legal aid remuneration causing a reduction in the resources available to pay for additional regulation. With further cuts being proposed in legal aid remuneration, this situation is likely to significantly worsen in the coming period. Accordingly, effective and proportionate regulation must be put in place which recognises the fiscal realities of the current legal services market. An example of a regulatory review can be seen in the Scottish model, which now conducts six yearly cycles as opposed to three, demonstrating that over time a lighter touch regime can develop whilst maintaining appropriate standards.
- 20.1 The indication that the Scheme will go through stages of development with escalating fees indicates the importance of a process whereby the profession is involved and able to help influence the design of the Scheme. Solicitors in Northern Ireland are entering into a period in which the cost of Practising Certificates are to rise in line with new Complaints procedures to come into place within new legislation following the Bain Review. It is important to take a global view of costs in order to ensure that the commitment to a “small financial impact” in the RIA is met. Furthermore, it is important to stress that professional indemnity insurance arrangements are mandatory for all law firms in the jurisdiction, with this providing a significant measure of protection for clients. This insurance is purchased at considerable cost to practices and this adds to the case for a proportionate and cost-effective Registration Scheme.

- 21.1 Equally, proportionality needs to be carefully considered in terms of the Regulatory Impact Assessment on firms with high to low proportions of legal aid work. Although the market in NI is one of a network of solicitors offering a general practice model, the question of apportioning fees needs to be weighed against the importance of preserving access to justice in rural/deprived areas.
- 22.1 The Consultation proposes a graduated process whereby fees are increased following the testing of procedures and measurement tools and best practice is identified. However, the Consultation does not as drafted offer any detail on whether the template forms for registration and compliance will be revisited and costs adjusted in line with efficiencies found. This would be beneficial and would support the commitment to a collaborative approach which works in both directions.
- 23.1 In addition, the Society considers that any substantive changes to the Scheme in future, whether in terms of fees, the Code of Conduct or its substantive administration, should remain subject to a general duty to undertake a consultation process with the profession and wider stakeholders. This would deliver accountability and collaboration in line with the expressed intentions of the Department.

Ensuring Appropriate Quality Assurance Measures

- 24.1 Although the Consultation Paper mentions the success of the preliminary pilot, it would have been useful for consultees to receive a post-pilot report on lessons learned through the collaborative approach. This would reflect the importance of identifying audit and quality measures which fairly reflect the realities of everyday practice and take an approach which focuses on the substance of quality service, avoiding a 'box ticking' approach. The RIA states that the Code of Practice has been amended to reflect these lessons and further detail on this would be beneficial.
- 25.1 The Society welcomes the commitment to arrive at a "shared and explicit understanding" with providers of legal services as to what constitutes quality. The Society is however concerned to ensure that the governance mechanisms established for the Scheme, the regulatory approach taken and the accountability structures put in place reflect this intent. As stated, there are a number of ways in which the current proposals could be amended to enhance the involvement of the professional bodies.

- 26.1 Research shows there are continuing difficulties in terms of identifying comprehensive measures of quality, as many offer only a partial picture and some combination is therefore required.¹ Measuring outcomes on a purely quantitative basis is problematic due to case variations and the fact that the definition of ‘success’ can depend on the goals of the clients concerned. In some instances taking more time is actually serving the client’s interests more effectively and it is important that professional judgment is supported when looking at quality assurance mechanisms.

Risks of Duplication and Efficiencies

- 27.1 The partial RIA in the Consultation commits to liaise with DFP to minimise duplication of areas covered by the Draft Legal Complaints and Regulation Bill. Given the commitment to a phased approach to implementation, the Scheme should focus on audit, file management and record keeping rather than broader, more subjective measurements. In this regard, any client satisfaction measures will take shape through the new regime of complaints handling. This is one area in which resources can be appropriately targeted and the aims of the Scheme met with a lower regulatory burden.
- 28.1 In line with these observations, the Society thinks that one method in which costs may be effectively contained is to allow the measurement of client satisfaction to rest with the new structures for client complaints put in place by the Draft Legal Complaints and Regulation Bill. Accordingly, the Registration Scheme focuses on quality assurance tools which focus on standard methods of file management and handling etc. This will avoid a double levy on the profession for what will be substantially the same exercise in terms of mapping best practice in terms of client care.
- 29.1 The Scottish Legal Aid Board (SLAB) harnessed the advice of practitioners in both defining and revising peer review criteria. If NI adopts a system which seeks to measure quality without peer review, there is a risk that any Scheme will not effectively target appropriate indicators of quality in the interests of the clients and the general public. The Department’s commitment in the RIA to an “unobtrusive process” would be best served by harnessing the knowledge of experienced practitioners delivering high quality legal services to the community.

¹ Professor Alan Paterson, *Peer Review and Quality Assurance*.

- 30.1 Clients of legal services do not routinely ‘shop around’ purely on the basis of quality marks; rather they rely on regulatory requirements to re-assure them that all solicitors are trained to a sufficient standard.² Survey evidence has demonstrated that clients themselves view legal services as different to purchasing financial products or household goods, rendering them less susceptible to single indicator comparisons. Given that clients operate on trust in professional competence, this places a premium on the quality of advice as benchmarked by experienced practitioners.³
- 31.1 Given the above, the Society are pleased to see that the Department make repeated reference to the importance of the Society’s role in developing, reviewing and helping to administer the Scheme. This reflects a more nuanced approach which recognises that the delivery of professional legal services is based on trust in the ethical and professional obligations of experienced practitioners, rather than an approach which focuses on the lowest common denominator.

The Audit Approach, Fees and Panel Composition

- 32.1 The Scheme does not in its present form include provision for peer review, instead setting out the proposed audit cycle and a Panel (the Panel) to take decisions following audit. Given the importance of pre-registration advice and of informing the judgment of auditors as to what constitutes quality practice, the involvement of practitioners within these areas is consistent with the emphasis on a collaborative and phased approach which focuses on proportionality [Para 7.4 and 10.3].
- 33.1 The importance of proportionality and the development of fair and efficient structures in terms of auditing are made more compelling by the proposal that firms could be subject to additional fees for failed audits. In a similar vein, given that the Panel charged with issuing sanctions does not allow for appeals [Para 10.11], the argument for practitioner involvement in these structures is strengthened.
- 34.1 The Society is opposed to the operation of a Registration Panel without a mechanism for appeal. We consider an appeal a vital safeguard to help promote the fairness and integrity of the Scheme amongst the profession and the wider public. Furthermore, the Society is opposed to a Panel composed entirely by Department officials, as would be the case following the conversion of the Commission into an agency. The current proposal for the Panel to be

² Vanilla Research, Legal Services Consumer Panel, 2010, *Quality in Legal Services*.

³ Legal Services Board, Sullivan, R, 2011, *Quality in legal services: a literature review*.

made up entirely of officials from the Agency without appeal rights would produce a system with lower safeguards than elsewhere.

- 35.1 For example, in Scotland, the Civil and Criminal Quality Assurance Committees comprise nine members, at least 5 of whom are solicitors, with lay representatives and representatives of the SLAB. Under this model, the SLAB meets the costs of remuneration and training for reviewers, but not the administrative costs of the Scheme. Both Schemes contain a right of appeal to the Court of Session in terms of registration sanctions. This operates in a context in which costs are met by the public purse. Given that the proposed model is to be 'self-financing', the case for this representation is greater still.
- 36.1 Accordingly, the Society believes that a process of appointment of experienced solicitors to the Registration Panel should be undertaken to reflect the importance of professional involvement, as reflected in the Scottish model. This representation is critical to ensure that accountability over the level of the levy and operation of the Scheme is based on a full understanding of the position of practitioners on the ground.
- 37.1 The Society reiterates our view that any Scheme should be publicly funded, but should the Department insist on funding the Scheme via a levy on practitioners, a number of issues requires to be taken into consideration. In particular, the apportionment of fees and whether to adopt a uniform fee across all practices or attempt some weighting either according to firm size or proportion of legal aid work, the Society takes the view that this question is more appropriately answered when greater details about the specific proposals are forthcoming.
- 38.1 The balance of considerations on this issue will be influenced by overall burden, estimated costings and the regulatory approach to be adopted. As the Department have indicated that the development of this Scheme is to be evolutionary and collaborative, the Society would welcome further discussion on the question of fees as the proposals develop. Until that detail is forthcoming, the Society will reserve our position on this matter.
- 39.1 Similarly, the question of the Code of Conduct needs to be reconsidered as the proposals for the Scheme develop. The Society is strongly of the view that the Code needs to be subjected to forensic scrutiny as the detail of the regulations is developed. The Code itself should be subject to consultation and further discussion at that point, as its interpretation will be a central role in the cost burden and efficiency of the Scheme. The fees, the Code of Conduct and the audit proposals are closely intertwined and will determine the character of the Scheme as it is implemented.

Appeals

- 40.1 This concern to establish a right of appeal as a final safeguard is made more important due to the potential severity of sanction open to the Registration Panel. The reputational impact of failed audits and the ultimate sanction of de-registration of services means that provision for appeals is consistent with the regulatory scope of the Scheme. Given that Scotland is a more appropriate comparator in terms of the size of the profession than the much larger population in England and Wales, it is clear that the Scottish model recognises the importance of practitioners being in the predominant role in terms of governance.
- 41.1 This model recognises the incentives that professional regulators have in preserving the reputation of the profession by sanctioning those who fail to meet these standards. It is the presence of such incentives and the knowledge and expertise required which indicate the importance of amending the draft Scheme to guarantee practitioner involvement in a partnership model.
- 42.1 As noted with the operation of peer review elsewhere and the use of solicitors as auditors within the model in the Netherlands as mentioned in the Consultation Paper, the Society feels that practitioners could be used effectively as auditors in line with agreed standards of practice. This would also help to ensure a proportionate, targeted and cost-effective model of providing quality assurance in legal aid services.

Conclusion

The Society is grateful for the opportunity to submit a response in respect of the consultation on the proposed introduction of a Statutory Registration Scheme for all providers of publicly funded legal services in Northern Ireland.

We trust our contribution is constructive and we are happy to meet with the Department to discuss any of the issues raised in our response.

We would like to be kept informed of any subsequent proposals formed as a result of this consultation and also any changes to the overall policy direction of the topic under discussion along with a stated rationale.

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