



Department of  
**Justice**  
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**Introduction of a Statutory Registration Scheme  
for all providers of Publicly Funded Legal  
Services in Northern Ireland**

**Targeted Consultation**

**February 2017**

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## **Annexes**

- A Draft - The Access to Justice (Registration) Regulations (Northern Ireland) 2017**
- B Draft – The Criminal Legal Aid (Registration) Rules (Northern Ireland) 2017**
- C Draft - Civil Legal Services (Disclosure of Information) (Amendment) Regulations (Northern Ireland) 2017**
- D Draft - Criminal Legal Aid (Disclosure of Information) (Amendment) Rules (Northern Ireland) 2017**
- E Code of Practice**

## 1. Introduction

- 1.1 The Department of Justice (the Department) is engaged in the final steps to introduce a *Statutory Registration Scheme for all providers of publicly funded legal services in Northern Ireland (the Scheme)*. This includes a targeted consultation on enabling legislation and the Code of Practice. This builds on the public consultation<sup>1</sup> which took place between 7 July and 24 October 2014. The Post Consultation Report<sup>2</sup> (the Report) setting out the policy intent was published following a briefing to the Justice Committee on 16 April 2015. The underlying purpose of the Scheme is to put in place arrangements to ensure that those who receive public funding for the delivery of legal services provide the appropriate level and quality of service to their clients and the public purse.
- 1.2 The Report noted the Department's intention to introduce the Scheme in a phased manner. The initial stage, with registration and self-certification of compliance with policies and procedures, was intended to allow for the further development of the Code of Practice and fee charging methodology. It was envisaged that this initial stage would be free to the legal profession, with formal charging commencing in phase two. Since publishing the Report the Department has continued to develop the Code of Practice, including the Audit and Compliance Framework, and has formalised the fee charging methodology.
- 1.3 In the intervening period, the Northern Ireland Audit office (NIAO) has published a further report into Managing Legal Aid<sup>3</sup> which was critical of the delay in implementing the Scheme.
- 1.4 The Public Accounts Committee (PAC) has also been highly critical of the delay in implementing the Scheme. When Departmental officials appeared before the PAC in June 2016, the Committee Members

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<sup>1</sup> <https://www.justice-ni.gov.uk/consultations/introduction-statutory-registration-scheme>

<sup>2</sup> <https://www.justice-ni.gov.uk/publications/post-consultation-report-statutory-registration-scheme>

<sup>3</sup> <https://www.niauditoffice.gov.uk/publication/managing-legal-aid>

noted that the enabling legislation for the Scheme (the Access to Justice (Northern Ireland) Order 2003) had been in place for a considerable period of time and recommended that the Scheme should be implemented without further delay.

1.5 This consultation is a necessary step to enable the introduction of the Scheme during the 2017/18 financial year. This will include the registration of legal practitioners on the Scheme and the commencement of audit and compliance visits by the end of the 2017 calendar year.

1.6 The term Department is used extensively throughout this document, and the draft legislation; on occasions the documentation also refers to the Legal Services Agency Northern Ireland (the Agency). While the two terms are used interchangeably, it should be noted that the Department has responsibility for the policy and legislation to introduce the Scheme; the Agency has direct responsibility for the operation of the Scheme.

1.7 It should also be noted that the Agency has been fully involved in the policy development of the Scheme and will be responsible for the practical introduction and operational delivery of the Scheme.

## 2. **Policy Intent**

2.1 The policy developed during the Consultation, and further refined in the intervening period, requires that:

- all firms of solicitors, individual solicitors and barristers, whether in private practice or working in the voluntary sector (operating under a waiver issued by the Law Society) will be required to register with the Department in order to continue to provide publicly funded legal services;

- the requirements for registration will be set out in a Code of Practice;
- compliance with minimum quality standards, as detailed in the Audit & Compliance Framework section of the Code of Practice, must be evidenced by self-certification, audit and compliance visits, administrative desktop reviews, customer surveys and complaints reviews;
- the Agency will have the power to impose sanctions and conditions, suspend and exclude suppliers who fail to meet or maintain requisite standards;
- the Scheme must be fully self-financing in terms of costs incurred in administering the Scheme, and ensuring compliance, which will be recouped through fees charged to those registering; and
- the data provided at registration may also be used to help the Agency meet its monitoring obligations under section 75 of the Northern Ireland Act 1998.

2.2 The Scheme will be developed further with a second Phase which will include:

- the development of an education and support programme relevant to legal aid (which will be taken forward by the Agency in collaboration with the Law Society and Bar Council); and
- quality assurance mechanisms will be developed which may include peer reviews in due course.

### 3. **Purpose of the Consultation**

3.1 This consultation is being progressed to fulfil the Department's statutory obligations as required by Article 36(5)(a) of the Access to Justice (Northern Ireland) Order 2003; and Article 36(3) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. It aims to progress the policy as outlined above and is targeted at the legal profession, which will directly be impacted by the Scheme, the Attorney General, the Magistrates' Courts Rules Committee, the Crown Court Rules Committee, the County Court Rules Committee and the Office of the Lord Chief Justice. It provides consultees with the opportunity to identify any practical issues which the Department should consider in finalising the arrangements to introduce the Scheme.

3.2 This consultation focuses on:

- draft Rules and Regulations to implement the Scheme;
- the Code of Practice, including:
  - the Audit and Compliance Framework;
  - the fee charging methodology to achieve full cost recovery;
  - the Review Panel membership;
- the Impact Assessment and the Equality Screening documents; and
- the Regulatory Impact Assessment (RIA).

3.3 The Department would welcome comments on any aspect of this consultation but would particularly welcome views on the fee charging methodology (Section 5.3); the Compliance, Audit and Review Panel (Section 5.4); and the draft Rules and Regulations, attached at Annexes A and B. In addition some further consequential amendments have been included to the Disclosure of Information instruments governing civil legal services and criminal legal aid and these are attached at Annexes C and D.

3.4 Following consideration of responses to this consultation exercise, final legislation will be advanced through the draft affirmative procedure to

make provision for the operational framework required to implement the Scheme. The Justice Committee of the NI Assembly has responsibility for scrutiny of these proposals and will be consulted before the legislation is considered by the wider Assembly.

#### 4. **Responding to this consultation**

4.1 The Department invites views on any issues raised by this consultation document, the Impact Assessment Screening, the Equality Screening and Regulatory Impact Assessment documents. Responses are welcome from organisations and individuals. If responding on behalf of an organisation, please make it clear who the organisation represents and, where appropriate, how the views of the members were assembled.

4.2 Please submit your response to this consultation to:

Consultation Co-ordinator  
Public Legal Services Division  
Department of Justice  
Massey House  
Stormont Estate  
Belfast  
BT4 3SX  
Email: [plsdresponses@justice-ni.x.gsi.gov.uk](mailto:plsdresponses@justice-ni.x.gsi.gov.uk)  
Tel: 028 9016 9520  
Text phone: 028 9052 7668

4.3 Responses must be received by **16:00 on Friday 24 March 2017**.

4.4 A copy of this consultation will be placed on the Departments website at [www.justice-ni.gov.uk](http://www.justice-ni.gov.uk).

4.5 You may make additional copies of this report without seeking permission - we would invite you to access the document through our website and print or make copies yourself. If you do not have access to the internet or, if it would assist you to access the document in an alternative format or a language other than English, please let us know and we will do our best to assist you. Please contact the Consultation Co-ordinator with your specific request.

## 5. IMPLEMENTATION PROPOSALS

### 5.1 Overview of Scheme

5.1.1 The Scheme, with initial registration and self-certification of suppliers' compliance with policies and procedures, assured by the Agency through audit and compliance checks, and sanctions (where appropriate), will be implemented once the legislation is commenced.

5.1.2 The Scheme will help provide the necessary assurance on the use of public funding by ensuring that all those registered to provide publicly funded legal services:

- sign up to a Code of Practice;
- commit to a minimum standard of service delivery and record keeping; and
- certify that they are compliant with the conditions for registration.

All suppliers who register will be subject to:

- audits of compliance; and
- sanctions for non-compliance.

5.1.3 The Agency is currently engaged in a digital transformation project which will replace the current manual processes for legal aid with new on-line IT systems. The first phase of the digitalisation process, which will involve suppliers providing on-line information in relation to individual and firm registration details, is planned to be operational from September 2017.

5.1.4 The legislation has been drafted to allow a short interim period to facilitate the input of pre-registration details for the Scheme. Suppliers, and Compliance Managers, will be required to input registration details, as outlined in the Code of Practice, onto the Agency's IT system. There will be an initial period of up to eight weeks to allow these details to be uploaded and verified by the Agency. It should be noted that the

Agency will require some time to authenticate the information provided and therefore it is envisaged that there will be a cut-off point part way through this eight week period. If registration details are received after the cut-off point, the Agency will not be able to guarantee that these applications will be processed in time for the commencement of the Scheme and therefore those suppliers may be excluded from providing publicly funded legal services until such times as their Registration is approved. Operational guidance on the use of the system will be published by the Agency in due course and this aspect will be detailed further in that guidance.

5.1.5 Once the Agency has verified the application, and the supplier has paid the appropriate Registration Fee, the supplier will be registered to provide publicly funded legal services. From this point forward, anyone wishing to provide publicly funded legal services must be registered. This will include the continuation of work, or representation, which has been certified for legal aid prior to the Scheme's introduction. If a supplier chooses not to register, or does not provide the information to the Agency within the specified period, they will be unable to continue to represent the legally aided client and must arrange for the transfer of any work to a registered supplier. No remuneration will be paid for any publicly funded work undertaken from the date the Scheme is implemented if the supplier is not registered.

5.1.6 The full costs of the Scheme must be recovered and therefore those registering will be required to pay a fee at the point of registration. The methodology for recovering the cost of the Scheme, through fee charging, is detailed in this document. The methodology developed will allow the Agency to recover all costs directly associated with the Scheme as required by Managing Public Money Northern Ireland (MPMNI). MPMNI sets out the main principles for dealing with resources used by public sector organisations in Northern Ireland.

5.1.7 More detailed proposals, to introduce the education and support programme and peer, or other professional conduct reviews, will be developed and may be subject to further targeted consultation in advance of later implementation. These further developments may impact on the costs of the Scheme and will be detailed in future consultations.

## 5.2 **Legislation**

5.2.1 It is the Department's intention to progress draft Rules and Regulations, namely, The Criminal Legal Aid (Registration) Rules (Northern Ireland) 2017, and The Access to Justice (Registration) Regulations (Northern Ireland) 2017, to enable the introduction of the Scheme. Since the implementation of Civil Legal Services, from 1 April 2015, the Agency are currently operating under:

- a. the Access to Justice (Northern Ireland) Order 2003; for civil legal services and, criminal appeals to the Court of Appeal; and
- b. The Legal Aid, Advice and Assistance (Northern Ireland) Order 1981; for criminal legal aid.

5.2.2 Both of these parent Orders make provision for a registration scheme, and both make provision for a fee to be imposed.

5.2.3 The Scheme will operate with a single application process pointing to both pieces of enabling legislation. An application to register to the Scheme will be accepted as an application to register for all areas of legal aid work (subject to any conditions stipulated on individual professional practising certificates) with a single fee being payable. Once registered, the supplier will be able to undertake publicly funded work under either, or both, pieces of legislation, as applicable. Any terms affecting a provider's practising certificate issued by their Regulatory Body will automatically apply to their registration on the Scheme to provide publicly funded legal services.

5.2.4 The draft Access to Justice (Registration) Regulations (Northern Ireland) 2017 (the Regulations), attached at **Annex A**, are being made under powers conferred by Article 36 of the Access to Justice (Northern Ireland) Order 2003. The draft Criminal Legal Aid (Registration) Rules (Northern Ireland) 2017 (the Rules), attached at **Annex B**, are being made under Articles 36(3)(b) and 36B of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. Both instruments will be progressed through the Assembly in accordance with the draft affirmative procedure, and commenced to support implementation of the Scheme.

5.2.5 In addition, the Department is making some consequential amendments to the Disclosure of Information instruments governing civil legal services and criminal legal aid to ensure that information retained in relation to the Scheme is governed in the same manner as other legal aid information. The draft Civil Legal Services (Disclosure of Information) (Amendment) Regulations (Northern Ireland) 2017, attached at **Annex C**; are being made under powers conferred by Article 32(1) of the Access to Justice (Northern Ireland) Order 2003. The draft Criminal Legal Aid (Disclosure of Information) (Amendment) Rules (Northern Ireland) 2017 attached at **Annex D**, are being made by powers conferred by Articles 36(3) and 38A of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. Again, both instruments will be progressed through the Assembly in accordance with the draft affirmative procedure, and commenced to support implementation of the Scheme.

### 5.3 Registration Fees

5.3.1 MPMNI Chapter 6<sup>4</sup> deals with fees, charges and levies, and details specific rules about how the charge for access to public goods or services should be determined. It clearly states the requirement for full cost recovery therefore, the Scheme must be self-financing.

5.3.2 To ensure the Scheme remains compliant with the MPMNI guidelines the Agency has provided costings necessary to enable the Scheme to be implemented and deliver the necessary compliance audits going forward. The costs include the staff team, running costs and overheads directly attributable to the Scheme. The Year 1 costs have been estimated at £698,500, which includes a one-off cost of £1,099 in this first year. These costs are detailed in the table below.

Cost Centre	Annual Cost (£)	One-Off Cost (£)	Total Year 1 Cost (£)
Salary	514,529	0	514,529
General Overheads	109,630	0	109,630
Professional Memberships	1,555	0	1,555
Training Costs	4,200	0	4,200
IT Costs	22,508	1,044	23,552
Travel Costs	9,358	0	9,358
Subsistence Costs	757	0	757
Transactional Costs	11,280	18	11,298
Cost of Capital	23,584	37	23,621
<b>Total</b>	<b>697,401</b>	<b>1,099</b>	<b>698,500</b>

<sup>4</sup> <https://www.finance-ni.gov.uk/publications/managing-public-money-ni-chapter-6-and-associated-annexes>

- 5.3.3 It should be noted that the annual costs in any given year may fluctuate and the estimate above provides for a fully staffed team of 12 staff operating at full capacity in delivering audits over a 12 month period. The costings are also based on what is considered necessary to meet MPMNI requirements, however, the Agency will engage with Department of Finance (DoF) officials in the coming months to ascertain if there are any costs which could be absorbed internally and not passed on to those registering. As it is envisaged that registration for the first year will commence in September 2017 the fee for that year will be proportionate to the number of months that the Scheme will be operational.
- 5.3.4 The Agency will monitor the standard of service provided by all suppliers of publicly funded legal services in line with the Code of Practice as detailed at **Annex E**. Compliance Managers and barristers will be required to supply to the Agency any information which it considers necessary for the purposes of monitoring this performance. Performance monitoring will primarily take place via onsite audits conducted by the Compliance Audit team which will be conducted in accordance with Public Sector Internal Audit Standards. The purpose of the compliance audits is to determine a level of assurance from the suppliers of publicly funded legal services against the requirements of the Code of Practice. Where assurance levels are less than satisfactory the Scheme Administrator will make recommendations to suppliers to assist them in achieving the required levels of compliance.
- 5.3.5 The Compliance Audit team will process annually, all applications received from suppliers to be registered and accepted onto the Scheme. Thereafter, the Compliance Audit team will deliver approximately 1,520 routine compliance audit days. These routine compliance audit days will be divided between days where Agency staff will be physically present at supplier's premises conducting audit fieldwork, and days where compliance audit staff are planning, writing up and reviewing routine compliance audits. In addition to routine

compliance audits the Compliance Audit team will be resourced to deliver additional themed and cross cutting audits as well as extended audits if required.

5.3.6 Registration will normally last for 12 months and the current proposal is that suppliers will register in June each year. All suppliers will be informed in April of the registration fee for the incoming year. The fee will be paid at the point of registration each year and, when the Agency's digitalisation platform is fully operational, will be based on the total legal aid payments in the preceding financial year. For an initial period the costs will be based on the most recently available financial information which is likely to be the total payments of the financial year two years prior, for example, to register in September 2017, the fee will be based on the 2015/16 payments.

5.3.7 In developing the fee charging methodology the Department considered a range of options to recover the costs of the Scheme. A number of the factors and assumptions that were considered in the context of this work are highlighted below.

5.3.8 The payment data used in developing the fee was for the totality of payments made to solicitors and barristers undertaking legal aid work in the 2013/14, 2014/15 and 2015/16 financial years. The data has been compiled from the Agency's management information system. The information used to develop the Fee relates to net **profits costs only**; disbursements and VAT have been excluded.

5.3.9 The working assumption is that between 70% - 100% of all suppliers, both solicitor firms and counsel, who received payments for legal aid work in the years examined, will register to continue to provide publicly funded legal services when the Scheme is introduced. While this scenario assumes that suppliers with a higher profit cost are more likely to continue to provide this service, the Department has been careful to set the Registration Fee for those in the lower bands at a

level which would not be prohibitive for anyone to register. However, for the purposes of modelling the Fee, the assumption is that approximately 80% of those paid in the financial years considered will register; this assumes a registration rate ranging from 60% in the lowest band increasing to a 95% registration rate in the highest bands. We have not used 100% in any band to allow for changes to business practice, retirements etc.

5.3.10 The methodology to recover the annual Scheme costs introduces fees across a number of bands based on income brackets. The structure is split across 16 bands which range from payments below £10,000 to payments over £2million per annum; these bands reflect the current, and historic, levels of legal aid expenditure. For each band, a fee will be calculated based on the midpoint of that band, and will apply to each supplier falling within boundaries of that band.

5.3.11 The fee to achieve full cost recovery is calculated using a percentage which is derived by multiplying the expected supplier uptake in each band by the midpoint of the expenditure range in that band and taken as a proportion of the full costs to be recovered. This percentage figure is then applied to the midpoint of each band to calculate the fee applicable to all suppliers falling within that band. The fee will change each year as the percentage rate to be applied will be dependent on the overall total profit costs paid in any given year, the costs to be recovered and the assumptions, and experience, of uptake of suppliers registering to the Scheme.

5.3.12 Based on recovering £700,000 per annum, and using the most recently available data from the 2015/16 financial year, the fee ranges from £53 in the lowest band to £21,200 in the upper band. The fee table, in the Code of Practice, shows the full range of fees using net payments from with the 2013/14, 2014/15 and 2015/16 financial years. As can be seen from these tables the percentage to be recovered in any of these years would have been in the region of 1%.

5.3.13 It is possible that if more than the estimated suppliers register the Department may re-coup more than is required to cover the actual annual costs; the Department has discussed this scenario with the DoF and steps will be taken to even out any surplus or deficit across financial years. By way of example, and as is the case with other similar full-cost recovery initiatives, if the costs to be recovered for the operation of the Scheme are £700,000 per annum, and more suppliers registered than is anticipated, the fees paid in that year could total £750,000. As this would create a surplus against what was actually necessary to meet MPMNI guidelines, the amount to be recovered the following year would reduce by the surplus; for this example £50,000. Therefore for the following year the total to be recovered would be £650,000 and the fees would therefore be calculated against the lower amount. Conversely, if the Department was left in a position where there was a deficit of funds in any given year, this shortfall would also need to be recovered the following year by an increase in fees. There will be no refund of, or increase to, fees mid-year. It should also be noted that where any deficit or surplus falls within a tolerance to be agreed with DOF, (usually within the region of 1-2%) these costs will not be added to, or subtracted from, the next year's total to be recovered.

5.3.14 When considering the challenge of how best to recoup the costs of the Scheme the Department modelled a number of scenarios to split the costs between the two branches of the profession. For example, consideration was given to allocating the recoverable costs by dividing the total costs of the Scheme by the number of solicitors firms and barristers at a ratio broadly based on the level of payments received in the financial years.

5.3.15 Using this approach; in 2015/16 the net payments to solicitors and barristers was approximately £70m; £46.0m to solicitors firms and £24.0m to counsel; 66% and 34% respectively. The modelling for recovery of the Scheme costs was also therefore developed using the

same overall ratio. Based on the running costs of £700,000 the full amount to be recovered from solicitors was £460,000 and from counsel £240,000. The outworking of this approach would have meant that in any given band solicitors would pay proportionality more than a barrister in the same band, who was receiving broadly the same amount from legal aid.

5.3.16 Having considered the implications of this approach, the Department did not deem it appropriate to ask individual solicitors firms to contribute a bigger proportion of the overall costs when they were receiving the same amount of remuneration as counsel. The Department recognises that it could be argued that a larger proportion of the audit costs will be involved in assessing solicitors' compliance with the Code of Practice, and therefore they should pay a higher fee. Conversely, it may equally be the case that files relating to a barrister in the higher earning band could be audited on an equally regular basis via the solicitor's files. The Department was also cognisant that solicitors have, on the whole, larger outgoings for staff, premises etc than counsel would have.

5.3.17 Consideration was given to a number of other options to distribute the cost of the Scheme. For example, the Department considered dividing the total costs of the Scheme by the number of fee-earners / suppliers (i.e. individual solicitors and barristers). This approach was discounted as the Department does not have sufficient information pertaining to the number of individual solicitors in each firm who undertake legal aid work. In addition the Department did not consider it equitable that a firm with a large number of solicitors, but undertaking very limited legal aid work, should be expected to pay the same fee as a firm with a similar numbers of solicitors but who were in the higher payments band. It was also considered that this approach would add unnecessary complexity to the transparency of the fee methodology and calculation.

5.3.18 In recognition of comments received previously from the Bar, to introduce lower payments for the 'Young Bar' members, consideration was also given to apply bands based on 'title' or years since calling for barristers. That is, Queens Counsel, or long-standing juniors, would pay proportionately more than barristers of less than 5 years calling. This was discounted on the grounds that seniority within the Bar did not necessarily equate to payments from legal aid. It was not considered appropriate to assume that a QC, who receives limited remuneration from legal aid, should be expected to pay the same fee as a QC undertaking mostly publicly funded representation simply because of their years of standing within the profession. The Department is of the opinion that the potential impact on the Young Bar has been mitigated by the fee proposal being adopted as it reflects lower fees for lower payments with an increasing scale reflecting higher payments in the higher bands.

5.3.19 The fee at the lower end is considered to be set at a level which would not exclude anyone from continuing to undertake legal aid work, nor is the fee at the higher end deemed disproportionate against the level of payments in those bands. Suppliers will be aware of legal aid payments made throughout the year and, while they will not be able to fully calculate the fee due the following year, they should be able to predict the band they will fall within at next registration. When the digital transformation project is complete suppliers will be informed how much they have received in legal aid payments at the beginning of April each year and also indicate the fee to be paid if the supplier chooses to register for the incoming year. The choice of registration date in June will provide transparency for suppliers as the rates will be published in advance of registration, allowing suppliers to make a judgement call on whether the fee represents a valid business overhead to continue to deliver publicly funded legal services, and take steps as appropriate.

5.3.20 The Department considers this to be the most equitable approach to setting the fee as it does not adversely differentiate between the

different branches of the profession and each supplier pays against their legal aid payments level. We would welcome consultee's views on this approach.

#### **5.4 Registration, Compliance, Audit and Review Panel**

5.4.1 When registering all suppliers, individual solicitors, solicitors firms and barristers, will be required to self-certify and provide required evidence that they comply to the Code of Practice as set out at **Annex E**.

5.4.2 Where the Agency is satisfied that an application does not meet the statutory requirements for registration, it shall refuse the application and notify the applicant of the reasons for this decision and of their right to request a review of the decision.

5.4.3 The Agency reserves the right to refuse any future application for registration if not satisfied that the applicant is capable of discharging the responsibilities under the Scheme, or where the application is made within any period of an Excluding direction.

5.4.4 At Registration all solicitors firms, and sole practitioners, will be required to provide evidence of compliance with the basic entry requirements for registration, namely, that the following policies and procedures are in place:

1. Policy regarding standards for professional conduct;
2. Procedure for personal work and time recording, where appropriate;
3. Procedure for case recording;
4. Description of system of financial recording;
5. Procedure for training and sample training record;
6. Procedure for supervision of staff;
7. Procedure for document control;
8. Procedure for case review;
9. Procedure for client reporting; and
10. Procedure for complaints.

Voluntary sector organisations will also be required to provide a copy of the waiver issued by the Law Society.

- 5.4.5 Firms (and Voluntary organisations) will also be required to nominate a Compliance Manager who will be the Agency's primary point of contact for that firm. The Compliance Manager will be accountable for the firm's compliance with the Scheme and as such must be a registered solicitor. It is also preferable that the Compliance Manager has a sound understanding and knowledge of legal aid as Agency staff will be communicating directly with this person when undertaking compliance audits and for any investigations.
- 5.4.6 Barristers will also be required to provide evidence that they adhere to the Code of Practice.
- 5.4.7 The Agency will undertake compliance audits on a risk-based approach to reflect the Public Sector Internal Audit Standards (PSIAS) risk ratings. This risk-based approach differs from the three year rolling model highlighted in the Post Consultation Report. As noted at paragraph 1.2 the Department has further developed the Scheme and a number of the initial proposals have been refined, including this aspect.
- 5.4.8 The compliance monitoring will be planned using a risk-based approach which will ensure audit resources are deployed across all spending areas to ensure appropriate coverage is achieved. Audits will also be developed to be cross-cutting and to take account of emerging trends based on management information available.
- 5.4.9 It is the Department's intention that details of the audits to be conducted will be published in advance. This may be twofold. First, a high level yearly audit plan detailing the % of firms across each fee band that will be audited each year will be published. A second list, providing details of the solicitors and firms who will be audited will be

published on a quarterly or monthly basis. The Department considers the publication of this second level of detail to be necessary to ensure barristers are advised which firms will be audited and therefore if there is the potential that their work will also be included in those audits. The Department would welcome views on the publication of this level of detail and particularly if practitioners have any specific concerns that a list detailing the names of firms to be audited is available in the public domain.

5.4.10 This approach does not imply, nor is the Department inferring, that the firms receiving the larger amounts of funding from the legal aid fund would be in any way non-compliant with the Code of Practice. It is simply setting the context under which audits and compliance activities will be undertaken.

5.4.11 Currently the Agency has statutory provision to require suppliers to provide files on legally aided cases, on request, for inspection and scrutiny and this situation will continue when appropriate. It should however be noted that the Department will not be seeking to audit evidence of compliance of work undertaken before the introduction of the Scheme, as the legislative instruments would not provide for the necessary powers to inspect files before the Scheme is operational. The minimum standards do however reflect what is already expected from the profession's regulatory bodies and therefore all suppliers should already be evidencing compliance, and be in a position to self-certify that this is the case at point of registration.

5.4.12 The audit process of Routine, Extended, Special and Final Audit is detailed in the Audit and Compliance Framework section of the Code of Practice. The assurance ratings and recommendation priorities are also detailed in the Code.

5.4.13 Following each audit where compliance has found to be less than satisfactory, a draft report will be issued to the Compliance Manager or

barrister concerned giving them an opportunity to comment before the report is finalised. The final report will then be issued with detailed findings and, where appropriate, recommendations setting out what is required in order to evidence compliance.

5.4.14 The Agency may also at its discretion issue a Warning to the supplier advising of further sanctions which may be imposed should they fail to rectify the matters identified in the report.

5.4.15 Where, following a final or special audit, the report indicates limited or unacceptable assurance in complying with the Code of Practice, consideration will be given to sanctioning the firm, solicitor within the firm, or barrister. The Compliance Manager (and individual solicitor or barrister, if applicable) will be informed in writing and may make formal written representations, on the findings within the report, and the sanctions to be considered.

5.4.16 The Scheme Administrator shall consider the report completed by the compliance auditor, and any written representations received from the Compliance Manager or barrister, before determining the appropriate sanction. The sanction recommended by the Scheme Administrator will then be subject to internal quality Assurance by a member of staff from the Agency's senior management team.

5.4.17 The supplier will be notified in writing of the sanction decision and they may request a review of that decision within 28 days of the date of the notification. If the decision is to sanction for an overall failure, the supplier (individual or firm) will be de-registered.

5.4.18 Where the supplier is de-registered (which may be accompanied by Excluding directions precluding the supplier from being able to register for a set period of time); or where the decision is to suspend registration, or impose conditions or restrictions; the Administrator shall inform the appropriate regulatory bodies as soon as is practicably possible of the decision. Where a supplier is de-registered, any legal

aid certificates outstanding must be referred to another registered provider.

5.4.19 Where the legislation allows, and a supplier requests a review of the Agency's decision to sanction, the Administrator will convene the Review Panel and invite the supplier to make written or oral representations.

5.4.20 The Department accepts that decisions taken by the Panel could have severe implications for suppliers, in particular, if the Panel decides to remove a supplier from the Scheme. Respondents to the original consultation offered a number of suggestions regarding the membership of the Panel. In response it was noted:

*The Department has taken on board the concerns raised by respondents, and the composition of the Panel will now include at least one suitably skilled senior official external to the Commission (now Agency).'*

5.4.21 To ensure that there is transparency and accountability for these decisions the Department has now decided that the Panel will consist of the following membership:

- a senior officer within the Agency (at Director level or above) who has not been previously involved in the decision making process regarding the supplier in question;
- a senior officer of the Department (at Senior Civil Service level);  
and
- a senior officer within the Government Legal Services Department (at Senior Civil Service level).

5.4.22 Other Government officials with specific expertise relevant to the issue at hand, for example accountancy or fraud, may be asked to provide advice to the Panel as necessary.

5.4.23 The Panel shall consider each report and any written or oral representations, and decide whether to affirm, amend or substitute the decision of the Administrator. The supplier will be notified of the Panel's decision and reasons following review. The decision of this Panel will be final.

5.4.24 Where fraud has been detected or is suspected, the Agency will notify the appropriate authorities without delay and take action as necessary to protect legal aid funds. In doing so the Agency may impose such sanctions as it deems appropriate to withhold payment, limit, suspend, or withdraw any individual or firm from providing legal services funded from legal aid.

## **5.5 Information Sharing protocols with Regulatory Bodies**

5.5.1 The Department recognises that much of the information required of those registering with the Scheme will also be required by the respective regulatory body in order to issue the Practising Certificate; or will emanate from that body in respect of any changes affecting the individual's ability to practice. In order to minimise duplication the Agency will seek to agree information sharing protocols with the Law Society and Bar Council to ensure that processes are introduced for timely confirmation or transfer of data and mutually beneficial notifications. Each individual wishing to register for the Scheme must consent to the sharing of their data for this purpose.

5.5.2 Where it is practical and more efficient for evidence to be provided by the regulatory body, such as details pertaining to the validity of a practising certificate or courses attended for relevant CPD points, the protocols will set out agreed responsibility. However, individual suppliers should note that should their regulatory body be unwilling or unable to provide the necessary evidence to facilitate timely registration, the requirement to do so will revert to the individual supplier. The obligation to ensure that complete, accurate and timely

information and evidence is recorded will ultimately rest with the supplier applying to register.

- 5.5.3 The Agency will seek to confirm evidence of relevant CPD course attendance with the regulatory bodies, though each individual provider will be required to provide evidence or address queries should the need arise.

## **6.0 Impact Assessments**

- 6.1 As part of the public consultation process the Department published a draft Equality Impact Screening (EIS) and Partial Regulatory Impact Assessment (RIA). No substantive comments were received in direct response to either the EIS or the RIA. In responding to the main consultation however, the Law Society stated *'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.'* Respondents from the voluntary sector requested that they be exempt from fees, and the Bar made verbal representations that special consideration is given to newly qualified barristers in their early years of building a practice.
- 6.2 The Department sought additional information to assist in ascertaining any adverse impact; and stated in the published post-consultation report that the collection of fees will be deferred to allow the representative bodies to collate and forward any information for consideration and analysis so that the proposals can be tailored to take account of all available evidence. However none of the organisations to date has provided any evidence to show that, or to what extent, the proposals would have an unfair or negative impact on any section of the community or particular business model.

6.3 The Department has taken into account the lessons learned in the Pilot, the comments made by respondents during consultation and engagement, the advice of the Department's Head of Internal Audit, and the experience of Scottish Legal Aid Board (SLAB), to inform the policy proposals including costs projections. The costs of the Scheme must be recouped in full, and the methodology for the recovery of these costs is outlined in this paper.

6.4 The proposals have been screened in accordance with the Department's Equality and Regulatory Impact Assessment procedures. Impact assessments and these screening assessments have been published alongside this consultation document. They will be reviewed on receipt of any detailed evidence during targeted consultation discussions.

## **7. Next steps**

7.1 The Department now seeks the final views of the legal profession, through their regulatory bodies, the voluntary sector organisations affected, the Attorney General, the Crown Court Rules Committee, the County Court Rules Committee, the Magistrates' Courts Rules Committee and the Office of the Lord Chief Justice, during this targeted consultation. As the overarching Scheme proposals have already been set out in the Post-Consultation report, these discussions should focus on the draft Regulations necessary to implement the Scheme and the Code of Practice, which includes the Audit and Compliance framework, and Fee Charging methodology.

7.2 The Scheme will be implemented at the earliest opportunity once the legislation is laid.