



INTRODUCTION OF A 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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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.

April 2017

EXECUTIVE SUMMARY

Some key points in the Society's response include the following:

- The Society has reviewed the updated proposals for the Statutory Registration Scheme and considers that there remains a lack of detail and precision about the proposals. The tone of the Consultation is more expansive than its previous incarnation and this, along with the proposed timeline for introduction appears to be driven by the adverse findings of the PAC Report on legal aid, rather than a practical timeframe for implementation. The departure from a phased approach with opportunity for dialogue and development is noteworthy. This creates the potential for a rushed approach which may create unnecessary problems during the post-implementation period.
- The Society emphasises that it must be remembered that the rationale for the Scheme is to regulate the private contractual relationship between the Legal Services Agency (LSA) and legal aid providers in terms of quality assurance, not to regulate the legal profession generally. Breaches of the Scheme are therefore matters of private contract between the solicitors and the Agency concerned. The Society is the statutory regulator and all issues pertaining to the conduct of solicitors must be appropriately referred to the Society for investigation and action with a full report from and co-operation with the Department.
- The Society has concerns around the sharing of client information and matters in respect of the Data Protection Act and the importance of client confidentiality. It is clear that aspects of this Scheme will significantly increase the risk to solicitors as data controllers and the Society would welcome proposals from the Department as to how these risks are to be mitigated in practice. This should form part of a more focused discussion on the mechanics of the Scheme and how it is to operate. Given the ambitious timeframe for implementation, it is concerning that this detail is not forthcoming.
- The Department has not provided detailed information about the calculation of overall costs or how this is broken down into staffing, audit costs etc. There is no information over whether this was benchmarked against similar Schemes elsewhere. This lack of transparency is incongruous with the proposal that the Scheme should be funded solely by the legal profession in the form of a levy. We note in separate information provided that nearly 30% of the estimated solicitor providers will be paying annual fees of £1,325 and more.

- The Society remains of the view that it is not necessary to fund this Scheme through the issuing of a levy. Article 36 (4) of the Access to Justice (Northern Ireland) Order 2003 states that Regulations “may” make provision concerning charges, but does not require this nor does it stipulate that the Scheme should be fully funded by the providers of legally aided services. Equivalent schemes in other jurisdictions are met by public funding.
- The decision to opt for fully funding the Scheme by practitioners adds greater weight to the need for full transparency in the Scheme’s costs, governance and administration as well as the supporting infrastructure within the LSA required to contain costs. Although the Department is consulting on the proposed model of levying fees, it is not providing information as to how those fees have been calculated and the assumptions built into the approximate figure of £700,000.
- In addition to the above points, the Society notes that it is illogical to implement the Scheme fully in advance of the rollout and testing of the Digitalisation Programme. The Scheme will add considerable pressure to the administrative capacity of the LSA and its delivery is inextricably linked to digital improvements in the Agency. The stated imperative to implement this within the timescale proposed is mistaken and the Society would urge the Department to return to a phased approach and to provide further information.

SECTION 1

THE PROPOSED STATUTORY REGISTRATION SCHEME AND THE ROLE OF THE LAW SOCIETY

Implementation Principles

- 1.1 In the first Consultation Paper on the Statutory Registration Scheme in 2014, it was implicit that the Scheme proposed “*reflects standards that the profession are already required to comply with*”. Indeed in the Foreword the former Justice Minister recognised that the Scheme would be “*complementary*” to the role of the Society. The Society should not be any less involved nor should the Scheme adopt a different approach in the updated framework that is being proposed in 2017. The Society wishes to re-emphasise its commitment to ongoing engagement with the Department and the LSA.
- 1.2 In view of this aim, paragraph 5.1.7 of the Targeted Consultation Document (TCD) suggests that further reforms to the Scheme including peer review and the support programme “*may*” be subject to further targeted consultation. The Society is clear that *any* material changes to this Scheme **must** be subject to such consultation and that this requirement is of particular weight if the cost implications are to be borne by the profession. In addition, the Society considers that any changes to the Scheme in future, whether in terms of fees, the Code of Conduct or its administration, should remain subject to a general duty to undertake a consultation process with the profession and wider stakeholders.
- 1.3 Moreover, these consultations should include an appropriately considered Regulatory Impact Assessment. This would be in keeping with the expressed intentions of accountability and dialogue on the part of the Department. In that respect, further information on the proposed staffing complement which is envisaged to administer the Scheme and a detailed costs breakdown is necessary to fully consider the proportionality of the proposals. These are not currently detailed in Annex D to the Consultation Paper.
- 1.4 It is clear that the adverse findings on this issue by the Public Accounts Committee (PAC) has caused the Department’s proposals to shift from a phased approach to one punctuated by haste. Given that the audit framework is substantially different from that outlined in previous proposals, it is important that there is opportunity for its operating principles to be fully explored and their impact on costs considered. The danger lies in a rushed implementation resulting in a Scheme with operational flaws, which will require to be revisited at a later stage. In our response to the previous Consultation, the Society noted the Department’s commitment to a “*shared and explicit understanding*” of what constitutes quality.

- 1.5 The Society has significant concerns that the current proposals do not develop this aim by moving forward quickly without full transparency at the earliest opportunity. In this regard it is important to note that the PAC Report referred to the failure to “**design and operate** an effective registration scheme” (our emphasis).¹ It is implicit within this criticism that the effective design of a scheme logically requires transparency and engagement with those who can contribute to the design of the system. In that respect, the Society submits that a rushed implementation would only compound the criticism within the PAC Report and may fail to take into account relevant considerations as to its design. The recommendation to introduce such a scheme “without delay”² must be qualified and read in conjunction with the requirements for effective design, consultation and reflection on its operating principles.
- 1.6 Such an approach is regrettable, as a phased introduction with an advance pilot scheme in different regional locations, would allow for an ongoing review of the Scheme’s proportionality and cost-effectiveness. The need for regional variation reflects the need to measure the impact of the scheme on rural and urban practices serving communities most in need in terms of legal aid. This pilot scheme is of even greater weight given the material differences in the new proposals to those suggested in 2014.

We have consistently emphasised the importance of ‘road testing’ the proposals and the practical realities of implementation. We urged that it is important that the Department works closely with the Society and sets aside time to design an education programme to signpost the changes and requirements. This will allow firms to adjust to required changes in governance. The Department should also provide awareness raising sessions for practitioners at various locations, detailing the Scheme and its operation. The Society further notes that at present there appears to be no formal consideration for a review of the Scheme, which we believe is necessary to assess its proportionality and operational efficiency over time.

- 1.7 It is clear from the Post-Consultation Report issued in 2015 that the Department agreed with this analysis at that time. In it the Department stated:

“The Department intends to introduce the Scheme in three phases, commencing with initial registration and self-certification of compliance with policies and procedures. Officials will continue to refine the detail of further phases, to implement compliance audits, education and support; and a range of sanctions and quality assurance of customer

¹ *Managing Legal Aid*, 2016 at p. 11.

² *Ibid*, at p. 12.

service, through targeted consultation and engagement with the profession's regulatory and representative bodies."

The fundamental principles which supported the phased approach have not changed in the interim and the dangers from a rushed implementation remain.

The Proposed Model

- 1.8** The most recent proposals reflect a significant change in tone from the Department. In the previous proposal, the overriding ethos was one of providing a proportionate framework to demonstrate minimum quality standards of service in legal aid work, whereas this new model is characterised by a progressively increasing regulatory apparatus, with "cross-cutting" audits being proposed.

The Post-Consultation Report in 2015 referred to the LSA establishing thematic reviews to establish best practice and noted the potential for cross-cutting audits in Annex D. However, the current Consultation Paper refers to thematic and cross cutting audits without defining how these are triggered and the additional resources required. The Society is supportive of best practice learning but would caution this is achieved in a cost-effective, focused way. The Society supports the principle that the aims of the Scheme can be achieved with a minimised regulatory burden alongside a phased approach. We are concerned that the Department may have shifted its approach and is proposing a more complex model in a truncated timeframe.

- 1.9** In terms of the design, it is vital that there should be a focus on the fundamental rationale for the Scheme, which is to recognise quality assurance principles in private contracts between practitioners and the LSA. Issues relating purely to the conduct of practitioners must be solely within the remit of the Society as the statutory regulator and therefore any such issue arising within the operation of this Scheme must be referred to the Society by the LSA.

The Society considers that there should be a clear focus and the avoidance of 'mission creep' in respect of the Scheme and that any conduct issues should be referred without delay to the Society with a full report and co-operation from the LSA to assist our investigations. We welcome the Department's reinforcement of its views that registration should reflect quality standards solicitors routinely deliver but note that this should be borne in mind when assessing proportionality.

- 1.10** Additionally, an appropriate CPD agenda must be rolled out across the profession. Crucially, any new administrative demands on the body of

practitioners should be based on demonstrable evidence and should be cost effective. The Department refers in the Consultation Document to the Managing Public Money Northern Ireland (MPMNI) principles and how these require the Scheme to be “self-financing”. However the Department will be aware that under paragraph 6.1 of the Department of Finance’s MPMNI document, Departments or bodies may seek to subsidise the provision of certain services in order to lower costs for users. As a consequence, the Department is not “*obliged*” to seek full cost recovery; rather this is a conscious policy decision being made in a specific context. Article 36 of the Access to Justice (Northern Ireland) Order 2003 states that Regulations “may” make provision concerning charges, but does not require this, nor does it stipulate that the Scheme should be fully funded by the solicitors themselves.

- 1.11** We note in the Consultation that the Department intends to examine areas where costs may be absorbed by the LSA, as opposed to being charged to the profession. The first issue in respect of this is that the Department has not explicitly outlined its interpretation of the MPMNI guidelines and how this has shaped their thinking. Secondly, there is no indication as to whether these discussions are with a view to preventing further costs or to reducing the cost estimates provided. Without further detail on these issues, it is difficult to comment in precise detail on the Department’s rationale.
- 1.12** When weighed against the importance of encouraging the provision of legal aid services and the fact that in other jurisdictions these schemes are publicly funded, imposing a levy is not an obligation. The Society feels it is unjust to impose the running costs of the Scheme on legal aid practitioners from both branches of the profession. This is not the case in other jurisdictions where similar schemes are not so financed. That being so, the Society seeks clarification from the Department as to why the financial burden is to be passed to the service deliverer. Providers of legally aided advice and representation deliver these services on rates that were set decades ago with cuts to those rates on the horizon. To now suggest a charge to practitioners to fund a Departmental quality assurance scheme is unjust and seeks to obtain funds to support a basic function of government, which should be met from a Departmental budget/taxation.

Regulatory Protections and Proportionality

- 1.13** It is also important to note that the Society is implementing reforms to its regime for client complaints handling under the Legal Complaints and Regulation Act (Northern Ireland) 2016. Within the terms of the Act, a majority-lay Solicitor Complaints Committee will oversee the handling of client complaints matters, with the Legal Services Oversight Commissioner consulted on the Regulations promulgated by the Society to determine

professional standards. These arrangements are also to be funded by a levy on the profession at a time when there have been substantial cuts to legal aid remuneration, with further cuts on the civil side to follow. In addition to this, there is a proposal for a further levy on the profession to be introduced in relation to an enhanced framework of Anti-Money Laundering. This background of strong regulatory protections in the public interest underscores the need for a proportionate scheme directed towards its legislative purpose.

- 1.14** When considering these regulatory frameworks alongside the operation of Professional Indemnity Insurance (PII), there is a strong battery of protections for clients in place. The operation of our regulatory framework and requirements for CPD underscore our commitment to quality within the profession. It is against that context that the proportionality of the Scheme must be considered. If the Department insist on a model funded by the profession, it must make every effort to minimise/'right size' costs to focus on the key quality issues engaged. Moreover, the Department has not provided information concerning the use of sums raised through the operation of the Statutory Charge and whether this makes any contribution to funding legal aid. This information would be useful to take into account when considering the overall cost burden and the contribution of the profession.

Structure and Operational Aspects

- 1.15** In terms of the broad shape of the proposals, the Department is proposing the adoption of a risk based approach to inspection, a departure from the proposal in the Post-Consultation Report to adopt a three yearly cycle. The Society would welcome further detail on the principles being applied in this approach, its relationship with the principles of transparency and proportionality and an explanation as to why there has been a change of direction. In particular, the factors influencing audit frequency and intensity should be clearly set out for discussion and comment, as it is important that there are clear expectations concerning the operation of the Scheme. Transparency is a core element of the MPMNI principles and this should apply to charging structures, assessment processes and the resources deemed to be required to administer the Scheme. Without further detail on these issues, we cannot identify the assumptions made by the Department and how they have arrived at factors influencing audit intensity and cost levels.
- 1.16** We note that the Department has indicated that it proposes the publication of a two-pronged audit timetable. The Society has no issue with the disclosure of the number of firms within each fee band who will be audited in any given year. However disclosure of the names of firms and solicitors being audited is more problematic. This is because if we consider that the Department is proposing a risk-based approach, there may be reputational/competitiveness

issues for the solicitors concerned which is unwarranted i.e. audit intensity may be triggered by factors which do not reflect the performance of the persons/firms concerned. On that basis, the Society opposes this aspect of the proposal.

- 1.17 In line with our response to the earlier Consultation and considering the introduction of the Digitalisation Programme and efficiency savings, the Department should adjust proposed costs in line with efficiencies. There should be an annual review of efficiencies within the operation of the Scheme, to look at ways in which it can operate in a streamlined and more effective manner with minimal burden on businesses. For example, the Department has stated that the first phase of the Digitalisation Programme will begin in September 2017. We would welcome confirmation that it is still on track. Until the particulars of digitalisation are outlined in detail it remains unclear how the Scheme will operate and the impact it will have on the resources dedicated to practitioners' engagement with the LSA. The Society would expect that the Scheme and the Digitalisation Programme would work in complementary arrangement and therefore digitalisation should precede the introduction of the Statutory Registration Scheme. We would be grateful for your confirmation that this is what is intended.
- 1.18 The Scheme will add considerable pressures to the administrative capacity of the LSA and its delivery is inextricably linked to digital improvements therein. We are mindful that in the same report where the PAC urged the establishment of the Scheme they also noted that the Agency's "management information systems are archaic and not fit for purpose".³ The stated imperative to implement this within the timescale proposed is mistaken and the Society would urge the Department to return to a phased approach and to provide further information. The Society strongly urges the necessity for digitalisation to be up and running before the Statutory Registration Scheme is launched to allow time to resolve any teething issues. This would ensure the Scheme is at least introduced against the context of streamlined, stress-tested processes.
- 1.19 The Society would welcome sight of a specific timeline with regard to the Department's implementation of the Digitalisation Programme and crucially its assessment of what impact this will have on the Scheme. As digitalisation is aimed at reducing the LSA's administration costs, there would be an expectation that future savings could be passed onto practitioners with a lower fee framework for the Scheme. It should be noted that this Scheme is likely to create increased dialogue with practitioners on the LSA's expectations moving forward and it is important that the LSA retain the capacity to deal with these issues. It also reinforces the general principle that the phased approach to

³ *Managing Legal Aid*, at p. 6.

implementation has time and costs-saving implications which are likely to be foregone in any hurried implementation.

Defining Quality and Flexibility of Implementation

- 1.20** Where quality standards are imposed, an issue arises over how they are monitored and overall compliance with the Scheme is assessed. Research shows there are difficulties identifying holistic measures of quality⁴ and we note the discussion in the Consultation Document about the use of client surveys as a mechanism to assess quality. The Society stresses that client satisfaction has clear modicums of subjectivity and this should be taken into account when valuing it as an assessment tool. Measuring outcomes on a purely qualitative basis is problematic, due to case variations and the fact that the definition of ‘success’ can depend on the goals of the clients concerned. For example, in some instances taking more time is actually serving the client’s interests more effectively. Similarly, a disappointing outcome in a case may cause client dissatisfaction despite this bearing no connection to the quality of service received.
- 1.21** Moreover, developing client care is an important aspect of the reshaping of client complaints issues introduced by the Legal Complaints and Regulation Act (Northern Ireland) 2016. It has been consistently noted that the profession in Northern Ireland has a relatively low number of complaints from clients. Accordingly the Scheme should principally focus on quality assurance through case handling and file management as key aspects of service quality. This will avoid a double levy on the profession for what would substantially be the same exercise in terms of mapping best practice in client care. The importance of identifying an objective approach to defining quality of work based on file management further reflects the importance drawing on the knowledge of experienced practitioners through a peer review mechanism. The Society would welcome the Department’s views on how this could be implemented in a small jurisdiction.
- 1.22** We note that at paragraph 5.4.11 of the TCD the Department proposes that the LSA will continue to request files for inspection where this is considered to be appropriate. The Society would reiterate that the administrative burden on solicitors should be minimised and due care is exercised to avoid duplication. Associated costs of delivering and returning files must be met by the LSA though it is unclear what impact digitalization will have on this onerous process. In addition, this will require effective communication within the LSA and that the power to request files is exercised appropriately, taking into consideration the fact that firms will have already completed their compliance audits under the Scheme. The Society has reservations that data protection

⁴ Professor Alan Paterson, *Peer Review and Quality Assurance*

protocols may be breached by the LSA requesting client files [and auditing files in solicitors' offices], thus leaving the profession open and exposed to ICO complaints. Client confidentiality is a paramount principle for practitioners and therefore the Department will have to satisfy the Society that this principle will remain intact and indicate how it will be protected when the Scheme comes into operation.

- 1.23** In practical terms, the TCD notes at paragraph 5.1.4 that there may be delays in registration for those not meeting the initial eight week deadline to 'pre plug' the details of firms onto the system. The first observation the Society would make is that this timeframe appears unrealistically short. The Society recommends that a buffer is built into this system perhaps in terms of a pause in the eight week period to allow a degree of flexibility. This is both to ensure that any teething issues with the digital platform can be resolved and also to reflect that any transition to a new system will take time to become established. Compliance with registration requirements is more likely to be straightforward after the initial year(s) of operation, when all concerned have operational experience of the system. It is crucial that the digital platform and the SRS are fully integrated and appropriate economies on administration are realised within the new framework.
- 1.24** The Society promotes Lexcel and ISO accreditation amongst our membership. We remain strongly of the view that it is the responsibility of the statutory regulator to administer accreditation requirements on a case by case basis. The Department should take due cognisance of the Lexcel and ISO accreditations which a number of practices engaged in legal aid hold. The Department has proposed one option, whereby it operates the Registration Scheme and receives the charges for it but does not appear to have considered the option of recognising the quality assurance aspects of these alternative schemes, as operated in England & Wales. Practices have a high benchmark to attain so that they can be accredited to these schemes and it is unfair that those who have already paid for this accreditation are also to be charged for the new Scheme for substantially similar functions. The Society would argue some flexibility is required in such circumstances.
- 1.25** Due to the decision to apply a uniform framework, there will be a situation where a number of firms will have to pay a multiplicity of separate sets of fees for quality monitoring from the Society to include new levies for the new client complaints system, for Anti-Money Laundering oversight, Lexcel/ISO and the SRS. This should be taken into account when assessing the regulatory burden and designing a scheme proportionate to its aims. It is important to note that Lexcel looks at issues such as risk-management and best practice standards.

- 1.26** The Society remains firmly opposed to the operation of a Scheme Panel without a formal mechanism for appeal to the High Court. We consider an appeal to an external body as 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 without any practitioner representation and re-iterate our comments in our response to the earlier Consultation about the rights of appeal in Scotland as a positive example.
- 1.27** The Scheme should be designed in such a way as to provide for opportunities to improve the governance of legal aid. This might include a review of issues of duplication, particularly in respect of the terms of multiple forms requiring the provision of the same or similar information. The Society recommends that the LSA should initiate regular audits of its procedural requirements for legal aid applications with a view to streamlining the process. This should result in savings in administration and meet the commitment to a consultative approach to the governance of legal aid.

As highlighted in the 2014 response, the Society considers it pertinent to include a ‘practitioners experiences’ element to the Scheme. This would provide a feedback mechanism for Scheme administrators to identify elements of the procedures for applying and completing legal aid which pose challenges in practice. This should include a mechanism to suggest possible improvements. This would be very much in keeping with a collaborative spirit required in this proposal which now appears to be absent.

Furthermore the arrangements between legal aid providers and the LSA should also set out specific service standards with regard to the processing of applications, the handling of files and the payment of fees.

Next Steps

- 1.28** The above comments reflect some of the Society’s observations and concerns about the broad scope of the Scheme and the further information required to critically evaluate it. They provide the Department with an insight into our thinking but are without prejudice to any other issues which may occur within the course of our discussions and to representations made previously on the issues. We await further discussions with the Department and the next sections in our response will cover some of the operational aspects of the proposals. We caution that the short timeframe for response, the need for further information, the truncated implementation timescale and the introduction of new elements in the proposals necessitate the need for further consideration before any implementation of the Scheme.

SECTION 2

THE PROPOSED STATUTORY FRAMEWORK

- 2.1** In this section we consider the following draft subordinate legislation:-
- (i) The Access to Justice (Registration) Regulations (NI) 2017
 - (ii) The Criminal Legal Aid (Registration) Rules (NI) 2017
 - (iii) The Civil Legal Services (Disclosure of Information) (Amendment) Regulations (NI) 2017
 - (iv) The Criminal Legal Aid (Disclosure of Information) (Amendment) Rules (NI) 2017

The provisions of items (i) and (ii) are virtually identical as are those of items (iii) and (iv).

- 2.2** For the purpose of this response we will comment in Part 1 on items (i) and (ii) together and similarly in Part 2 with regard to items (iii) and (iv). When we refer to a numbered Regulation in item (i) this also relates to the equivalent numbered Rule in item (ii).

2.3 PART 1

- (i) The Access to Justice (Registration) Regulations (NI) 2017
- (ii) The Criminal Legal Aid (Registration) Rules (NI) 2017

The Society makes the following comments in respect of the above two drafts and seeks further clarification on a considerable number of issues arising therefrom.

2.4 Regulation 3

- Sub-paragraph (1)

The Society notes that the Department will maintain a register of eligible counsel and solicitors and also of firms. We seek clarification on the following:-

- Is it intended that there will be separate registers of counsel, solicitors and firms /organisations?
 - How quickly is it intended that the register(s) will be updated e.g. if a new firm is established or a practitioner retires?
- Sub-paragraph (2)

We note that registrants will have a maximum period of 8 weeks to register after commencement of the legislation, with an earlier cut-off date likely to be imposed to allow the LSA time to verify the details (see para 5.1.4 of the Department's Targeted Consultation Document (TCD)). The Society seeks

clarification on the nature of the verification of the details supplied which is to be undertaken by the Department and in particular what resource implication (if any) this might have for the Society. A draft of the operational guidance referred to in para 5.1.4 should be issued for consultation as soon as possible.

We consider that the 8 week period is unrealistic and that a considerably longer period will be required. The latest figures published by the LSA in relation to legal aid payments for the year 2014-15 reveal that payments were made to 638 barristers and 492 firms. No statistics are available in respect of the number of solicitors who provided legally aided services. However 492 firms represents approximately 90% of the firms recorded by the Society at that time. Society records show that in the Practising Certificate Year January 2014 - January 2015, 2200 Practising Certificates were issued to those in private practice. Accordingly for the purposes of obtaining a rough estimate of the number of solicitors involved 90% would be 1980.

As the Department's working assumption is that between 70% - 100% of all suppliers (both solicitor firms and counsel who previously received payments for legal aid work) will register to continue to provide publicly funded services when the Scheme is introduced, this suggests that the Department will be required to process between 2330 and 3330 applications for registration.

The Society notes with considerable concern that according to para 5.1.5 of the TCD the Scheme is to operate not only in respect of any new work that is authorised following the commencement of the legislation but is also to include the continuation of work or representation certified prior to commencement. Furthermore should the supplier choose not to register or fail to register within the permitted time frame, s/he will be unable to continue to represent the legally aided client and must arrange for the transfer of any work to a registered supplier. Regardless of whether the Department has legislative competence to do so (and we would seek a copy of any advices which you have on this point), we consider that this proposal will be an administrative nightmare for all involved including the LSA and has the potential to lead to significant delays in the work and business of the Courts.

- Sub-paragraph (6)

We note that this sub-paragraph provides that "the Department *may* impose a fee... The use of the word *may* is in sharp contrast with the views expressed in the Targeted Consultation Document which states that the Scheme must be self-funding.

The sub-paragraph also provides that the amount of the fee is to be such amount as the Department considers *reasonable*. Without prejudice to our views on the charging of a fee as set out in Section 1, we consider this provision grants a very wide margin of discretion to the Department, with no opportunity for the views of the paying parties to be considered or taken

account of. We consider the absence of same to be unfair and contrary to principles of transparency, accountability, proportionality, consistency and efficiency.

By contrast we note that section 6 of the Legal Complaints & Regulation Act (NI) 2016 provides that in relation to the Levy Regulations which the Department of Finance is empowered to make to cover the cost of the Legal Services Oversight Commissioner (LSOC) these must include provisions requiring the Department to consult with each professional body on the amount of the levy payable by that body. The current projected annual cost of funding the LSOC is £150,000. As the proposals in respect of the cost of the Statutory Registration Scheme are over four times greater than this, we consider this provision should be amended to require formal consultation with the Society and the Bar with regard to the amount required to fund it and the funding arrangements for same now and in the future.

2.5 Regulation 6

- Sub-paragraph (2)

We would welcome early sight of the form or forms requiring to be completed.

- Sub-paragraph (3)

We would be grateful if you would advise what information and supporting documentary material is envisaged as being reasonably required.

Society Practising Certificates run from 6th January in any year to 5th January in the year following. We would be grateful if you would advise how it is intended that the 12 month period of registration referred to in para 5.3.6 of the TCD will operate alongside the Society's timeframe.

- Sub-paragraph (6)

We would be grateful if you would advise how the fee for someone setting up in business as a new entity will be calculated.

2.6 Regulation 7

- Sub-paragraph (2)

We would be grateful if you would confirm that the consideration of the provisions in (a) - (c) will only apply in respect of any first registration immediately following the commencement of the legislation (i.e. when there is no history of compliance or non-compliance available).

- Sub-paragraph (3)

Please furnish a copy of any Guidance the Department will be issuing on when it will be considered that it is not appropriate to register an applicant.

We note that the Department shall register an applicant for a period not exceeding twelve months. In light of the content of para 5.3.6. we understand this to mean that someone registering in December for the first time is likely to receive a six month registration only to take him/ her up to the following June. Please confirm.

2.7 Regulation 8

It is our understanding that if an application for registration is refused in the name of a firm then all solicitors connected with the firm are similarly affected. However if a named solicitor's application is refused this only affects him/her and not any other connected solicitors in the firm. We would be grateful if you would so confirm.

2.8 Regulation 9

Please advise when the Department intends to consult on its procedures governing the monitoring of compliance with the Code of Practice.

2.9 Regulation 11

The Society considers that the requirements of this provision which is very broadly drafted touch very closely on the regulatory role of the Society and is a cause of some concern. This Regulation appears to go considerably further than the provisions in England & Wales in relation to fraud and unethical behaviour – see Standard Terms 23.7 and 24.9.

We would therefore welcome further discussion with the Department in relation to same before it is finalised.

2.10 Regulation 13

We note Regulation 13 introduces a contempt of court process, where if the Department forms the view that an applicant has obstructed compliance with the registration scheme a certificate signed by the Director of Legal Aid shall certify the subsequent obstruction as being made and the matter will be referred to the High Court. However the details of how this process will operate in the High Court is absent from the provisions of the Regulation.

2.11 Regulation 14

- Sub-paragraph (1)

Without prejudice to our comments with regard to Regulation 11 above, we consider that in any Guidance issued by the Department in due course, the powers of suspension will need to be clearly defined.

- Sub-paragraph (2)(c)

We query whether the word 'employed' should precede the word barrister in line 1 - see Regulation 7(3)(b).

2.12 Regulation 15

Whilst the process for issuing warnings requires the Department to detail the reasons for the warning and that failure to comply may lead to further conditions or restrictions being imposed; we note there is no process for the applicant to seek a review under Regulation 19 of the decision to issue a warning. We consider the Regulations should be amended to include same.

2.13 Regulation 16

- Sub-paragraph (2)(c)

Again we query whether the word ‘employed’ should precede the word barrister in line 1.

2.14 Regulation 17

- Sub-paragraph (2)

We consider that if the Department de-registers a firm or organisation, it should not follow as an automatic consequence that the Department **must** de-register any registered solicitor or barrister connected with that firm or organisation.

As currently drafted a solicitor in a firm could be condemned by the conduct of another within his firm and thereby closing down his/her ability to carry out legal aided work. This has the potential to cause considerable inequity where a firm operates a number of branch offices under the same name but each operates autonomously from the other.

Such an outcome might also be considered unfair where a whistle blower brought a serious breach to the attention of the Department.

The following extract from *Cordery on Solicitors* (9th edition) at para E434 which states as follows is cautionary:-

“While moral turpitude, as has been seen, is not a necessary constituent element of conduct unbefitting a solicitor, some degree of personal fault is required; in other words professional misconduct does not arise as a matter of strict liability (as opposed to breaches of specific rules such as the Solicitors’ Accounts Rules). Thus there is no vicarious liability in conduct, and there should be no question of a partner in a firm of solicitors being guilty of professional misconduct merely because he is the partner of a solicitor who has offended. Misconduct may of course arise through omission, including failure to supervise staff, whether fee earners or accounts staff.”

For all of these reasons we consider that the Department should maintain a discretion not to de-register.

Again we query whether the word ‘employed’ should precede the word ‘barrister’ in line 2.

2.15 Regulation 18

- Sub-paragraph (1)

This provides that the Department can make an excluding direction where it believes that there has been “*a significant abuse of the facilities provided by the Order*”.

We would be grateful if you would furnish in due course a copy of any Guidance which the Department intends to issue in relation to what constitutes ‘significant abuse’.

- Sub-paragraph (7)

We consider that in the event of a decision by the Department not to accede to an application to vary or revoke, there should be a requirement on the Department to detail reasons.

2.16 Regulation 19

- Sub-paragraph (3)

We consider the minimum notice period should be 14 days (i.e. 10 working days).

2.17 Regulation 20

We have noted that at Regulation 13 the Regulations invoke the jurisdiction of the High Court in favour of the Department with regard to contempt. Regulation 20(2) states that the decision of the Department on a review application by a registrant will be final. This is in contrast to where a solicitor finds him or herself before the Solicitors’ Disciplinary Tribunal where a right to appeal any decision to the High Court exists.

Given the consequences for a registrant of the Department’s decisions under the various Regulations referred to in Regulation 19 (failure to develop a livelihood and where a firm is engaged in a significant amount of legal aid work, closure of the firm and termination of the employment of solicitors and support staff), we consider there should be external oversight governing the correctness or proportionality of same. Accordingly we consider there should be a right of appeal to the High Court.

2.18 Review of the Regulations / Rules

This legislation significantly changes the current landscape for the provision of legally aided services - both civil and criminal. We consider that it would be prudent that the general operation of the Scheme (to include the charging mechanism) is kept under both general and periodic review. We would be obliged for the Department's views on this and in particular whether the Regulations / Rules should contain any express statutory provision with regard to same.

2.19 PART 2

- (iii) The Civil Legal Services (Disclosure of Information) (Amendment) Regulations (NI) 2017
- (iv) The Criminal Legal Aid (Disclosure of Information) (Amendment) Rules (NI) 2017

The Society has no comments to make in respect of the above two drafts.

SECTION 3

CODE OF PRACTICE

In the following text the numbering refers to the numbering in Part 1.

Part 1: Introduction

1.7 This states that any function delegated to a non-qualified, competent and responsible employee of the firm shall be under the immediate supervision of the nominated solicitor which “*must be evidenced*”. The Society seeks clarification as to what evidence will be required. As it stands this appears to be an onerous and rather subjective request.

In the following text the numbering refers to the numbering in Annex A.

Annex A: Solicitors

Applications and changes

2.1.1 In the absence of having a copy of the format that applications for registration will take it is difficult for the Society to properly consider this aspect of the Scheme. Whilst it appears that there will be a single application for the provision of both civil and criminal defence legal services, the Society seeks clarification on whether there will be two separate applications - one for individual solicitors within a firm and one for the firm itself. If yes, this could lead to significant duplication. Moreover if it there is a fee per application then this could also prove costly to a firm in registering all their solicitors.

2.1.2 The fee level will be very important to practitioners. General legal practices will not be in a position to pay a substantial fee. If the fee level is set too high, it could potentially mean that smaller firms are alienated from the process and it may allow larger firms the opportunity to monopolise legal aid work. At present the fee structure is unclear and will require further clarification.

2.1.3 We await for comment Agency Guidance on what constitutes ‘material changes’.

Conditions for Individual Solicitors

2.2.4 As indicated in our response in Section 2 in relation to the statutory framework for the Scheme (Regulation / Rule 11) we have considerable reservations about how this issue is being approached by the Department and require further discussion thereon. In relation to the wording of this particular clause there will always be the possibility of the type of conduct referred to. Accordingly is compliance met by a solicitor signing an acknowledgement to this effect?

Attendance at courses

2.4 We await a copy of the consultation document on Phase 2 of the Scheme in relation to the development of an education and support programme. This will then enable us to ascertain how these requirements will interface with the provisions of the Society's existing Scheme for Continuous Professional Development and the operation thereof. One difficulty which immediately comes to mind is that it appears that the statutory registration period may not coincide with the currency of the annual Practising Certificate.

Section B: Conditions for Firms

2.7.1 The Society requests information in relation to the proposed process when a registered individual solicitor moves firm to a) another registered practice and b) an unregistered practice which intends to become a registered practice.

2.7.4 We enquire if the Department is satisfied that the provisions of this clause reflect the statutory position as set out in Regulation / Rule 8.

2.7.5 We consider this is a clause where further discussion is required to clarify a number of issues.

It appears to us that it incumbent on the Agency to provide details of what it expects as a minimum that each of these Policies should cover otherwise there is a risk on an unending stream of disputes between practitioners and the Agency in relation to what is expected.

Clarity is also sought as to what will constitute "*evidence of compliance*". For example, is ISO or Lexcel accreditation sufficient to evidence the basic entry requirements for registration?

Nomination of Compliance Manager

2.9.2 If a nomination is refused we expect that reasons will be furnished.

2.9.4 We note the responsibilities of the Compliance Manger include at 1 the informing of the Agency of any changes, including changes to employees. This is very broad. Read literally it appears that the application process will require the furnishing of details to the Agency of all employees full time/part time/temporary. If this is what is intended further discussion is urgently required as to why this is considered necessary. Clarification is also required on what changes need to be informed. In relation to responsibilities 10 and 11 see our comments earlier.

Part 3: Standards of Professional Conduct for Solicitors

3.1 The Society has no issue with the general principle outlined by the Department that "*a solicitor shall act independently, honestly and in accordance with the standards of the Code..*". However the Department must exercise caution against any duplication with the functions of the Society.

Standards of Professional Conduct for Solicitors

3.2.4 Clarity is sought on why a solicitor would advise a barrister in this regard.

3.2.5 Further guidance is required as to what qualifies as a “*breach*”. Perhaps the Department could give examples of relevant breaches. If breaches of professional conduct standards occur these should be reported to the Society.

Knowledge and Experience

3.3.2 Solicitors already have to comply with substantial CPD requirements. There is no objection in principle to the requirement of additional courses in relation to criminal and civil legal services; however clarity is required on which organisation will have management of this.

3.3.3 Consideration should also be taken of difficulties in compliance for those on extended sick leave, maternity leave / parental leave.

Co-operation

3.6 The Society takes no issue with addressing relevant questions from the Agency. We expect that requests for information will be proportionate and visits will be made in a timely fashion, with advance notice and will not interrupt the general running of the practice.

We note the Agency is “*to be allowed access to the firm of solicitors’ premises and records*”. We consider that this does not include the power to enter by force into solicitors’ offices.

Co-operation will require respect and a common sense approach from all parties. The Society is willing to play a helpful and constructive role in this regard.

Witnesses

3.9 It was stated by the Department at the PAC in 2016 that standardised fees for expert witnesses would be introduced in 2017. Clarification is sought on the current time frame for same.

Professional & Expert Witness Fees & Witness Expenses

3.10.4 We assume that the register of barristers will be available on the Agency’s website. Please confirm.

Part 4: Standards of Service for Solicitors

Section A: Standard of Professional Service

4.1 The provision of a standard of professional service by solicitors is a matter regulated by the Society.

- **Initial Advice**

4.1.2 Solicitors are required to provide clients with retainer letters in accordance with the terms of the Solicitor (Client Communication) Regulations 2008

We query the appropriateness of an Agency staff member with no specialisation in legal practice assessing the ‘objectives, issues, options or steps to be taken’ in the course of a case.

- **Engagement**

7 The requirement to “*record the continued financial eligibility entitlement to funding from the Agency*” will be extremely onerous in many cases. The Society would caution against duplication in this respect. These are primarily matters that solicitors comply with through statutory obligations. The Client Communications Regulations set out what is required, both in respect of the process of funding and who they are dealing with on a day to day basis. Solicitors are not assessors of financial eligibility and should not be. The Society feels that there is currently ample legal protection to cover such requirements of engagement. Often a client’s financial eligibility cannot be determined without the plethora of documentation required by the Agency – for example, from its own CLA4: Application for Civil Legal Aid – Financial Eligibility application form. This document runs to 26 pages and without it the Agency will not consider the financial eligibility of a client for legal aid.

In addition clarity on the definition of “*regular*” would be sought.

8 The definition of “*success*” in a case is subjective and fluid. In public law proceedings where Children’s Care Orders are being sought and are subsequently granted, a solicitor could not advise a guardian or client in terms of “*success*.” This does not mean however that they are not entitled to defend a position in court.

This provision overall will tend to increase the solicitor’s workload. Ultimately case progression could be delayed as responses are awaited from the Agency. The Society is concerned in this respect as there is currently significant delay in the Agency’s administration. Information on the Agency’s response targets to practitioners would be most welcome.

- **Progression of Case**

14 The Society feels this is an extremely onerous provision. It will ultimately cause significant delay if solicitors have to inform the Agency of each and every offer during the course of negotiations. It will unnecessarily increase a firm’s workload at a significant cost. Again, there are concerns as to whether the Agency will have the resources to deal with these requirements even if they are adhered to. In a practical sense, it will be very difficult for the organisation to deal with the volume of calls say in a family contact or ancillary relief case at hearing that would come through from solicitors each day during the course of negotiations. Practitioners have noted that currently, even without this requirement, it is very difficult to get through to the Agency by telephone.

15 Clarification is sought on what constitutes “*necessary*”.

- **Measurement of Expectation**

19 The Society is disappointed that the Department did not set out what expectations solicitors may avail of in return. It is hoped that the Agency is aware of the crucial importance its own efficiency has in relation to these issues.

- **Contributions**

20 There is already a legal requirement to advise individuals on contributions over the period of a legal aid certificate. Contributions are collected by the Agency without any involvement or monitoring from the solicitor.

- **Statutory Charge**

22 The Agency should provide an explanation of the Statutory Charge within its own documentation. This could then be provided by solicitors to assisted parties. The Society notes that there is no reciprocal duty on barristers to explain the Statutory Charge.

- **Instruction of Barrister Requirements**

24 The Society would emphasise that barristers should be responsible for maintaining their own records and obligations to the Agency.

- **Court Attendance**

A solicitor is an officer of the Court. It would be inappropriate for an Agency staff member with no specialisation in legal practice to assess whether a delay in a case is “*unnecessary*”. It is for the Court to assess whether an adjournment or postponement is necessary or not. This is a judicial function that the Agency cannot interfere with.

- **Submission of Bills**

32 It is noted that the Agency requires all information and full responses from solicitors regarding all items on a bill. This is despite the fact that some of these items will be outside the control of the solicitor. We take it that within the time specified is the statutory time limit for submission of the bill. If not, please clarify.

- **Complaints**

33 Every firm is already required to have a complaints procedure in place. All staff would be aware of this. As a regulator the Society insists on this requirement.

- **Instruments Governing Legal Aid and Literature**

36 The Society requests more information on what tests are to be applied to ensure that the client **understands** all relevant literature from the Agency. An outline of the

time a solicitor should spend on this would be appreciated along with details of how the solicitor would be reimbursed.

Moreover will the stated failure of a client to understand “*any relevant available literature published by the Agency related to the obligations under any of the schemes*” constitute a failure of the solicitor to comply with the Code of Practice?

It is our view that at present this requirement appears to be too widely framed. It has the potential to be onerous on members of the profession.

- **Monitoring of Performance**

4.2.1 This is a requirement that is very wide in scope; it may constitute a major administrative burden for solicitors.

4.2.2 The Society cautions as to whether questionnaires would be an accurate indicator of service standards. A client's interpretation of how a case should run may not be an accurate and objective assessment of the case. For example in a Children's Order case where the client gets a disappointing result, it may negatively affect the client's perception of the level of service, as the litigation is so frequently emotionally charged.

4.2.3 The Society would inquire as to whether the Agency will be setting a time frame for the payment of bills to solicitors.

4.2.4 The Society requests details of the audit notice period, along with information on how often a firm will be audited per annum.

Section B: Civil Legal Services Validity of Applications

4.3 This information is currently provided for through the regulations and guidance issued by the Agency.

Section C: Validity of Claims for Payment

4.4.1 The Society considers this to be an onerous requirement, particularly in a large firm. This will ultimately mean more administration for firms with time and money implications training the appropriate Compliance Manager.

- **Time Limits**

4.4.5.1 This again raises the question of whether there will be a time limit for the Agency in relation to processing payments. If time limits are changed then practitioners should be fully notified.

Section D: Relationship with the Agency

4.5.3 In principle we do not have a difficulty with this provision but seek clarification on what constitutes a ‘material change’ and who are ‘key personnel’. Compliance with a five working days’ time frame may prove problematic on occasion.

Part 5: Systems of Management and Administration for Solicitors

5.1 There is a requirement for detailed policies, procedures and instructions to be drawn up by each firm. This is likely to impact disproportionately on smaller firms, particularly sole practitioners.

Personal Work and Time Recording

5.2.1 The information set out is standard record keeping and would be routinely kept by all solicitors.

5.2.1 Clarification is sought as to whether this information is to be held separately or simply recorded on client files. When read in conjunction with paragraph 5.3, it suggests that in addition to normal file recording, each individual solicitor would be required to produce to the Agency a detailed diary of all work undertaken personally. This recording of information would be very onerous in practice. It would also result in extensive duplication.

5.2.2 If the information for each solicitor is stored in a diary, there is a requirement that it is retained for 6 years. This appears to be in addition to the requirement to retain client files for the same period. Again this may be onerous for some practitioners depending on whether the diaries are computerised or not.

Financial Transaction Recording

5.4 There is a requirement that records of all financial transactions are maintained separately from other client information. This may pose difficulties depending on the accounting software system used by individual firms of solicitors.

Training

5.5 All solicitors undertake CPD training in line with the Society’s requirements. It is not clear why barristers have a different requirement of only 1 CPD hour. The training for support staff is not stipulated. The Society seeks clarification on these points.

Document Control

5.7 A list of documents 1-8 are required to be available. Most of these documents are accessible online and it is not stipulated whether online access is sufficient or whether hardcopies are required to be held in the solicitor’s office. Again, it is likely that this requirement will place a significant burden on smaller firms to provide detailed manuals and handbooks e.g. in relation to the firm’s system of management and administration. Whilst all firms have procedures in place, they may not all be codified in one document.

Case Audit

5.9 There is a requirement from the Department for an “*effective diary and file-checking system*”. However there is no detail provided as to what is required. Many firms do not have formal case management systems and simply diarise files manually. It is unclear as to whether this is sufficient.

5.9.2 There is a reference to an audit. However it is unclear as to whether this is a requirement on each firm to carry out an internal audit and to reference same in documentation. This would be another onerous requirement.

Complaints

5.11 This would constitute a significant burden on firms as there would be a requirement to hold a separate complaints file for assisted parties. There is already a robust complaints procedure in place as governed by the Society. This is therefore a duplication of the current procedure undertaken by firms.

5.11.4 Currently when an internal complaint is dealt with by a firm there is no requirement to report this to the Society unless a regulatory issue arises. The Society only becomes aware of a complaint when the complainant is not satisfied with how it has been dealt with internally by the firm. It appears however with the final point of 5.11.4 that even if a complaint is dealt with internally there is a requirement to report on the remedial action to the Agency. The Society would ask for clarification in regard to this issue.

Annex C – Audit and Compliance Framework

Key Points

- Composition**

The 2017 consultation proposes a decision-making body composed of three civil servants with no practitioner on the Panel. As outlined in the 2014 consultation response, the Society is opposed to a Panel composed entirely of Departmental officials.

The Society notes the system operating in Scotland where the Civil and Criminal Quality Assurance Committee comprises 9 members, at least 5 of whom are solicitors, with additional lay representatives and representatives of the Scottish Legal Aid Board (SLAB). Under this model, the SLAB meets the costs of remuneration and training for reviewers, but not the administrative costs of the Scheme. It contains a right of appeal to the Court of Session in terms of registration sanctions.

Scotland may be considered an appropriate comparator in terms of the size of the profession compared to 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. 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 practitioner involvement in a partnership model.

Given that the proposed model in Northern Ireland is to be ‘self-financing’, the case for this practitioner representation is even more acute. 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 of the operation of the Scheme is based on a full understanding of the position of practitioners on the ground.

- **Right of Appeal**

The Society is opposed to the operation of a Registration Panel without the mechanism of an external appeal. We consider such an appeal mechanism is a vital safeguard to help promote fairness and integrity in the Scheme amongst the profession and wider public. The concern to establish a right of appeal as a final safeguard is made more important due to the potential severity of sanctions open to the Registration Panel. The reputational impact of failed audits and the ultimate sanction of deregistration of services means that provision for appeals is consistent with the regulatory scope of the Scheme.

We also consider 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 the following sections the numbering refers to the relevant numbering of the provision in Annex C.

File Audit Process

1.1 Whilst files will be “*selected randomly*” by the Agency, details of files to be audited should be given in advance to allow for time for solicitors to obtain and present same. For example, if a file is with a costs draftsman some time may be required to seek its return. This is also the case for files subject to Law Society audits and those subject to audits by external auditors such as Lexcel/ISO.

1.1.1 Where the Agency requires a sample of files for review, we seek clarification as to whether the reviews will take place in the solicitor’s offices or in the Agency. If it is the latter, we assume the Agency will at its own expense meet the cost of postage and return.

1.1.5 The Society seeks clarity on what will constitute a “*proportionate number of files*” and who decides how files are to be audited.

1.1.6 The Society would emphasise the distinct roles of a barrister and a solicitor. Audits of barristers’ work should be separate and independent from that of a solicitor.

It is not the role of a solicitor to hold documents for a barrister, nor to answer for their work. The Society notes that records of a barrister's work will be monitored primarily through audits of their instructing solicitor's records. This has the potential to create considerable additional work for the solicitor.

1.1.7 Solicitors should be given ample notice for an audit. Small firms and especially sole practitioners will need at least several weeks advance notice to facilitate an auditor's inspection of files. Solicitors' diary and court commitments mean that the Agency will need to show considerable flexibility in this regard.

1.1.10 We would expect that such a visit would only happen in the most exceptional of circumstances and would welcome clarification from the Agency as to its view when such might be required.

Recommendation Priorities

1.3.1 A solicitor must have an opportunity to explain a failure before any punitive action is taken.

Routine Audit

2.1.5 The criteria for a special or extended audit should be clear and communicated to the solicitor in question.

2.1.6 Clarification is sought on what a "*cross-cutting review*" is and what notice will be provided to the solicitor.

Final Audit

2.3.1 The Society requests the criteria for the Agency ordering a final audit and how this is different from an extended audit.

2.3.2 The Society would inquire why the solicitor has to pay for the final audit as it is not accepted that this should be the case.

Failed Final Audit

3.3.1 The Society considers that a solicitor should also be permitted to make oral representations as well.

3.3.5 The Society requests more detail on this point – in particular whether the solicitor will have a notice period and whether s/he will be able to complete existing cases.

3.3.6 In the event that a practitioner is de-registered, we enquire whether there is a time frame envisaged within which cases must be transferred.

Review Panel

3.4.2 The Society again reiterates its disappointment that no solicitor or legally qualified person will sit on this Panel. As a matter of fairness, the Agency should not

solely deal with the complaint process. There should be a solicitor and barrister appointed by the Society and the Bar Council eligible to sit on any such Review Panel.

Annex D: Fee Charging Methodology

The information provided on fees in the 2017 Consultation contains more details and figures than that included in the 2014 Consultation.

However the Department has proposed only **one option** for a fee charging scheme - where it operates the Statutory Registration Scheme and charges for the cost of same.

Requirement for Full Cost Recovery

The Society is very concerned that it is intended that the full cost of the Statutory Registration Scheme is to be borne by the profession. We refer the Department to our earlier observations expressed herein. It is our view that such costs are for the Department to meet in the first instance.

There is lack of clarity and transparency in the calculation of the charges proposed by the Department. We are concerned that there is a significant risk of the cost of ordinary legal aid administration being passed on to its providers. This is unjust and improper.

There is no transparency in regard to these costs which is a requirement of the MPMNI. The Department suggest that the annual costs may fluctuate in any year and that costings are based on considerations necessary to meet MPMNI requirements without any further detail provided. The Society considers the forecasted figures are undoubtedly disproportionate for an internal audit scheme of this nature and size. It is noted that the Unit is to be staffed by 12 members without previous experience in this area. Relevant details such as job titles and level of seniority are not provided. As a consequence potential overlaps between the costs of the Scheme and the general operation of legal aid cannot be identified.

The estimated costs appear on the face of it to be entirely disproportionate to the Scheme and in comparison to similar schemes in other public and private bodies. The Society is aware of similar schemes in organisations with a similar budget to the Agency. Audit costs for these schemes are a fraction thereof.

This Scheme is not independent of the Agency and forms part of its operations. It is inconceivable that private service providers pay for its operation.

We seek clarification on whether the Department has considered whether fees should be abated:-

- for a re-registration as opposed to an initial registration

- where a provider has an external quality assurance accreditation such as Lexcel or ISO
- in cases of extended sick leave / maternity leave / parental leave

Fee Calculation Methodology

It is anticipated that the introduction of fees will increase in time as further quality assurance methods, such as customer surveys, are introduced, and costs increase accordingly. The current suggested level of running costs are already significant and focus on full cost recovery from the service provider who delivers but does not receive any service.

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 mid-point of the expenditure range in that band and taken as a proportion of the full costs to be recovered. We enquire whether it is the median figure which is to be used as a multiplier, and if so why is the average not used?

This percentage figure is then applied to the mid-point of each band to calculate the fee applicable to all suppliers falling within that band. Again, it is not accepted that the service supplier should be providing full running costs.

We would ask the Department to furnish details of similar schemes where the cost of providing Government functions is passed on to private organisations delivering them on behalf of the Government such as General Practitioners, pharmacists and opticians.

As indicated elsewhere the Scheme should not be introduced in advance of digitalisation. Digital working needs to be fully implemented so that any flaws can be identified such as has occurred in England and Wales. It would then make sense to correct the flaws in digitalisation and thereafter develop the Registration Scheme in an integrated way with digital working. It would also be very useful if the Department could give some indication as to how it envisages both systems would be integrated.

The Department may also consider charging additional fees to firms/organisations which fail routine audits. No transparency has been offered as to how such additional fees will be calculated or the basis upon which such a charge will be made.

SECTION 4

IMPACT ASSESSMENT SCREENING

- 4.1** The Department accepts that there is a potential that fewer lawyers will undertake legal aid work following the introduction of the Scheme. However, it does not appear to have any information about which suppliers will give up legal aid and where they may be located. On page 20 of the Impact Assessment Screening document it is stated, “the introduction of the Scheme could see a reduction in the number of solicitors offering legal aid services, although this may impact rural and urban areas equally”. This level of analysis is regrettable as the potential impact on access to justice has not been adequately considered. In the Society’s view, this is a high risk strategy, as the experience in England & Wales shows that once providers leave legal aid, they do not return. The Department has applied averages across all geographical areas. However evidence from other jurisdictions shows that rural areas suffer disproportionately when lawyers withdraw from legal aid. The prospect of ‘advice deserts’ cannot be ruled out.⁵ The Department needs to fully explore this potential and foreseeable advice desert and its potential impact on access to justice across the region of Northern Ireland.
- 4.2** Further to this, we note at paragraph 6.2 of the TCD that the Department refers to the lack of available information on which to base an impact assessment on the profession. However, this appears inconsistent with the estimate of as many as 30% of firms opting out of providing legal aid services once the Scheme is implemented. The Department has identified this band and it is unclear whether they have considered the potential for a differential impact upon rural practices providing legal aid. The provision of legal aid in these areas could be deduced from figures available within the Agency.
- 4.3** Proportionality needs to be carefully considered in relation to the Regulatory Impact Assessment on firms and their proportions of legal aid work. Whilst the network in Northern Ireland is one of solicitors offering mainly a general practice model, the question of apportioning fees needs to be weighed against the importance of preserving access to justice. The Society has analysed research which shows that the availability of legal advice and information is linked to a variety of socio-economic factors. The Low Commission’s first report⁶ concluded:

“When people get into difficulty in their daily lives, they need to be able to get the right information and advice as early as possible. If this information and advice is no longer available, they could become

⁵ The Financial Health of Legal Aid Firms in Scotland – Law Society of Scotland 2017

⁶ Tackling the Advice Deficit – A strategy for access to advice and legal support on social welfare law in England and Wales – Low Commission – January 2014

unemployed, homeless or in debt – and, not only will they suffer distress, but the state will incur increased costs”.

- 4.4** Legal aid is generally agreed to be the most poorly remunerated area of law. The proposed fee structure and administrative requirements represent yet another reduction in legal aid remuneration. If solicitors have to comply with burdensome requirements, there is an inability to service other court, police station and client work thereby affecting access to justice.
- 4.5** The Department is aware that a number of voluntary and community sector organisations provide legal services through a Direction under Article 28 (2)(e) of the Solicitors (Northern Ireland) Order 1976. The statutory intention is to ensure the provision of legal services for communities in need and the Society works with these organisations to secure this. Given the insecure funding streams and difficult fiscal context in which these organisations operate, it is regrettable that there is no research to substantiate the conclusion that there would be no impact on these organisations. The Society feels it is imperative that the Department visit this issue as there will be an inevitable negative impact on this sector if the Scheme is introduced.

Conclusion

The Society welcomes 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 this 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.