

# Legal Services in Northern Ireland

Complaints, Regulation, Competition

Legal Services Review Group



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Competition

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# Chairman's Foreword

1. Government intervention to regulate various sectors of the economy, including professional services, to provide greater competition and more robust procedures for dealing with poor service and conduct has been increasing over recent years. Legal services are the most recent sector to receive attention. The most publicised development has been the Clementi Review and the subsequent White Paper in England and Wales, but similar reviews are taking place in Scotland and the Republic of Ireland, and now in Northern Ireland.
2. In December 2005 the Government established the Legal Services Review Group to recommend to the Minister of Finance and Personnel how the legal professions in Northern Ireland should be regulated. The Group included representatives of lawyers, voluntary organisations, the business sector, and consumers more generally, as well as academics drawn from law and economics. Its thinking was informed by responses received to a consultation document issued by the Department of Finance and Personnel; oral evidence from some of the respondents; regional meetings throughout Northern Ireland with solicitors, barristers, representatives of voluntary and consumer organisations, and members of local businesses; and the Clementi Review and similar reviews in Scotland and the Republic of Ireland.
3. Having considered the evidence and the representations made to us, we unanimously agreed forty-two recommendations relating to regulation, complaints-handling, and competition that we believe will improve the provision of legal services in Northern Ireland. We are grateful to those who helped us arrive at this unanimous conclusion: those who responded to the Department's consultation document, those who attended our regional meetings, and those connected with the reviews elsewhere in these islands. We are also grateful to our Secretary, Mr Michael Foster, for his initiative, hard work, drafting, and excellent organisation; he greatly simplified our task.
4. As the reader of our report will discover, we fully accept Clementi's principles and objectives for the regulation of legal services. But we have not accepted some of his recommendations for England and Wales because we believe they are inappropriate for Northern Ireland. Northern Ireland is

different – different in size, different in the nature and structure of its legal professions, and different in its history of regulation. Hence different recommendations are needed – recommendations that capture the principles of good regulation but also recognise these other differences.

5. We believe that our recommendations do just that: they are a measured and proportionate response to the problems legal services face in Northern Ireland. They will place consumers in Northern Ireland in at least as good a position as those elsewhere in these islands, but without excessive costs and complex structures. Hence we unanimously and strongly advance our recommendations for consideration by the Government and the citizens of Northern Ireland.

A handwritten signature in black ink, appearing to read 'G. Bain', with a large, stylized initial 'G'.

**Professor Sir George Bain**

# Members of the Review Group

- Professor Sir George Bain (Chairman)
- Mr Les Allamby, Director, Law Centre (NI)
- Professor Vani Borooah, School of Economics and Politics, University of Ulster, Jordanstown
- Mr John Collinson, General Consumer Council for Northern Ireland
- Professor Norma Dawson, School of Law, Queen's University Belfast
- Mrs Margaret Elliott, Solicitor, Elliott Trainor Partnership, Newry
- Mr James McNulty QC, Practising Barrister
- Mr Wilfred Mitchell, Policy Chairman, Federation of Small Businesses
- Mr Michael Foster, Secretary to the Review Group

# Executive Summary

## CHAPTER 1: INTRODUCTION

1. The Legal Services Review Group was established by the Government to report to the Minister of Finance and Personnel with recommendations relating to the current regulation of the legal professions in Northern Ireland. It brought together representatives of lawyers and consumers as well as academics.
2. We examined the existing regulatory framework in the context of the Clementi report and the subsequent White Paper in England And Wales. Twenty-two consultation responses received by the Department of Finance and Personnel informed our thinking, with oral evidence and regional meetings providing further assistance to us. Similar reviews in Scotland and the Republic of Ireland also aided our deliberations.
3. This process helped us to achieve a unanimous report, which contains forty-two recommendations relating to regulation, complaints-handling and competition, which we believe should provide a framework that is well suited to the needs of consumers and the professions in Northern Ireland.

## CHAPTER 2: THE NORTHERN IRELAND SYSTEM

4. We examined the existing legal system in Northern Ireland. We found legal professions that are different from those in England and Wales, but similar to those in Scotland and the Republic of Ireland, with a general practice model of approximately 500 solicitors' firms spread around Northern Ireland combined with an independent referral Bar Library in Belfast, where about 560 barristers practise as sole traders.
5. We also found a system that is largely self-regulating, with only the solicitors' profession being subject to oversight from the Lay Observer in relation to complaints-handling and from the Lord Chief Justice for Northern Ireland for some other matters. The Northern Ireland Bar is not currently subject to any form of statutory external oversight.

6. In terms of competition, associations between barristers are not permitted, nor are associations between barristers and solicitors. Other alternative business structures are similarly prohibited, as is the external ownership of law firms.

## CHAPTER 3: REGULATION

7. We divided our work into four main categories. The first of these was general regulation: those aspects of the work of the professional bodies that are more internal in nature, including entry to the profession, rule making and codes of conduct. We examined the Clementi model, and looked at approaches taken in other jurisdictions, as well as examining the views of consultees.
8. We found that the legal professions have discharged their regulatory functions in a reasonable manner. The regulatory failure in England and Wales has not occurred in Northern Ireland. Nor is there the regulatory maze in Northern Ireland that Clementi encountered in England and Wales. Hence simply to apply Clementi's proposals to Northern Ireland would not be appropriate; they need modification to produce best practice in this jurisdiction.
9. We believe that the professions themselves should continue to discharge regulatory responsibilities, but subject to enhanced oversight arrangements, and, where it adds value, increased lay participation. Oversight should be applied to both solicitors and barristers by a Legal Services Oversight Commissioner helped by advice from the Lord Chief Justice for Northern Ireland.

## CHAPTER 4: COMPLAINTS HANDLING

10. We consider that the most public aspect of regulation, complaints handling, requires the most wide-ranging reform. Although we found that the professional bodies have generally discharged their responsibilities in this area fairly, we identified a number of areas where the system requires to be strengthened in the public and consumer interest. Given the relatively few complaints made about lawyers in Northern Ireland, we believe that they should continue to administer complaints handling, but subject to several important changes.

11. We consider that lay participation should be increased so that all complaints are heard by a majority of non-lawyers, including a lay chair. We believe this change will provide the necessary openness and transparency required to give consumers the confidence to make a complaint when they have received poor service.
12. Increased lay participation should be coupled with strengthened oversight, with the Legal Services Oversight Commissioner having wide-ranging powers, including an auditing function and the ability to set and monitor targets. The proposed system should be more accessible and more accountable than before and complaints committees should be functionally separate from their professional bodies. The eligibility to make a complaint should also be considerably widened.
13. Compensation awards should give consumers effective and adequate redress, including a simplified process for pursuing a claim for professional negligence for smaller value cases. We set our limits lower than those proposed elsewhere in these islands; at £3,500 for misconduct and poor service, and £3,500 for professional negligence. We consider these figures to be more suited for Northern Ireland, and believe they will avoid many of the potential dangers that other jurisdictions may face with higher compensation limits.

## CHAPTER 5: OVERSIGHT

14. At the heart of our proposals lie the benefits that enhanced and effectively discharged oversight will add to the regulatory function. Although oversight currently exists in relation to the complaints-handling function of the Law Society, it is insufficient at present to meet the needs of consumers. The proposed Legal Services Oversight Commissioner should have a variety of powers to ensure that the professional bodies of both solicitors and barristers carry out their functions in a transparent and proper way that is in the public interest and in the best interests of consumers.
15. The Legal Services Oversight Commissioner's main powers should relate to the complaints-handling process, with audit powers combined with those for monitoring the system and setting new targets. These should be supported by enforcement powers, including the power to impose financial penalties. The Commissioner should also have an important role to play in other aspects of regulation, such as ensuring that proper and targeted

consultation is carried out by the professional bodies in discharging those responsibilities.

16. We consider that the office of the Legal Services Oversight Commissioner should be proportionate to the needs of the consumer in this jurisdiction. The office should be funded by the professions themselves, with the polluter-pays principle being part of the funding arrangements for the new body.

## CHAPTER 6: COMPETITION: ALTERNATIVE BUSINESS STRUCTURES

17. We believe that competition is in the best interests of the consumer and hence to be welcomed. We found that it exists in Northern Ireland, with a general practice model of solicitors' practices providing advice to consumers throughout Northern Ireland, supported by an independent Bar Library from which about 560 barristers compete with each other to provide advocacy services to clients.
18. We were impressed by the existing model that gives anyone in any part of Northern Ireland the chance to obtain advice on any matter from the top barristers in Belfast. While we considered the alternative models being proposed in England and Wales – Legal Disciplinary Practices and Multi-Disciplinary Practices – we believe that allowing such models in Northern Ireland would not have the desired effect of increasing competition. Indeed, we consider that they could actually reduce it. We accordingly leave the existing restrictions on such parties as they are. We also concluded that allowing external ownership of legal firms could carry with it unwanted problems, and we recommend no change to this restriction for Northern Ireland.

## CHAPTER 7: COMPETITION: OTHER ASPECTS

19. We consider that the theory of allowing licensed conveyancers to set up in Northern Ireland would not be matched with the practice. Thus we have not recommended the removal of the statutory bar on them.
20. But we have suggested relaxations, subject to certain caveats, to both the rules relating to the direct access of a barrister for advice, and to the rights of audience of solicitor advocates in the higher courts. Both should lead to enhanced competition in the legal services market.

## CHAPTER 8: CONCLUSION

- 21.** We consider that our proposals should improve the regulation of lawyers, with increased lay participation and enhanced oversight permitting greater openness and transparency to underpin the good work already done by the professional bodies in Northern Ireland. The copper-bottomed complaints-handling system should be more suited to ensuring that the needs and demands of consumers are met in the future.
- 22.** Our recommendations were unanimously agreed by representatives not just from the legal professions on the Review Group, but also from those who represent the voices of the voluntary sector, the business sector and the consumer. We believe that these proposals should be effective and proportionate for Northern Ireland, and should place the consumer in at least as good a position as those in other parts of these islands, but without the high costs and complex structures that have been recommended in these areas.

# List of Recommendations

## REGULATION

1. The legal professions should continue to discharge regulatory functions, subject to more effective and transparent oversight by an independent Legal Services Oversight Commissioner.
2. Lay persons should have an increased involvement in relation to general regulatory matters.
3. The professional bodies should undertake greater and targeted consultation on rules they intend to make.
4. The Legal Services Oversight Commissioner should have an audit function in relation to professional rules.
5. The Lord Chief Justice should have an advisory role in relation to professional rules.
6. The regulatory and representative functions of the professional bodies need not be separated for general aspects of regulation, but should be for complaints handling (see Recommendations 9 and 10).

## COMPLAINTS

7. The responsibility for complaints handling should be retained by the professions, subject to the following recommendations that will copper-bottom the procedures to ensure best practice and to enhance the rights of consumers.
8. Lay people should be in a majority on all complaints committees and these should be chaired by a lay person.
9. Responsibility for the complaints-handling function should transfer from the Bar Council to the Benchers to achieve functional separation between regulation and representation.

10. Complaints committees of the Law Society should be functionally separate from the Law Society Council.
11. The Solicitors' Disciplinary Tribunal should continue to perform its current range of functions, and should continue to be chaired by a legal professional, but with a lay majority.
12. A new disciplinary committee of the Bar should be established, should be chaired by a legal professional, should have a lay majority, should deal with serious conduct issues at first instance, and should act as an appeal forum for all other conduct complaints.
13. Appropriate induction and training should be given to lay members appointed to sit on complaints committees.
14. The Legal Services Oversight Commissioner should have the power to audit the induction and training given to lay members appointed to sit on complaints committees.
15. The appointment of lay persons to complaints committees should follow the Nolan principles, including public advertisement and recruitment processes, and should be subject to the scrutiny of the Legal Services Oversight Commissioner.
16. Eligibility to make a complaint should be open to anyone and be subject to oversight from the Legal Services Oversight Commissioner.
17. All solicitors' firms should have a formal complaints procedure in place that is made known to all clients and prospective clients.
18. Complaints committees should have the power to award compensation, with a limit set at £3,500 for service and conduct complaints that do not fall into the category of professional negligence.
19. For those matters in which professional negligence is identified, the clients complaints committee should have the power to award compensation, with a limit set at £3,500. The complaints committee should be assisted in determining the value and nature of the case by adjudicators appointed from a panel of legal experts by the Legal Services Oversight Commissioner.
20. The Legal Services Oversight Commissioner should have the power to monitor the payment limits of the client complaints committee and make

recommendations to the appropriate authority when change is considered necessary.

## OVERSIGHT

- 21.** Revised oversight arrangements should be put in place, with a new office entitled the Legal Services Oversight Commissioner.
- 22.** The Legal Services Oversight Commissioner should have the power to audit individual complaints files.
- 23.** The Legal Services Oversight Commissioner should have the power to monitor and set targets for the complaints-handling duties of both professional bodies. Where targets are not agreed, or are not met, the Legal Services Oversight Commissioner should have the power to impose an appropriate penalty.
- 24.** The Legal Services Oversight Commissioner should be responsible for selecting lay persons from the available pool of lay representatives to hear specific cases.
- 25.** The Legal Services Oversight Commissioner should assist in promoting the accessibility of the complaints-handling system by producing an action plan and making recommendations on this matter to the professional bodies.
- 26.** The Legal Services Oversight Commissioner should be able to offer advice on the other regulatory functions of the professional bodies, including their rule-making powers. Should the advice of the Legal Services Oversight Commissioner be ignored, the Commissioner should have the power to refer the matter to the government for appropriate consideration.
- 27.** The Legal Services Oversight Commissioner should have the power to consult with interested stakeholders on any aspect of regulation.
- 28.** The Legal Services Oversight Commissioner should have a duty to produce a report, laid before Parliament, which is accessible and user friendly to lay persons.

29. The Legal Services Oversight Commissioner should be an individual supported by a small staff, the exact size of which should be determined using the usual methods employed by government.
30. The Legal Services Oversight Commissioner should have sufficient resources to ensure that consumers in Northern Ireland are afforded an effective level of oversight to protect them.
31. The professions should fund the office of the Legal Services Oversight Commissioner through a two-part levy. A general levy should be applied to all practitioners on a proportionate basis, and a specific levy should be applied on all practitioners who have been found guilty of poor service or misconduct.
32. The Legal Services Oversight Commissioner should liaise with the professional bodies regarding the exact nature and amount of the levies.
33. The appointment of the Legal Services Oversight Commissioner should follow normal public service recruitment procedures, with an appointment panel consisting of a chair provided by the Civil Service Commissioners, an independent lay assessor, and a member nominated by the Lord Chief Justice.

## COMPETITION: ALTERNATIVE BUSINESS STRUCTURES

34. The professional bodies should take appropriate steps to ensure that professional standards are meaningful and more accessible to consumers.
35. The prohibition on barristers forming associations with other barristers should remain.
36. The prohibition preventing the creation of Legal Disciplinary Practices should remain.
37. The prohibition preventing the creation of Multi-Disciplinary Practices should remain.
38. The prohibition preventing the external ownership of a law firm should remain.

## COMPETITION: OTHER ASPECTS

39. The current restriction on licensed conveyancers operating in Northern Ireland should remain.
40. The Bar Council should consider widening the existing Direct Professional Access Scheme to allow members of the general public to access barristers directly for advice.
41. The Government should consider amending the Judicature (NI) Act 1978 to allow solicitor advocates to appear, subject to certain conditions, in the higher courts.
42. The Bar Council should consider its current rules relating to the rights of audience of employed barristers.



## Chapter One

# Introduction

- 1.1** Legal services have been an important part of the social fabric of Northern Ireland. Indeed, legal services play a particularly important role in this jurisdiction by facilitating access to justice and the administration of justice. Hence it is essential that these services are readily available, of high quality, reasonably priced, and provided in a manner that suits the needs of consumers.
- 1.2** To ensure that legal services are provided in this way, their regulation has received increasing attention in Northern Ireland and elsewhere. The most publicised development has been the Clementi Review in England and Wales. But similar reviews are taking place in Scotland and the Republic of Ireland, and now in Northern Ireland.
- 1.3** The European Commission has also reviewed competition in the professions, including those in law, and its research suggested that there were unnecessary barriers to the provision of professional services in member states. In February 2004 it published a document, *Report on Competition in the Professional Services*, that targeted restrictions in five areas: price fixing, recommended prices, advertising, entry requirements and reserved rights, and regulations governing business structures. The report invited member states and professional bodies to review professional rules and to identify any that might hinder effective competition.

## CLEMENTI REVIEW

- 1.4** The Office of Fair Trading issued a report on competition in the professions in early 2001. It was particularly critical of what were perceived as unjustified restrictions on competition in the legal profession. After the government identified a number of key issues that required further examination, the Lord Chancellor asked the former Deputy Governor of the Bank of England, Sir David Clementi, to carry out an independent review of the regulation of legal services in England and Wales.
- 1.5** Clementi issued a consultation paper in 2003, asking for views on a wide range of matters that went to the heart of the regulatory framework for legal services. This exercise culminated in the production of a final report in December, 2004, *Review of the Regulatory Framework for Legal Services*

*in England and Wales*. His principal recommendations covered three main areas: regulation, complaints handling, and competition.

- 1.6** Clementi examined the evidence and found a history of regulatory dysfunction and the presence of a regulatory maze in England and Wales. His aim was to simplify the system and to provide greater oversight of the regulation of legal services. His main recommendations on regulation included:
- Establishing a Legal Services Board to act as a legal regulator, providing effective external oversight to front-line regulators such as the Law Society and the Bar Council.
  - Allowing certain regulatory functions to be devolved back to front-line regulators on a day-to-day basis, subject to their competence and governance arrangements.
  - Requiring front-line regulators to separate effectively their regulatory and representative functions.
- 1.7** Clementi noted that the existing process of handling complaints was not consumer friendly and lacked sufficient openness and accountability. He recommended the establishment of an independent body for legal complaints (the Office for Legal Complaints), which would handle consumer complaints about providers of legal services, and take away from the professions the responsibility for service complaints — those relating to adequate professional service, such as unreasonable delay, failure to communicate or rudeness. Conduct complaints, such as the breaking of professional rules, would continue to remain the responsibility of the relevant professional body.
- 1.8** Turning to competition, Clementi recommended that lawyers from different professional bodies should be free to form partnerships together, what he called Legal Disciplinary Practices. He also recommended that non-lawyers should be permitted to be involved in the management and ownership of these practices, subject to certain safeguards applied by the Legal Services Board, including a “fit-to-own” test. He stopped short of recommending that restrictions on partnerships between lawyers and non-lawyers, what he called Multi-Disciplinary Practices, should be lifted.
- 1.9** In a White Paper published on 17 October 2005, *The Future of Legal Services: Putting Consumers First*, the Government accepted all the recommendations in the Clementi Report, and went further by signalling its

intention to allow a wider range of alternative business structures than Clementi recommended. On 24 May 2006 the Department of Constitutional Affairs published a draft Legal Services Bill for pre-legislative scrutiny that will be considered by Parliament in late 2006 until mid-2007. The Bill gives effect to the proposals to reform legal services regulation and delivery, as set out in the White Paper, by establishing a Legal Services Board and an Office for Legal Complaints, and facilitating alternative business structures and external investment.

## SCOTLAND

- 1.10** In Scotland an exercise similar to the Clementi Review has been taking place. In the first session of the Scottish Parliament, the Justice 1 Committee held an inquiry into the regulation of the legal profession. It focussed on the complaints-handling process, but also looked at the wider aspects of regulation and concluded that self-regulation was the best option for Scotland. It noted, however, that the present system of self regulation needed to be reformed to make it more friendly to consumers and more in keeping with the public interest.
- 1.11** The principal, and most advanced, initiative of the Justice 1 Committee concerns complaints handling. The Scottish Executive issued a consultation paper on 11 May 2005, *Reforming Complaints Handling: Building Consumer Confidence*. It posed a number of alternative models for future complaints-handling, with options ranging from maintaining the existing system but with enhanced powers for the Scottish Legal Services Ombudsman, through increasing oversight with the introduction of a single-gateway approach for complaints, to having an independent complaints-handling body, with a lay chair and a lay majority. The consultation paper received 490 responses — the majority of them favouring the creation of an independent body to handle complaints — and on 22 December 2005 Scottish Ministers announced their decision to introduce legislation that would establish such a body. The Legal Profession and Legal Aid (Scotland) Bill is currently being considered by the Scottish Parliament.
- 1.12** To consider other aspects of regulation and issues surrounding alternative business structures, a Research Working Group was set up. Its aim was to
- identify, describe and analyse the different legal services markets operating in Scotland; to identify restrictions, whether deriving from

statute, professional rules or custom and practice, which might have the effect of preventing, limiting or distorting competition in the different Scottish markets; and to identify access to justice, public interest and aspects of consumer protection that might justify such restrictions, and to evaluate whether the restrictions were proportionate to their purpose.

The Group also undertook to examine the evidence on alternative business structures across comparable jurisdictions.

- 1.13** It submitted its views to Ministers in May 2006 in a *Report by the Research Working Group on the Legal Services Market in Scotland*. The Group made observations on a range of issues, including legal education and training, a variety of professional rules and practice, and restrictions on alternative business structures. The Scottish Executive is considering the report, although it appears likely that any firm decisions on the development of future policy will not be taken in advance of elections to the Scottish Parliament that are due to take place in May 2007.

## REPUBLIC OF IRELAND

- 1.14** In January 2005 the Competition Authority in the Republic of Ireland produced a preliminary report, *Study of Competition in Legal Services*. At that stage its most significant proposals included abolition of educational monopolies in legal education, removal or amendment of the rule requiring barristers to be sole traders, amendment of the rule restricting the provision of conveyancing services to solicitors, removal of the restriction on partnerships between solicitors and barristers, and the removal of most restrictions on advertising.
- 1.15** The Authority issued a total of twenty-one questions accompanying these preliminary recommendations and invited comment. Its final report is anticipated by the end of 2006 and it is understood by us that there will be a number of changes to the initial recommendations.

## NORTHERN IRELAND

- 1.16** In 1991 the government in Northern Ireland produced an unpublished policy paper that advanced a variety of recommendations on the provision of legal services. But the proposals were not implemented.

- 1.17** In 2004 the government asked the then Lay Observer for Northern Ireland, Professor Vincent Mageean, to report on legal services in Northern Ireland. His report, which contained a number of recommendations on the future regulation of the legal profession and on complaints handling, was not published by the government, partly because the Clementi review had widened the debate to include issues not covered by Professor Mageean.
- 1.18** Instead, in September 2005, the government decided to publish its own consultation document, *Regulation of Legal Services in Northern Ireland*. It set out a number of questions to be answered on regulation, complaints handling, and competition. The paper also signalled the government's intention to set up, under the chairmanship of Professor Sir George Bain, a Review Group with membership drawn from the professions, academia, the voluntary sector, and consumer and business groups.

## TERMS OF REFERENCE

- 1.19** The Review Group was given the following terms of reference:

In light of:

- The findings of the Clementi Review of the Regulatory Framework for Legal Services in England and Wales,
- The subsequent White Paper due to be published later in 2005, and
- The responses to the Northern Ireland consultation document launched in September 2005

To bring forward firm proposals for the regulation of legal services in Northern Ireland that are consistent with:

- Protecting and promoting consumer interests;
- Promoting competition through the removal of unjustified restrictions;
- Promoting public understanding of citizens' legal rights; and
- Encouraging a strong, effective and independent legal profession.

The proposals will take due cognisance of

- The study of competition in legal services in the Republic of Ireland;
- The emerging findings of the Scottish Executive's inquiry into the regulation of the legal profession;

- The annual reports of the Lay Observer for Northern Ireland and the Review of Legal Services provision carried out by the former Lay Observer, Professor Vincent Mageean; and
- The European Commission Director-General 2004 report on competition in professional services.

**1.20** We believe that our report covers all the constituent elements of this remit. But certain groups, particularly the representatives of the legal professions, suggested that our terms of reference fail to take account of vital issues such as the proper administration of justice and access to justice. The Law Society, for example, noted in its submission to us that the “public interest” was not mentioned in the terms of reference and had received inadequate coverage in the consultation document.

**1.21** Although these matters are not specifically highlighted in our terms of reference, the former Minister of Finance and Personnel, Lord Rooker, signalled in the press release accompanying the circulation of the consultation document that they were relevant to our review. And we have certainly considered our recommendations in the light of, among other issues, the public interest, the proper administration of justice, and access to justice.

**1.22** The legal professions also criticised the consultation document and our terms of reference for relying too much on an analysis derived from England and Wales. Although the ongoing reforms in England and Wales and the subsequent White Paper and draft Bill were important considerations, so too were the reforms taking place in Scotland and the proposals emerging in the Republic of Ireland. Most importantly, we have considered what is best for Northern Ireland, based on the nature of the legal system and the professions in this jurisdiction, and what we feel are the needs and rights of consumers here. Our aim has been to take into account all the issues that have been raised during our work, and to develop a proportionate set of recommendations that will benefit consumers throughout Northern Ireland.

## REVIEW PROCESS

**1.23** We have used a variety of sources to obtain the evidence on which to base our recommendations. Our first source was the responses received by the Department to its consultation document. The initial closing date for

responses was 6 January 2006 but the Department, in consultation with us, allowed extensions to a number of consultees that effectively meant we continued to receive submissions until the middle of February 2006. In total, we received responses from twenty-two individuals and groups, a full list of which is attached at Appendix A.

- 1.24** The response level was lower than we had anticipated. In particular, we received only three responses from individuals expressing some grievance with the existing system. The nature of the other comments varied from short submissions that focussed on one or two issues raised in the consultation document, to lengthy and well-prepared responses dealing with all the questions. Perhaps not surprisingly, the most detailed responses were received from the Law Society, the Bar Council and the Benchers, although we also received helpful and informative documents from those coming at the debate from a different perspective, including the Office of Fair Trading and Which?.
- 1.25** The responses to the consultation document have been most valuable to us, providing useful information and helping us shape our thoughts. But we considered that further investigations were essential, particularly to establish the context for reform in Northern Ireland. Hence we had meetings with a variety of individuals and groups. The full Review Group met with the Law Society, the Bar Council and the Benchers, as well as with the Office of Fair Trading, and these meetings provided an important opportunity to test and probe further with these bodies the points made in their written submissions. We found such meetings constructive and helpful. In addition, the Chairman and Secretary had a series of meetings with relevant persons, including their counterparts in England and Wales, Scotland and the Republic of Ireland, and both the current and former Lay Observer for Northern Ireland. These meetings also clarified points of detail and aided our thinking. A full list of meetings held by the Review Group, the Chairman and the Secretary are also attached at Appendix A.
- 1.26** We were also conscious of the need to hear from as wide a range of people as possible; hence we held a series of meetings around Northern Ireland. We invited solicitors, barristers, representatives of voluntary and consumer organisations, and members of local businesses to come to meetings with us in Belfast, Newry, Londonderry and Cookstown. These meetings stimulated healthy and constructive debate around all the issues of our review and provided us with an additional source of information that we found most helpful.

## OUTLINE OF THE REPORT

- 1.27** The rest of our report is divided into seven chapters. In Chapter 2 we examine the Northern Ireland legal system, looking at the existing framework of the legal profession, how it is regulated, and how the current complaints-handling arrangements work. We examine both the solicitors' and barristers' professions. We also examine some of the existing restrictions in relation to business structures.
- 1.28** In Chapter 3 we examine the system of self-regulation in Northern Ireland, identify the core principles of good regulation, analyse the current regime, look at developments in other jurisdictions, examine the views of those we consulted, consider the issues involved, and put forward our recommendations.
- 1.29** In Chapter 4 we undertake a similar exercise in relation to complaints handling. We look at developments in other jurisdictions, examine the views of those we consulted, consider the issues involved, and provide recommendations based on our findings.
- 1.30** In Chapter 5 we look at the issue of oversight, with an examination of the role of the Lay Observer. We then examine the views of consultees and advance recommendations based on what we feel best suits Northern Ireland.
- 1.31** Chapters 6 and 7 focus on competition, looking at developments elsewhere, analysing the alternative business structures that are available, and identifying the arguments for and against relaxing existing restrictions. We also look at the particular issue of licensed conveyancers raised in the consultation document as well as briefly examining issues of direct access to barristers and rights of audience for solicitors in the higher courts.
- 1.32** Chapter 8 concludes our report by providing some general remarks and offering some observations on the future.

## Chapter Two

# The Northern Ireland System

## SOLICITORS

### Profile of the Profession

- 2.1** The profile of the solicitors' profession in Northern Ireland is markedly different from that in England and Wales. The key characteristic of the five hundred firms of solicitors in Northern Ireland, with approximately 2200 solicitors, is the general practice model, with most firms providing legal advice across a wide range of matters.
- 2.2** To practise as a solicitor in Northern Ireland a person must hold a practising certificate. The basis on which these certificates are applied for, granted or refused is set out in the Solicitors' (Northern Ireland) Order 1976, and in associated secondary regulations made by the Law Society that are subject to the agreement of the Lord Chief Justice for Northern Ireland.
- 2.3** Solicitors can be divided in two broad categories: those in private practice, who offer services for a fee, and those who are employed "in-house". The latter includes those employed by government (e.g. Crown Solicitors, Departmental Solicitors' Office, Public Prosecution Service) and those employed by, for example, a company and who provide legal services only to their employer. The majority of solicitors in Northern Ireland, as elsewhere in these islands, are employed in private practice.
- 2.4** Solicitors in Northern Ireland can operate in a range of private practices. About fifty percent are single partner/practitioners, (compared with approximately 70 percent in the Republic of Ireland, and only 20 percent in England and Wales). Less than 30 percent work in firms of five or more partners (compared with 70 percent in England and Wales), and the majority of such firms are situated in the larger cities.
- 2.5** Solicitors' firms have a wide geographic spread, being located in seventy-four locations in Northern Ireland. They tend to situate themselves in "high-street" environments in cities, towns and villages across the country. They typically compete with other similar-sized firms for business from private clients. Although some firms of solicitors tend to specialise in particular areas of law, most firms in Northern Ireland offer initial advice on any area,

referring cases outside their expertise to other firms or to barristers in Belfast. The main sources of work tend to be family law, conveyancing, probate, and some criminal work.

- 2.6** Most of the larger firms of solicitors operate in Belfast. They tend to have multiple partners and employ a number of associate solicitors, operating from offices in the city centre. It is in these firms that advice on more specialised matters, particularly for commercial clients, is usually available. But even the largest firms in Northern Ireland would be considered of only medium size in England and Wales, and, to a lesser degree, in the Republic of Ireland.
- 2.7** From time to time solicitors' firms merge or a single practitioner is bought up by other firms. New firms sometimes start when solicitors leave existing firms. But the main difficulty in starting a firm is developing a client base to make initial operations viable, and many associate solicitors stay in their current firms in an attempt to become a partner.
- 2.8** In the last twenty years there has been a significant growth in the number of firms and in the number of solicitors, with figures nearly doubling in that period. In a relatively short period, therefore, the size of the profession has changed considerably, reflecting the growth of the market for legal services.

### Regulatory Framework

- 2.9** The solicitors' profession in Northern Ireland is subject to a framework of statutory regulation derived primarily from the Solicitors' (Northern Ireland) Order 1976, as amended by the Solicitors' (Northern Ireland) (Amendment) Order 1989. The primary legislation, together with secondary legislation made under powers contained in the parent Order in Council, gives the Law Society the responsibility for regulating the profession. It is responsible, therefore, for setting and regulating professional standards, and (in conjunction with others) entry to the profession, training and ongoing professional development, the handling of client funds, and other miscellaneous matters.
- 2.10** In exercising its regulatory function, the Law Society is subject to the oversight and supervision of the Lord Chief Justice for Northern Ireland. The Society has described this as a "structure of accountability that reflects the position

of solicitors as officers of the court and members of an independent profession within the justice system”.

- 2.11** Other checks and balances exist within the system. Independent lay members participate in the consideration of clients’ complaints; and in serious cases of professional misconduct, the Law Society does not adjudicate; the matter is referred to the independent Solicitors’ Disciplinary Tribunal.
- 2.12** As an additional measure to protect clients, all solicitors in private practice are required, in order to practise, to maintain Professional Indemnity Insurance at a level and to a specification prescribed by the Law Society. As in Scotland (but not in England and Wales), the Law Society has operated a form of Professional Indemnity Insurance (through a corporate Master Policy) that provides a guarantee of recovery to clients where loss has been suffered through the actions of solicitors. The Law Society believes this demonstrates the willingness of the profession in Northern Ireland to assume a collegiate approach to, and responsibility for, client protection.
- 2.13** The Law Society also maintains by statutory authority a Compensation Fund. It is uncapped, is funded by contributions from practising solicitors, and is a prerequisite to the right to practise. The Fund provides an additional guarantee to clients of recovery of losses incurred as a result of a solicitor’s default (for example, because of insolvency) or otherwise than in circumstances covered by the Professional Indemnity Insurance arrangements.
- 2.14** Because of the collegiate burden borne by the profession, the Law Society attaches a high priority to pro-active monitoring of solicitors’ practices. Its professional staff actively monitor solicitors’ accounts on a regular and precautionary basis, as well as in response to specific concerns identified by the Law Society in respect of particular practices.
- 2.15** The handling of complaints by the Law Society is subject to review and comment by the independent Lay Observer. In addition to reviewing the handling of particular cases by the Law Society, the Lay Observer periodically makes recommendations for improving procedures and other matters. The Law Society points out that a series of Lay Observers have commended the efficiency with which complaints are handled, and the seriousness with which the regulatory functions exercised by the Law Society are taken by the profession. We examine this aspect further in Chapters 4 and 5.

- 2.16** Although the Law Society is subject to a degree of oversight on complaints handling, the primary responsibility rests with it. Where a complainant is dissatisfied with a solicitor, the next port of call is the Law Society, where one Assistant Secretary acts essentially as a filter for all complaints. She considers the nature of the complaint and, if appropriate, enters into correspondence with the complainant before deciding whether the complaint should enter the next stage of the process.
- 2.17** When the Law Society considers that a complaint should proceed, it operates under the terms of the Solicitors' (Northern Ireland) Order 1976, as amended, together with the relevant Practice Regulations and its own internal guidelines. These require the Assistant Secretary to determine whether the complaint can be resolved at secretariat level, or if it needs to be referred to the Client Complaints Committee. The cases in which a complaint must be referred include the following:
- Where the Committee's powers concerning inadequate professional services may require to be exercised (several examples are given of this in the guidelines).
  - Where conduct matters arise that may require censure or consideration of a referral to the Solicitors' Disciplinary Tribunal: in particular, a breach of undertaking, a breach of conflict of interest or any other Practice Regulation; a breach of the Legal Aid Regulations; where a solicitor accumulates four complaints in any year; or where a solicitor has accumulated two reprimands from the Client Complaints Committee in one year.
  - And other general areas, including cases in which the complainant expresses dissatisfaction with the Society's initial investigation or conclusion; the complaint raises novel issues which it is in the interest of the profession and the public to have reviewed and adjudicated upon; and, under a protocol with the Lay Observer, when he raises queries in respect of the Society's procedures or decisions.
- 2.18** The Law Society has delegated the majority of its powers under the Solicitors' (Northern Ireland) Order 1976, as amended, to the Client Complaints Committee, and it oversees and controls the investigation of complaints relating to unprofessional conduct and inadequate service. The Committee has a membership of fifteen persons, of whom four are lay members. Three of the eleven solicitor members must not be members of the Council of the Law Society. A quorum of five, including at least three Council members and one lay member, applies to any meeting of the Committee. Where

the Committee is not quorate, however, it may still meet, discuss cases and make recommendations, but those recommendations cannot be implemented until the next meeting that satisfies the quorum. Under Article 73A(4) of the Solicitors' Order, any decision of the Committee must have the support of a majority of the Council members who are present.

- 2.19** An agenda that includes minutes of the previous meeting is normally issued before a meeting. Business is fixed under several headings, and the committee is aided by the Assistant Secretary who provides any relevant correspondence. In adjudicating, the Committee considers a range of matters and has recourse to a range of actions, including:
- finding the complaint is not upheld;
  - upholding a complaint but deciding to take no further action;
  - upholding a complaint and reprimanding the solicitor;
  - requiring a solicitor's attendance before the Committee;
  - directing the form of any further enquiries to be made; and
  - recommending to Council that a reference be made to the Solicitors' Disciplinary Tribunal.
- 2.20** The Client Complaints Committee cannot award compensation for inadequate service. But there is a range of remedies available to a client under the statutory powers available to the Law Society (or the Solicitors' Disciplinary Tribunal), such as the reduction or disallowance of the solicitor's costs. Other punitive sanctions include financial penalties, practice restrictions, and the removal of the entitlement to practise by the Solicitors' Disciplinary Tribunal. We examine the issue of penalties and compensation in further detail in Chapter 4.
- 2.21** The Solicitors' Disciplinary Tribunal is statutorily constituted with the status and powers of the High Court. It operates wholly independently of the Law Society. Members of the Tribunal are appointed by the Lord Chief Justice after consultation with the Law Society. There are currently thirteen legal members of the Tribunal and five lay members with vacancies for three legal members and one lay member to bring membership up to the usual level; but there is no fixed limit.
- 2.22** The Tribunal is serviced by a Secretary, who under the legislation must be a solicitor but not a member of the Tribunal. There is no formal process for

appointing the Secretary, with the incumbent having been approached after advertisement failed to fill the post. The Secretary is paid a reasonable amount for time expended in the role, with the amount being billed to the Law Society, which collects it along with any fines imposed. Thus a substantial part of the cost of administering the system is recovered from respondents (i.e. offending solicitors).

- 2.23** Almost all cases sent to the Solicitors' Disciplinary Tribunal emanate from the Law Society. Members of the public can complain directly to the Tribunal, but this seldom happens. The Lay Observer can also refer cases directly, but this also rarely occurs. When the Society forwards a complaint, it is by way of formal application, supported by sworn affidavits and exhibits, normally made by the Chief Executive of the Society. The Secretary sends papers to two members of the Tribunal for them to confirm that, on a preliminary view, there is a case to answer.
- 2.24** A formal process is then started with all the evidence before the Tribunal by way of affidavit. Twenty-eight days notice is given of a date for hearing. The Secretary then has to contact a number of Tribunal members to see who might be available. The Tribunal must always contain a lay member and two solicitors, and it has become standard practice to ask three legal members to sit because frequently one of them may have to drop out at the last minute because of other commitments. Legal members are not remunerated but lay members are paid by the Department of Finance & Personnel at the rate of approximately £150 a day.
- 2.25** The Tribunal does not notify the hearing to anyone other than the Law Society and the respondent solicitor. The hearings are open to the public but are not advertised. Members of the public rarely attend and sometimes the person making the complaint appears.
- 2.26** After the hearing, the Secretary drafts the Findings & Order of the Tribunal. This sets out the charges, what has been said by the solicitors for the Society, and any response from the respondent's representative. The final part of the Findings & Order sets out the decision and what penalty, if any, has been imposed. Very few of the cases are contested, but those that are require a longer hearing and special days have to be set aside. The draft Findings & Order is settled by the Chairman of the hearing. It is then signed by the Chairman and one other member. Then, as required by the legislation, the Secretary sends it to the Law Society and the respondent. The Tribunal has no power to publish the Findings & Order. Appeal is to the

High Court within twenty-one days. The Society has a duty under the Order to keep a record of all solicitors who have been made subject to a Findings & Order of the Tribunal. Any solicitor struck off the Roll may apply to the Tribunal to be re-admitted.

- 2.27** The Tribunal does not issue an annual report, but the Society includes the more serious Orders made by the Tribunal in its Annual Report, and it also reports any matters of concern the Tribunal has detected that should be brought to practitioners' attention. A notice is published in *The Writ* (the Law Society's monthly magazine) advising the profession of the names of those solicitors who have been struck off.
- 2.28** The Solicitors' Disciplinary Tribunal deals with approximately twenty cases per year. Most involve around two or three charges in relation to either the Practice Regulations or the Accounts Regulations. Each year there are two or three bigger cases that involve multiple charges under the Accounts Regulations and may involve restriction or suspension of practice or, indeed, removal from the Roll of Solicitors. In the last two years for which figures are available, four solicitors have been removed from the Roll, and three others have had their practising certificates restricted or suspended.
- 2.29** The final stage in the complaints process is the Lay Observer for Northern Ireland, currently Mr Alasdair McLaughlin. Article 42 of the Order provides for the Head of the Department of Finance and Personnel, after consultation with the Lord Chief Justice, to appoint one or more Lay Observers. Since 1977 the Lay Observer has reported on the nature of complaints made to the Law Society and how it deals with these. The Lay Observer looks only at how the complaint has been handled; he has no power to investigate complaints against a legal practitioner.
- 2.30** The Lay Observer can influence good practice in complaint handling, and a frequent theme of his annual report has been the need for better practice in the process itself. When the Lay Observer disagrees with the Law Society, he can ask the Society's Professional Conduct Committee to assess the complaint. In addition, he can, though rarely does, refer cases to the Solicitors' Disciplinary Tribunal.
- 2.31** The Lay Observer has the power to access complaint files held by the Law Society and tends to audit about a third of all cases each year. This power is unique among similar bodies in other jurisdictions in the United Kingdom. But, unlike in England and Wales, and Scotland, he cannot order

compensation, nor can he enforce any recommendations that he makes, nor investigate any complaint falling outside the statutory definition that the Law Society uses to determine what complaints are heard. These issues have led to major criticism of his role, and we examine these in more detail in Chapter 5.

## BARRISTERS

### Profile of the Profession

- 2.32** The second branch of the legal profession in Northern Ireland is the Bar. Barristers can be divided into those in independent private practice and those who are employed by companies and other organisations. Barristers in private practice work as sole practitioners, and this group forms the vast majority of barristers. Employed barristers, by giving up their sole practitioner status, lose their right of audience before the courts.
- 2.33** Barristers in independent private practice can be further divided into Barristers-at-Law, commonly known as junior counsel, who are members of the Outer Bar, and senior counsel, more commonly known as Queen's Counsel, who are members of the Inner Bar. QCs typically have a higher standing in the profession, and command higher fees. Junior Counsel prepare pleadings and usually advocate cases before the Magistrates Court, the District Court and the County Court. For High Court cases solicitors usually engage a junior counsel to act with a QC. In these cases, junior counsel draft the pleadings and the QC conducts the case before the court.
- 2.34** All barristers in Northern Ireland operate from the Bar Library in Belfast. The Library has recently relocated from its old premises within the main Royal Courts of Justice to a new building beside it in Chichester Street. The Library provides desk, office and library facilities for barristers. Some barristers, particularly those who practise mainly in other areas of Northern Ireland, use the Library infrequently.
- 2.35** There are currently around 560 barristers in private practice in Northern Ireland. Their numbers have almost doubled over the last fifteen years, a factor that contributed to the decision to build the new Bar Library.
- 2.36** Under present rules, solicitors can provide many of the services of barristers. Solicitors do not have automatic rights of audience in the High Court, but

they can undertake a specialist advocacy course that enables them to provide such services. Barristers cannot offer such services as conveyancing, the administration of estates, and, generally speaking, anything that involves access to clients' monies.

- 2.37** Practising barristers are subject to the "cab-rank" rule. If they are requested to work on a case, they must take it providing they are available and the client is prepared to pay their professional fees. The barristers' responsibilities include a duty to the Court, considered to be their primary duty, a duty to promote the interests of their client fearlessly, and a duty of independence.

### Regulatory Framework

- 2.38** Unlike the solicitors' profession, statute does not provide for regulation of the General Council of the Bar; hence the Council is responsible for the regulation of the profession. It has authority to set rules concerning conduct, professional practice, entry to the profession, ongoing training and professional development, and any other area relating to the practice of a barrister in Northern Ireland. It is assisted in this task by an organisation known as the Benchers, who are members of the Inn of Court of Northern Ireland (the Inn).

- 2.39** The Inn comprises the Benchers and the members of the Bar of Northern Ireland and was established on 11 January 1926. The present constitution of the Inn took effect on 14 November 1983. It provides that the powers of the Inn be exercised by the Benchers and the Executive Council and, in addition, that the separate powers of the Bar Council are not subject to direction by the Inn. The Benchers comprise:

- (a) The Judges of the Supreme Court while holding such office. (There are fourteen such Benchers.)
- (b) The Attorney General for Northern Ireland, the Solicitor General, and the Chairman of the Executive Council while holding such office.
- (c) Such persons who hold public office in the administration of justice, while holding such office, as from time to time the Benchers may elect. (There are two such Benchers.)
- (d) Four County Court Judges, while holding such office, elected by the Benchers, together with any County Court judge who was a Bencher on 1 January 1999 while holding office as a County Court Judge.

(There is one County Court Judge who was a Bencher on 1 January 1999, so there is a total of five such Benchers.)

- (e) Barristers of at least ten years' standing in private independent practice elected by the Executive Council, such number to exceed by at least two the number of Benchers comprised in the totality of Categories (a), (c) and (d) above.

**2.40** There are currently a total of forty-five Benchers in the above categories. The Attorney General and the Solicitor General are ex officio and generally do not attend meetings. The two public office holders (Category c) are former practising barristers. Of the remaining forty-one Benchers, twenty-two are practising barristers and nineteen are judges.

**2.41** The powers of the Benchers in relation to the regulation of the Bar in Northern Ireland extend to:

- (a) Admitting student members of the Inn and calling them to the Bar of Northern Ireland.
- (b) Appointing a Disciplinary Appeals Committee to hear an appeal from a decision of a Disciplinary Committee of the Executive Council.
- (c) Disbarring or suspending a barrister from practice in accordance with the recommendation of a Disciplinary Committee or a Disciplinary Appeals Committee, and expelling or suspending a student of the Inn.

**2.42** The Executive Council has the following standing committees: the Finance Committee, the Library Committee, the Education Committee, and the Disciplinary Committee. The Benchers' powers cover matters considered by the Education Committee and the Disciplinary Committee. The powers and functions of the Education Committee relate to legal education, pupillage, and the provision of facilities for continuing education for practising barristers. Disciplinary Committees deal with any charge brought by the Professional Conduct Committee of the Bar Council against a barrister for failing to comply with the duties specified in the Code of Conduct and with any appeal from the Summary Panel (i.e. the panel hearing the case for the first time).

**2.43** The Bar Council's complaints procedure was revised in 2003. Complaints may be considered from any source, and the Bar Council may investigate any aspect of professional behaviour that comes to its attention. When a

complaint is referred to the Disciplinary Committee, it may nominate a barrister to prosecute the case, free of charge, on behalf of the complainant. Disciplinary committees are chaired by a judge or a retired judge and have between five and seven members, of whom two are lay members. Hearings are public and, in cases of serious misconduct, details are published on a notice board in the Bar Library and in the Great Hall of the Royal Courts of Justice. Barristers may be admonished, fined or suspended.

- 2.44** The Bar has received many fewer complaints than solicitors, probably as a result of their more detached role in dealing with the public. Thirty-four complaints were received in 2005 of which many were made by other barristers. Complaints by members of the public are rare.
- 2.45** An appeal from a decision of the Disciplinary Committee can be heard by the Disciplinary Appeals Committee composed of three Benchers and a lay person, who is appointed from a panel determined by the Lord Chief Justice. The Appeals Committee may allow an appeal in whole or in part, confirm or vary the order of the Disciplinary Committee, or require a rehearing. The Appeals Committee has the same punitive powers as the Disciplinary Committee.
- 2.46** At the moment there is no external oversight of the complaints-handling process or of other aspects of the regulation of the Bar in Northern Ireland. Unlike in England and Wales, Scotland and the Republic of Ireland, where public oversight arrangements for the Bar exist, the Lay Observer for Northern Ireland has no remit in relation to the Bar.

## COMPETITION

- 2.47** Turning finally to business structures, the Review Group needs to consider four separate issues: associations between barristers, partnerships between barristers and solicitors, partnerships between lawyers and other professionals, and the external ownership of legal firms.
- 2.48** At present, the professional rules of the Bar permit a barrister to practise only as a sole practitioner, thereby prohibiting partnerships between barristers and between barristers and solicitors (the concept of Legal Disciplinary Practices). There is also a statutory bar on solicitors and barristers forming a partnership. Similarly, both the professional rules of the Bar Council and the statute governing the solicitors' profession prohibit partnerships between lawyers and other professionals (the concept of Multi-Disciplinary Practices).

And legislation does not permit the external ownership of a solicitors' practice by anyone not holding a practising certificate. All these issues are considered in Chapter 6.

## Chapter Three

# Regulation

### OBJECTIVES AND PRINCIPLES OF REGULATION

- 3.1** We start our consideration of regulation by distinguishing between its public side that manifests itself through the complaints-handling process, which we examine in more detail in the next chapter, and other aspects of regulation that might be described as more internal in nature. We concentrate in this chapter on these latter aspects — including entry standards and training, rule making, professional development, and codes of conduct — that are determined by the professions without interacting directly with consumers.
- 3.2** The consultation document issued by the Department identified the main purpose of regulation as seeking to ensure that members of a professional body (or other providers of a professional service) are suitably qualified and observe appropriate ethical standards.
- 3.3** The Better Regulation Task Force has identified several more basic principles of effective and fair regulation. First, regulation should be proportionate, with intervention that is appropriate and that avoids unnecessary cost. Second, it should be accountable, with regulators having to justify any decisions made, and being subject to public scrutiny. Third, it must be consistent, with fair implementation, and transparent, with any regulation being open, simple and user-friendly. Finally, regulation should be targeted, focusing on the problem and minimising any side effects.
- 3.4** Clementi identified six key objectives for any regulator of legal services.
- *Maintain the rule of law.* The rule of law embodies the basic principles of equal treatment of all people before the law, fairness, and a guarantee of basic human rights. Hence a legal system with effective judicial institutions is essential for protection against any potentially arbitrary use of state authority and unlawful acts of both individuals and organisations.
  - *Access to justice.* A key objective of regulation is the improvement of access to justice for all. Such access has a geographic dimension (and is relevant to our discussion of alternative business structures in Chapter

6) and also relates to access for those who are disadvantaged or cannot afford to pursue their legal rights.

- *Protection and promotion of consumer interests.* An aim of any regulator is to protect and further consumer interests. Clementi identified an asymmetry of information between the supplier and the consumer of legal services. Hence the regulator should strive to ensure that consumers have sufficient information to make informed decisions on the services they seek; and, in circumstances where the consumer may not be informed, to have the power, among other things, to prohibit oppressive marketing practices, raise or set standards, develop information programmes, resolve disputes, and protect vulnerable groups.
- *Promotion of competition.* A regulator should prevent unnecessary restrictions on competition, encouraging choice in the number and type of providers of legal services.
- *Encouragement of a strong, confident and effective legal profession.* The maintenance of a strong and effective legal profession should help to ensure access to justice and serve the public interest.
- *Promote public understanding of the citizen's legal rights.* Lawyers have a professional obligation to set out clients' rights and the consequences of different options. And Clementi suggested that the regulator might have a wider duty to improve customer knowledge of some of the more commonly used parts of the law, such as buying a house.

**3.5** Similar regulatory objectives have been identified in other jurisdictions. In the Republic of Ireland, for example, the Competition Authority in its preliminary report identified three reasons for regulating the legal profession:

- to ensure the administration of justice and the rule of law;
- to protect uninformed buyers from poor quality legal services; and
- to prevent the abuse of market power and other impediments to competition.

**3.6** In devising a suitable regulatory framework for legal services, Clementi also observed that the core principles of the legal profession should be fully taken into account. He summarised these principles as:

- *Independence.* As officers of the court, lawyers have a duty to act independently in the interests of justice and in compliance with their own rules of conduct.

- *Integrity.* Lawyers are generally required by their codes of conduct to act with integrity. High standards of professional conduct are necessary to meet the requirement of not bringing the profession into disrepute.
- *Duty to act in the best interests of the client.* This is the most important duty of lawyers, subject to their overriding duty to the court and to the interests of justice.
- *Confidentiality.* Both solicitors and barristers are required under their respective codes of conduct to keep the affairs of their clients confidential. The concept of Legal Professional Privilege is also applicable in relation to certain communications between a lawyer and a client.

## APPROACHES IN OTHER JURISDICTIONS

- 3.7** We began our examination of regulation by looking at the approaches being taken in other jurisdictions. That in England and Wales is what is referred to the Clementi B+ Model, which essentially provides for a Legal Services Board that will oversee the work of all legal service providers in that jurisdiction. It will also promote the public and consumer interest. The primary focus of the proposed new Board will be effective external oversight with much of the actual regulatory activity being devolved back to the front-line professional bodies. Hence many of the regulatory arrangements will take place within organisations such as the Law Society for England and Wales, but it will be subject to the supervision and input of the Legal Services Board, and its ability to regulate will be dependent upon its competence and its governance arrangements. In particular, the front-line bodies will be required to put in place a mechanism that separates their representative and regulatory roles.
- 3.8** The cost of the new system will be high, over £80 million per year. But this compares with the existing system that has an equivalent cost, resulting in part from the complexity of the existing regulatory system in England and Wales. The advantage of Clementi for that jurisdiction is reasonably clear: the current regulatory maze, running at a high cost, will be replaced by a more simplified structure, at little or no additional cost, and that cost will be borne by the legal services providers themselves.
- 3.9** In the Republic of Ireland, the preliminary report issued by the Competition Authority proposed the establishment of a Legal Services Commission with

overall authority for regulating the legal services market. The Authority also proposed the separation of representative and regulatory functions within the professions and the greater involvement of non-lawyers in the regulatory framework.

- 3.10** The Authority proposed and sought comments on two models, with Model A giving the Legal Services Commission full responsibility for the regulation of legal services, and Model B being akin to the Clementi proposal, with the Commission having responsibility for the regulation of legal services, but delegating many of these back to existing, and possibly new, self-regulatory bodies which would not be permitted to exercise representative functions. The Legal Services Commission would be given authority to make new regulations and to exercise a veto.
- 3.11** The Authority recommended in its preliminary report that the Department of Justice, Equality and Law Reform should bring forward legislation to establish a Legal Services Commission, and posed a series of questions about the issues surrounding Models A and B. It suggested that external, independent regulation of the legal profession would be indispensable for ensuring competition in the provision of legal services. The final recommendations of the Authority will be published shortly after the publication of this report.
- 3.12** The *Report by the Research Working Group on the Legal Services Market in Scotland* noted that the Scottish Executive's consultation paper on complaints-handling arrangements also raised issues dealing with the constitution of the professional bodies. The Law Society of Scotland has a statutory duty to promote both the interests of its members and the interests of the public, and the Faculty of Advocates (essentially the same as the Bar) has a similar, but non-statutory, dual role. The report notes that potential tensions exist between these dual functions, and the consultation document invited views on whether the Law Society should keep its regulatory and representative functions undivided or whether these functions should be split and made the subject of separate governance arrangements. Of those who expressed a clear view in response, over 84 percent were in favour of these functions being split.
- 3.13** The Office of Fair Trading noted that while some areas of regulatory activity carried on by the Law Society of Scotland and the Faculty of Advocates were subject to adequate oversight, significant areas had inadequate arrangements. In order to ensure that professional rules were in the public

interest, the OFT suggested that regulatory activity by the professional bodies should be subject to external oversight by an independent body. The Research Group noted the Clementi reforms in relation to this issue but did not reach any firm conclusion, other than to observe that the Scottish Executive is considering the way forward in the light of views expressed in the responses made to its consultation. It would seem unlikely that any firm policy directions will be considered in advance of the elections to the Scottish Parliament that will take place in May 2007.

## CONSULTATION RESPONSES

- 3.14** Those who responded to the Department's consultation paper readily accepted both the general principles of the profession and the indicators of good regulation. Different consultees emphasised some objectives and principles more than others, but indicated that they were all generally acceptable. The major differences in responses related to the nature and means by which the current system meets the implicit standards set by these objectives and principles.
- 3.15** The Law Society felt that the term self-regulation was misleading, and that a better description of the current framework for the solicitors' profession was co-regulation because the profession is subject to oversight and accountability from the Lord Chief Justice, the Department of Finance and Personnel, and the Lay Observer. But it was prepared to accept the terminology and argued that none of the above principles of regulation were inconsistent with self-regulation "properly understood and effectively applied". This argument does not apply to the Bar because it lacks the same level of oversight and statutory control.
- 3.16** The Law Society, the Benchers and the Bar Council strongly argued that to continue self-regulation would be in the best interests of the public, the consumer and the profession itself. They were supported by others, including the Belfast Solicitors' Association, the Association of Personal Injury Lawyers and, from outside the professions, by the Democratic Unionist Party, Queen's University, the Council of Legal Education, and, subject to certain modifications, both the current Lay Observer for Northern Ireland and his predecessor.
- 3.17** A common starting point for those in favour of continuing self-regulation was the issue of the independence of the legal profession, which, they

claimed, has a particular significance in Northern Ireland. The Law Society noted that

despite the ending of the 'troubles' and the welcome process of normalisation, there are circumstances of legal practice in Northern Ireland which are unique. These, combined with a continued context in which manifest sensitivities exist about the accountability and independence of state bodies and Government influence over the administration of justice. . . . are all factors which should be taken into account.

The Bar Council suggested that the existing system has the confidence of the public and that this was mainly due to its independence from the political process. It noted that the prospect of political appointees determining who can practise at the Bar would give rise to "a deep concern", and that "it is not enough that the legal process is independent; it must be seen clearly to be so".

- 3.18** Organisations such as the Office of Fair Trading and Which? took a different perspective. Both favoured a move away from self-regulation towards more external accountability and the complete separation of representational from regulatory roles. But both organisations recognised that Northern Ireland is a small jurisdiction in which the issue of cost and proportionality are relevant in determining the design of a future regulatory system. Thus the nature of their responses to the consultation process in Northern Ireland differed from the approach they had adopted to Clementi, where issues of size and scale did not constrain their proposals in the same manner as we witnessed during our review.
- 3.19** The Office of Fair Trading suggested that the performance of core regulatory functions — such as the setting of entry standards and training requirements, and the making of conduct rules — requires a balance to be struck between the interests of the profession and those of the public. It observed that without effective external oversight, self-regulation is unlikely to ensure that this balance is struck in a manner that best serves the public interest.
- 3.20** Hence the Office of Fair Trading and also Which? felt strongly that a professional body should have regulatory responsibility only where it can demonstrate that this would not conflict with its representational role. They noted that this requirement is a condition of the continuing regulatory involvement of the professional bodies in England and Wales, and that it is

equally applicable to the legal professions in Northern Ireland. Otherwise they believe that tensions will exist with the two roles being performed by the same organisation. Rules might not serve the public interest either because they unnecessarily restrict lawyers from adapting their services to meet the needs of clients, or because they do not strike an appropriate balance between competing objectives such as justice, independence, competition and innovation. Similarly, the representational function of the professions may be less effective where the professional body wishes to act as a lobbyist on behalf of members but is constrained in doing so by a duty to reflect other wider interests.

- 3.21** Separating these functions is an issue that the legal professions in Northern Ireland, especially the solicitors, have some difficulty with. The Law Society has cautioned against what it considers an artificial separation of its regulatory and representative roles. It informed us that there is an effective mechanism of cross-fertilisation between the two roles that would be undermined should formal separation of its functions be mandatory.
- 3.22** An issue that was strongly stressed during our regional visits was proportionality, that Northern Ireland does not require, and cannot afford, another bureaucracy to regulate the legal professions. Also frequently mentioned was the view that “Northern Ireland is different” and matters that may not figure in other jurisdictions, such as the concept of state control over the legal system, are highly relevant here. We particularly noted that many people were distrustful of government intervention in the legal system, and strongly believed that the professions needed to be clearly seen as independent of government.

## CONSIDERATION OF THE ISSUES

- 3.23** In considering the views and the material we gathered during our deliberations, our main aim has been to recommend a structure of regulation in Northern Ireland that is fit for purpose, that is suitable for this jurisdiction, that meets the needs and expectations of consumers, and that is proportionate. We want the user of legal services in all parts of Northern Ireland to have the same rights and service from their legal providers as those in the other parts of the United Kingdom and in the Republic of Ireland. The key challenge for us as a group has been how to achieve that overall objective while taking into account the particular issues that arise in this jurisdiction.

- 3.24** The market for legal services, in common with the market for all professional services, is characterised by market failure. This failure arises because of asymmetry of information between the supplier and the consumer. The customer, who is usually poorly informed about the nature of the problem, relies on legal advisers to both define the problem and to implement the strategy for solving it. There are, therefore, incentives for legal advisers to act in their own interests rather than in those of their clients. This problem is aggravated by most purchasers of legal services — commercial clients being an exception — not being “repeat customers” and, therefore, not having the opportunity of learning through experience.
- 3.25** One response to the problem of information asymmetry is for the profession to regulate itself. An advantage of self-regulation is that the costs of regulation, in terms of acquiring information or making regulatory adjustments, may be lower than under external regulation. A disadvantage is the tension that exists between the role of the professional body as regulator — which is to protect the interests of consumers, often against its members — and its role in representing the interests of its members, often against consumer bodies. In resolving this tension, the professional body may place more emphasis on its representative than on its regulatory role. This may affect complaints procedures, the quality of training, requirements for continued professional development, and other matters. In effect, self-regulation runs the risk of being the ultimate form of “regulatory capture” and has, potentially, the effect of a cartel: by controlling entry and setting prices above competitive levels, members of the profession earn excessive profits.
- 3.26** In spite of these risks, the Law Society and the Bar Council have generally established an effective framework for regulating themselves. Areas for concern exist regarding complaints-handling that we examine in the next chapter, but the professions have a good record on entry to the profession, professional rules, and codes of conduct. The Law Society for Northern Ireland, supported by many other consultees, stressed that, unlike in England and Wales, there has not been a history of regulatory failure in this jurisdiction. It is difficult to argue with that statement.
- 3.27** Indeed, a number of examples support the view that the professions in Northern Ireland have performed their regulatory duties well. The Law Society’s Home Charter Scheme, which regulates the residential conveyancing process for solicitors, provides clear evidence of a regulator ensuring that the interests of consumers are protected. The Bar has similarly discharged its duties in relation to entry and training in a manner that,

unlike in England and Wales, has encouraged and supported prospective barristers and pupil barristers as they seek to make a profession at the Bar (see Para. 6.22).

- 3.28** Legal regulation in Northern Ireland has also been helped by the absence of a regulatory maze that has made the system so complex in England and Wales, with roles for the Home Secretary, the judiciary, the Legal Services Ombudsman, the Department of Trade and Industry, the Lord Chancellor, the Office of Fair Trading, and even the Archbishop of Canterbury. The system of regulation in Northern Ireland is comparatively straightforward, with the Lord Chief Justice, the Lay Observer, and the Department of Finance and Personnel being the key institutions.
- 3.29** The absence of a regulatory maze in Northern Ireland that requires simplification, the small size of the legal professions, and their relatively good regulatory record compared with their counterparts in England and Wales led us to conclude that simply transferring Clementi's proposals and, in particular, a Legal Services Board, to this jurisdiction would not be appropriate. But we do believe that more effective oversight of the legal professions is required in Northern Ireland, and that it should take account of the principles set out by the Better Regulation Task Force and by Clementi.
- 3.30** We also believe that any new arrangements for regulating the legal professions in Northern Ireland must take into account the principle of proportionality. Two of the strongest advocates of the independent regulation of the legal professions, the Office of Fair Trading and Which?, both appreciate that the structures recommended for England and Wales might not be cost effective in Northern Ireland. Although the OFT believe that a fully independent legal services board would be the ideal method of achieving proper and effective oversight, it recognises that the benefits of such a body in Northern Ireland might be outweighed by the costs. It suggested to us that other steps could be taken to secure similar benefits: for example, a responsibility might be placed on an authority, external to the professions, to ensure that professional rules are subject to external oversight and in the public interest. And Which? suggested that the Department of Finance and Personnel might have a reinforced oversight role of the professions.
- 3.31** Hence taking these principles into account we have concluded that a more effective and transparent oversight role should be given to an

independent Legal Services Oversight Commissioner. That person should have a combined role in relation to oversight of both general regulation and the complaints-handling process, and should oversee both the barristers' and the solicitors' professions. We consider in more detail in Chapter 5 the exact nature of the proposed oversight role in relation to regulation and complaints handling, as well as examining the important issue of how such a person would be appointed.

- 3.32** We also consider that an increased involvement of lay practitioners would be helpful. The Law Society, the Benchers and the Bar have noted that they have no objection in principle to lay participation in general regulatory matters and, indeed, it already exists, with some lay participation occurring on education for barristers and solicitors and in relation to certain committees of the Law Society. But we recommend that such lay participation is increased, with thought being given to how lay persons can add value to the regulatory duties of both the Law Society and the Bar Council. We recognise that professional persons are generally better equipped to provide the necessary expertise on such matters as professional rules and codes of conduct, and hence we do not recommend lay majorities or lay chairs for committees dealing with these matters.
- 3.33** We believe that the Law Society and the Bar Council should consult interested parties in relation to any rules they make. We leave a final determination of the nature and scope of this consultation process to be fully developed by the person in charge of oversight, with recommendations relating to a duty to consult being prepared by that office holder. But, to take only one example, we would expect to see the Law Society and the Bar Council consult with the Office of Fair Trading about rules that have a competitive aspect to them, and that an onus would be placed on the professional bodies to take its views into account when finalising those rules. We also recommend that the oversight commissioner would consult with relevant organisations in auditing those rules.
- 3.34** We accept that a case can be made for the Lord Chief Justice having a role in any future arrangements. The professions are confident about the independence of the Lord Chief Justice, but we feel their confidence needs to be balanced against the alternative view that he may be too closely associated with lawyers to meet fully from a public point of view the requirements of openness and transparency. We take the view that in practice the Lord Chief Justice does hold the confidence of both the public and the professions and that a triangular arrangement, involving the

professional body, the Lord Chief Justice and the oversight commissioner has the potential to work well for both the public interest and the professions. We would, however, see the role of the Lord Chief Justice as being advisory in nature. We examine how the role of the Lord Chief Justice might fit in with the revised oversight arrangements in Chapter 5.

- 3.35** We have also considered the question of the separation of regulation from representation. Clementi took the view that in order to avoid real or perceived conflicts of interest these functions should be completely separated within the internal structures of each organisation. We agree with this in principle and in Chapter 4 we set out how such separation is required to deliver a copper-bottomed complaints-handling system. In respect of other aspects of regulation, however, the position is not as clear-cut. We are mindful that there is no history or current evidence of regulatory failure under the present arrangements, and no suggestion has been made to us that the professional bodies' general regulatory powers have been exercised against the public interest. But it has been suggested that within a small jurisdiction there is considerable opportunity for the representative and regulatory roles of the professional bodies to inform one another. And it has been further suggested that in practice the strict separation of regulatory and representative functions within relatively small professional bodies, in a small jurisdiction, would create difficulties.
- 3.36** Taking these points into account, together with the need for proportionality, we believe that strict separation of such responsibilities will not add value to the consumer, or, indeed, to the professions themselves. While the Benchers have suggested an additional measure of separation relating to entry of new barristers to the profession, which we believe the Bar Council should implement, it is difficult to envisage that the Benchers, especially the Judicial Benchers, might perform a similar role in making rules for the professional conduct of barristers.
- 3.37** We conclude, therefore, that formal separation is not required for these other aspects of regulation. We believe that it would not in practice ensure that any perceived conflicts of interest were avoided. Only strong and effective oversight coupled with increased lay participation can ensure this, and it is these aspects that we believe hold the key to improving the status quo. Hence the Legal Services Oversight Commissioner should have the ability to review the role of the professional bodies as regulators, to make recommendations for any changes where problems have been identified, and to ensure that best practice is observed when discharging

regulatory responsibility. We examine that particular proposal again in Chapter 5.

## RECOMMENDATIONS

**3.38** We recommend:

1. The legal professions should continue to discharge regulatory functions, subject to more effective and transparent oversight by an independent Legal Services Oversight Commissioner.
2. Lay persons should have an increased involvement in relation to general regulatory matters.
3. The professional bodies should undertake greater and targeted consultation on rules they intend to make.
4. The Legal Services Oversight Commissioner should have an audit function in relation to professional rules.
5. The Lord Chief Justice should have an advisory role in relation to professional rules.
6. The regulatory and representative functions of the professional bodies need not be separated for general aspects of regulation, but should be for complaints handling (see Recommendations 9 and 10).

## Chapter 4

# Complaints Handling

- 4.1** In this chapter we deal with an issue that directly affects the public and elicited the highest level of interest during the consultation process: the method by which complaints relating to the service provided by lawyers are handled.
- 4.2** In Chapter 2 we outlined the main features of the existing complaints-handling systems for both the solicitors' and barristers' professions. Both the Law Society and the Bar Council are responsible for regulating the conduct of their members and for handling consumer complaints. Although there are several common features, the methods by which they discharge this function sometimes differ between the two professional bodies. For example, the Bar will accept a complaint from whatever source, whereas the Law Society will investigate a complaint only in certain circumstances. We examine that particular issue later in the chapter.
- 4.3** The complaints-handling process for both has a professional majority determining the outcome; lay persons perform a role but they are in a minority. Different stages are present in each complaints-handling system: for example, the solicitors' profession has an element of oversight provided by the Lay Observer, but such oversight does not exist in the complaints process of the Bar. We take a more detailed look at the role of the Lay Observer in Chapter 5.
- 4.4** Complaints handling in Northern Ireland is different in some respects from that in other jurisdictions. For example, in England and Wales the existing position (pre-Clementi and the White Paper) is that solicitors are required by Rule 15 of the Solicitors' Practice Rules and by the Law Society's Guide to Professional Conduct of Solicitors to have "in-house" complaints-handling procedures that must be followed before a complaint can be made to the Law Society's Consumer Complaints Service. Solicitors must advise their clients how to make known any concerns they have about the service provided. They must also investigate the complaint within the practice, and at the conclusion of the review provide a response to the client in writing. A client who is not satisfied must be provided with information about the Consumer Complaints Service and its role. No similar Practice Rule exists in Northern Ireland and while some firms have a similar procedure in place, it is not compulsory and many firms do not. Similarly, in England and

Wales the Consumer Complaints Service has the power to award compensation to a client up to £5,000. At present, the Law Society, through its Client Complaints Committee, is unable to award compensation to clients in this way. But members of the Bar have paid compensation to clients in the past, although this appears to have been done on an ex gratia basis.

- 4.5** The issue of complaints handling has recently been the focus of change or proposals for change in each of the jurisdictions in these islands, with fully independent Offices for Legal Complaints being advocated for both England and Wales, and Scotland, and a change in the oversight functions in the Republic of Ireland. We examine each of these changes in turn.

## ENGLAND AND WALES: OFFICE FOR LEGAL COMPLAINTS

- 4.6** Clementi noted that there were two broad options available to him in relation to complaints handling: transferring responsibility from the front-line bodies to an independent consumer complaints body, or leaving complaints with the front-line regulatory bodies subject to oversight. And he went on to identify a number of issues arising from the manner in which complaints are dealt with by the existing front-line and oversight bodies.
- 4.7** He first noted that the record of complaints handling against solicitors in England and Wales had been much criticised over recent years, especially because of substantial delays in dealing with complaints and the questionable quality of the outcomes. Second, he had concerns about the independence of the complaints-handling system operated by the front-line regulatory bodies. And a significant number of responses from members of the public or organisations representing them indicated that this lack of independence was undermining public confidence in the legal profession's ability to adjudicate complaints. Third, he felt that the existing arrangements had the potential to create inconsistency in the minds of consumers and a lack of clarity about the avenues for redress. Finally, he noted that the overlaps and fragmented arrangements that currently exist in England and Wales for oversight of the professional bodies created complexity and inconsistency.
- 4.8** Hence Clementi recommended the creation of a fully independent and free-standing Office for Legal Complaints, a new body that would remove

the complaints-handling process from the professions entirely. He concluded

that a single independent complaints handling body for all consumer complaints is the best way forward. It would sweep up the complaints handling unit of the front line bodies and the main oversight bodies. Such an arrangement would have the benefit of:

- Providing a system which is independent of the legal profession;
- Providing a single system with one point of entry for all consumer complaints, making the system simpler for consumers;
- Bringing greater consistency and clarity of process; and
- Bringing greater flexibility, in particular making it easier to accommodate alternative business structures.

**4.9** Although Clementi envisaged that the Office for Legal Complaints would have responsibility for dealing with individual complaints, he also recommended that it should have, in conjunction with the proposed Legal Services Board, a more strategic role in, for example, the setting of targets for the handling of in-house complaints by practitioners.

**4.10** The Government fully supported Clementi's recommendations. Draft legislation currently under consideration will create an independent Office for Legal Complaints and, if passed, the new office will come into being during late 2008 or early 2009.

## SCOTLAND: INDEPENDENT LEGAL COMPLAINTS COMMISSION

**4.11** On 11 May 2005, the Scottish Executive issued a consultation paper *Reforming Complaints Handling, Building Consumer Confidence* that invited views on a range of complaints-handling issues, including:

- whether complaints-handling arrangements should be retained broadly as they are (subject to an increase in the powers of the Scottish Legal Services Ombudsman); or
- whether the level of oversight of the professional bodies might be raised by the introduction of a "single gateway" for complaints based on the

Ombudsman's office (with either a monitoring function or a substantive complaints-handling function); or

- whether an independent complaints-handling body should be introduced that would be managed by a board with a lay Chair and a lay majority.

**4.12** The consultation paper received a significant response, with 490 submissions being sent to the Scottish Executive, of which 417 were from members of the public. There was clear support for the formation of the final option outlined by the Executive, namely the creation of the independent complaints-handling body.

**4.13** Scottish Ministers considered the outcome of the consultation and announced on 22 December 2005 their decision to introduce legislation in the current session of the Scottish Parliament to establish a new independent body, the Scottish Legal Complaints Commission, to handle service complaints (those complaints that relate to the standard of service received by consumers from their lawyers as opposed to conduct complaints that relate to lawyers breaking their own professional rules). The new body will act as a gateway to receive those service complaints about lawyers that cannot be resolved at source and will take over the handling of complaints from the front-line professional bodies. Those bodies will retain responsibility for conduct matters and professional discipline, with the proposed new Commission referring complaints about conduct to them. But the Commission will have the power to oversee the manner in which conduct complaints are handled.

**4.14** The new system is aimed at building public confidence in the system for handling complaints against lawyers and the Commission will have the role of promoting good practice in complaints handling by legal practitioners. The Commission will be funded by the legal profession through a general levy on legal practitioners and a specific levy on complaints, with no fee being charged for making a complaint. The Commission will publish an annual report to Ministers that will be laid before the Scottish Parliament.

**4.15** The Bill was introduced to Parliament on 1 March 2006 and is currently being considered by Members of the Scottish Parliament. After pre-legislative scrutiny identified a number of areas of concern, Scottish Ministers tabled in the region of three hundred amendments to the Bill as introduced. The Bill is scheduled to complete its Parliamentary progress by the end of

2006, coming into law in early 2007. The timetable for the setting up of the Commission to handle complaints has yet to be finalised.

## REPUBLIC OF IRELAND: LEGAL SERVICES OMBUDSMAN

- 4.16** In early 2006 Minister Michael McDowell announced plans to establish a Legal Services Ombudsman in the Republic of Ireland that would strengthen the mechanisms for making a complaint against a solicitor or a barrister. The Ombudsman will oversee the handling of three types of complaints by the Law Society: inadequate services, excessive fees, and misconduct.
- 4.17** In doing so, the Legal Services Ombudsman will effectively subsume the Law Society's existing office of Independent Adjudicator and carry out the same functions in respect of both barristers and solicitors. Its main functions will be: to provide a forum of appeal for clients of solicitors and barristers who are dissatisfied with the outcome of a complaint to the Law Society or Bar Council; to provide an overseeing role by examining each year a random selection of complaints; and to monitor access to the professions and report to the Minister on the numbers admitted annually to each profession.
- 4.18** In conjunction with this change instigated by Ministers, the Law Society of Ireland set up a Regulatory Review Task Force to examine the procedures by which the Law Society deals with complaints against solicitors. Its main recommendations, which have been broadly supported by the Law Society of Ireland, include the following
- A majority of the Law Society's Disciplinary Body should be non-members of the Council of the Law Society and there should be no communication between the Council and its Disciplinary Committee on specific cases.
  - A client who has made a justifiable complaint should be eligible for compensation up to a maximum of €3000.
  - An independent panel of solicitors should be created to assist members of the profession about whom complaints are made.
  - More information should be given to lawyers about regulation, with a mandatory course on practice management for new entrants.

- More information should be given to the public about complaints procedures.
- Solicitors who refuse to deal with the Society's Disciplinary Committee should be severely dealt with and where there is a history of complaints, a special investigation should be launched.

## CONSULTATION PROCESS

**4.19** Most of those who responded to the Department's consultation paper offered a view on the existing complaints-handling system. Perhaps because of the greater contact that members of the public have with the solicitors' profession, the complaints-handling process of the Law Society received more attention than that of the Bar.

**4.20** Almost all the consultees believed that the existing complaints-handling systems were flawed and required change, but opinions differed as to the degree of change that was necessary. Both branches of the profession put forward proposals to reform the complaints-handling process, and it is worthwhile examining these proposals in some detail before looking at the views of the other consultees.

**4.21** In addition to its general submission to us, the Law Society made a separate presentation on complaints handling. It agreed that the existing system needed to be reformed. It noted, however, that although the available statistics could be interpreted in different ways, the basic evidence suggested that there are fewer complaints against solicitors in Northern Ireland than in other jurisdictions. Hence it believed that reform should be based on the strengths and the weaknesses of the Northern Ireland system, and concluded that the establishment of a fully independent complaints-handling body for Northern Ireland was not the best option for this jurisdiction. Instead, it proposed an alternative model based on an enhanced oversight role and a complaints committee, with a lay majority and a lay chair, which would be formally separate from the Law Society Council, and have a range of additional powers. We consider these proposals when developing our recommendations later in this chapter.

**4.22** The Bar Council and the Benchers also accepted the need for change, and in particular, for openness, transparency and independent oversight in relation to complaints and discipline. The Benchers summarised their suggestions as follows:

- Increased control of complaints and discipline by the Benchers and by lay representatives.
- Members of the Bar Council would be excluded from any involvement in the regulatory procedure to achieve separate regulatory and representative functions.
- The appointment of members of the Bar to regulatory committees would not involve the Bar Council but would be undertaken by the Benchers.
- The appointment of lay members to regulatory committees would not involve the Bar Council and would be undertaken by the Lord Chief Justice appointing a panel of lay persons and the Benchers appointing the relevant committee from the members of the panel.
- The appointment of an independent, publicly funded Legal Services Ombudsman with power to oversee complaints against barristers.

**4.23** The Bar noted that complaints against barristers were few and that their scarcity did not result from members of the public not knowing how to complain. It pointed out that complaints made to the Law Society about a barrister are always redirected to the Bar. It also noted that the Court Service has included information about complaints in leaflets distributed in all courts in Northern Ireland, and that the Bar's website makes clear how complaints can be made. Although we noticed that the website did not do so until our review was well under way, we nevertheless welcome the Bar's initiative in placing this information further into the public domain.

**4.24** More generally, we believe that the complaints-handling procedures for both professions are not sufficiently accessible. For example, the largest library in Belfast was not able to supply us with any information about how to complain against either a solicitor or a barrister. Disability Action noted that the complaints procedure must be fully accessible and proactively disseminated to those affected by the Section 75 duties. Law Centre (NI) noted that the form issued by the Law Society on how to complain is not user friendly. It also felt that many users in its client groups would have difficulty assessing appropriate information, and that broader grounds for complaint that allow the investigator to get to the heart of the quality of the service provided should be introduced.

- 4.25** Both professions appear to be taking steps towards providing the relevant information, but we believe much remains to be done before the material is readily available. We discuss this issue later in this chapter.
- 4.26** Both professions pointed out to us in their submissions and in their oral evidence that lawyers generally tend to be much tougher on each other in relation to complaints and discipline than lay persons. The lay members of the Complaints Committees of both the Bar and the Law Society agreed with this observation, and indicated that they were happy to play a minority role in proceedings. We examine this issue later in the chapter, and also look at induction and training of lay members because little of it occurs.
- 4.27** The view of the professions, therefore, is that change is needed, but that the primary responsibility for the complaints-handling process should remain with them, subject to greater oversight, a much greater degree of lay participation, and enhanced redress arrangements.
- 4.28** Other consultees took a different view. Which? believes that although many people are happy with the service they receive from solicitors, consumer dissatisfaction might be higher than the statistics show. It pointed out that the Omnibus Survey carried out on behalf of the Department of Finance and Personnel by the Northern Ireland Statistics and Research Agency indicated that nearly 60 percent of consumers in Northern Ireland were dissatisfied with the way their complaint was handled but that only 25 percent of dissatisfied consumers complained, and suggested that this indicated significant problems with the complaints system.
- 4.29** Which?, and others, took this evidence and other factors as reasons for suggesting that the complaints-handling process should lie outside the professions. It stated in its submission that

A well functioning complaints system should be well publicised, directly accessible, free to complainants, and quick and easy to use. Consumers also have a right to know about upheld complaints against solicitors. We believe the best way to ensure this is a one-stop shop for consumers, independent of the professional bodies and handling all complaints about legal advisers once the consumer has exhausted the firm's own complaints system.

It suggested that this one-stop shop should be set up as a similar, but smaller, version of the proposed Office for Legal Complaints in England and Wales.

**4.30** The Office of Fair Trading made a similar point in its submission. It has consistently supported the proposed establishment of a fully independent complaints-handling body as the only option that is likely to address concerns about consumer confidence, and it believes that such a model would be beneficial in acting as a gateway for all complaints. It did question, however, whether the benefits of having such a body in Northern Ireland could be achieved without disproportionate expense. And it suggested some steps that might be taken should a fully independent body not be considered cost effective: the complaints-handling bodies should be able to award substantial compensation, they should be functionally separate from the representational body, and they should have a lay majority and a lay chair. It also recommended that the role of the Lay Observer be significantly expanded to include:

- oversight of both Bar and Law Society complaints;
- a single gateway for all complaints;
- power to monitor and set targets for the handling by the professional bodies of conduct and discipline complaints;
- power to rehear complaints against practitioners; and
- power to order compensation.

**4.31** An important view of the complaints-handling procedure came from the office that has had the most direct, independent experience of it. Both the present Lay Observer, and his predecessor, provided comments on the existing system. We asked the current Lay Observer if the complaints-handling procedures should be removed from the professions and given to an independent Office of Legal Complaints. His view was that the professions should be responsible and fully accountable for regulating all matters, including complaints handling. He noted, however, that the manner in which complaints handling is undertaken should be reformed and he suggested the following:

- The separation of complaints handling from the representational role of the professional body should be more specifically marked.
- The procedures should be more accessible than they currently are.

- The complaints bodies should have a greater number of lay persons and a lay chair.
- Additional resources should be provided and public accountability much enhanced.

This last point about external public oversight is considered further in Chapter 5.

**4.32** In our regional meetings, we heard much from lawyers about the complaints-handling system. The comments offered by them were, in some instances, more conservative than those of their representative bodies. Most accepted that some change was required, including increased lay participation and strengthened oversight. We were told on several occasions that professionals operating the current system find it a useful early warning system against difficulties with particular solicitors' practices, and we were cautioned that an independent body might not be able to provide a similar symbiotic relationship with the Law Society to nip potential problems in the bud.

## CONSIDERATION OF THE ISSUES

**4.33** Having considered the evidence and the views of the consultees, our first task was to decide whether the complaints-handling process should be removed from the professional bodies and transferred to a new and independent body, such as the Office of Legal Complaints in England and Wales. We were attracted to many of the perceived benefits of an Office of Legal Complaints: it would provide a one-stop shop for consumers with a complaint against their lawyer, and it would match the best practice benchmarks of openness and transparency.

**4.34** But we also had to take into account the issue of proportionality. Whatever way the statistical evidence is interpreted, the level of dissatisfaction with lawyers in Northern Ireland seems to be lower than in other jurisdictions. The Law Society has not been bedevilled by the difficulties of its counterparts in England and Wales, and while its complaints procedure could and should be improved, the Society appears to have used the procedure in a reasonable manner. If it had not, we would have expected more than three submissions from members of the public; the inquiries in England and Wales, and Scotland received several hundred such responses.

- 4.35** Whatever the level of complaints against lawyers in Northern Ireland, we believe that consumers here should have access to a complaints system that is open, transparent, user friendly, and which meets the needs and expectations of all who need to use it. We consider that the existing system falls short of best practice and requires modification. Northern Ireland is a small jurisdiction, however, and new structures usually bring added costs that are passed on to consumers. Indeed, even the Office of Fair Trading, which strongly supports the establishment of the Office of Legal Complaints in England and Wales, recognised that such a body might be too costly to justify the benefits it might bring in Northern Ireland. Hence we have to develop a complaints system that meets best practice in a cost-effective manner.
- 4.36** We have been particularly impressed by the views of the Lay Observer and his predecessor. They told us that the professional bodies should have the primary responsibility for complaints handling, and that removing this function from them would have disadvantages. They agree with the Law Society that distancing the professional bodies from complaints handling might diminish their first-hand knowledge of problems arising within the profession and their ability to help members address them at the earliest opportunity.
- 4.37** We therefore conclude that an independent body for complaints handling is not best suited to the needs of Northern Ireland and this function should remain with the professions, subject to a number of important reforms. The most important reform is greater lay participation: lay people should be in the majority on complaints committees and these should be chaired by a lay person. The Law Society accepts the need for this reform, and we recommend that it should have a client complaints committee chaired by a non-lawyer and with a lay majority.
- 4.38** The Bar Council and the Benchers also accept the need for increased lay participation in the complaints-handling procedures for barristers, but they are concerned about a lay person chairing a complaints committee dealing with conduct complaints (as distinct from service complaints). They believe that since conduct complaints are often complex and have potential ramifications for the livelihood of individual barristers, they would benefit from the expertise of a professional chair. The current lay people who sit on these committees agree with the Bar Council and the Benchers.

- 4.39** We believe that suitably qualified lay chairs and participants are unlikely to ignore the advice of the professional participants on committees dealing with conduct issues. Indeed, both the Law Society and the Bar Council have told us that the views of lay persons on their existing committees rarely differ markedly from those of the professional participants. Hence we consider that a lay person should chair committees dealing with either service or conduct complaints against barristers, other than serious conduct matters.
- 4.40** We consider that complaints should continue to be made to the professional bodies. The client complaints committee should be serviced by a dedicated secretary. In the case of the Bar, we consider that the responsibility for the complaints-handling function should be transferred to the Benchers so as to achieve functional separation of regulation from representation. Similarly, the clients complaints committee of the Law Society should be functionally separate from the Law Society Council, with members elected to the Council not being permitted to hear complaints.
- 4.41** Complaints should be made directly to the relevant committee, with each secretary acting as the link to the committee. We see this as a helpful first filter and referral mechanism. Complaints may well be resolved before being heard by the committee, but those in which resolution or mediation is either refused or fails will proceed directly to the client complaints committee. Issues raised by consumers, which the secretary does not deem to be a complaint must be the subject of a separate regular return to the Legal Services Oversight Commissioner.
- 4.42** We recommend that the Solicitors' Disciplinary Tribunal should continue to perform its function (discussed in more detail in Chapter 2) of considering serious conduct issues and having the ultimate power of sanction in relation to the solicitors' profession. We recommend that the Solicitors' Disciplinary Tribunal continues to be chaired by a professional lawyer with majority lay participation.
- 4.43** We believe that a new Disciplinary Committee of the Bar should perform a similar function for barristers to that which the Solicitors' Disciplinary Tribunal does for solicitors. It would deal with matters involving serious conduct issues — those matters that could well have an effect on the ability of the barrister to practise at the Bar — at first instance (when the matter is first raised) and also act as an appeal mechanism for other complaints that carry with them an element of conduct sanctions. Again, we consider that the Chair

of this body should be professionally qualified and assisted by a lay majority.

- 4.44** The issues of lay majorities and lay chairs raises the matter of their training and induction. The lay persons currently sitting on complaints cases told us that they received little formal induction or training. Indeed, meeting us was the first time that the lay persons on the Bar Committees had been in the same room together. This runs contrary to best practice and we therefore recommend that all lay persons appointed to sit on a complaints-handling committee are given appropriate induction and training. We further recommend that the oversight body should have the power to make suggestions to the professional bodies on the provision of such training, and we deal with this point again in Chapter 5.
- 4.45** Another important matter is the method by which lay persons are appointed. At the moment those on the Law Society's Client Complaints Committee are appointed for an indefinite term by the Lord Chief Justice from a list of names put forward by the Society. A similar system exists for appointments to the complaints committees of the Bar.
- 4.46** We do not consider this method of appointment to be satisfactory. It lacks openness and transparency. We believe that the appointment of lay persons should satisfy the Nolan principles, with public advertisement and a structured recruitment process. We further suggest that the appointment of lay persons be subject to scrutiny by the oversight body.
- 4.47** We also considered the issue of who can complain. Under the existing system, certain classes of individual are excluded from making a complaint against a solicitor (the Bar can, and do, hear complaints from any source). The Law Society relies on the definition of "client" in the Solicitors (NI) Order 1976 in shaping its approach to hearing complaints. In practice, however, its approach is somewhat wider and it is prepared to accept complaints from the following:
- those who fall within the statutory definition of "client" (Article 3 of the Order);
  - those acting on behalf of someone else who is the "client", where they do so by relying on an enduring power of attorney or court order;
  - beneficiaries of an estate where the solicitor who is the subject of the complaint is a personal representative;

- complainants who are third parties to whom a solicitor has given a specific commitment that is unfulfilled; and
- other solicitors.

**4.48** But the Society does not accept complaints from disappointed beneficiaries who have been deprived of a benefit under a will, although such an individual may sue the relevant solicitor. Nor will it hear from those complaining against someone else's solicitor, although such a person can report another person's solicitor to the Law Society, and this may lead to disciplinary action being taken.

**4.49** Clause 102 of the draft Bill for England and Wales states that "anyone can make a complaint to the OLC unless classed as ineligible". Those classed as ineligible under the Bill in its current form are the following:

- a lawyer (A) who has procured the services of another lawyer (B) who wishes to take a complaint about B to the OLC (e.g. a solicitor who has briefed a barrister);
- a public body; and
- persons who are in future classed as ineligible under rules made by the OLC under clause 105.

**4.50** The Department of Constitutional Affairs has indicated that it sees no reason in principle why someone should not be able to bring complaints and derive redress from someone else's lawyer. But the Office of Legal Complaints will be required to promote the "regulatory objectives" set out in Clause 1 of the Bill, which include "promoting and maintaining adherence to the professional principles". These include the duty to act in the best interests of the client, and the Office of Legal Complaints will presumably have to deal with such complaints in the light of this duty. Hence the categories of person unable to make a complaint at the moment to the Law Society for Northern Ireland would be able to do so to the OLC under the new proposals for England and Wales.

**4.51** In Scotland, Clause 2 of the Legal Profession and Legal Aid (Scotland) Bill directs the Scottish Legal Complaints Commission to deal with complaints "by or on behalf of any person having an interest". As regards service complaints, this phrase is defined in clause 2(3) as "any person who appears to the Commission to have been directly affected by the suggested inadequate professional services". The phrase is not defined for conduct

complaints, but clause 23 allows the Commission to make practice rules and these may further restrict eligibility. The Commission will decide whether a complaint is of a service or conduct nature, deal with the former, and refer the latter to the relevant professional body.

- 4.52** We have taken the approaches of both jurisdictions into account in considering this issue. We believe that the eligibility to make a complaint in Northern Ireland should be widely drawn as in England and Wales, and Scotland. We recommend, therefore, that anyone should be able to make a complaint to the respective professional body – this is already the case in relation to the Bar – with the precise wording being a matter for further development at the appropriate time by the parliamentary draftsman. We further recommend that the oversight body should have the power to consider any issues relating to the eligibility to make a complaint and make any necessary recommendations.
- 4.53** In England and Wales the Law Society has made it compulsory for all solicitors' firms to have a formal in-house complaints-handling procedure. In Northern Ireland this is not the case, and although many firms have such procedures in place, many do not. We consider that their absence is not in the best interests of the consumer, and that all solicitors' firms should have a formal complaints procedure that is made known to all clients and prospective clients. We do not believe, however, that clients should be required to use these procedures. With so many small firms in Northern Ireland, some clients may not feel comfortable complaining to the person with whom they have a grievance.
- 4.54** Another important issue concerns redress and compensation. These matters, which are an increasingly important component of a complainant's perception of the case being properly and effectively determined, are not dealt with by the Solicitors' (Northern Ireland) Order 1976 or the Solicitors' (Amendment) (Northern Ireland) Order 1989. The Law Society accept in principle the need for some form of redress and has suggested that a scheme involving a form of non-binding arbitration could be developed that will allow payments up to a certain monetary limit.
- 4.55** We also believe that a measure of financial redress should be available to the wronged consumer. This is a complex area and one that we have considered in much detail. We are alive to the fact that both Scotland, and England and Wales, have proposed schemes, albeit different in nature, which would allow payments up to £20,000. We believe that permitting

payments up to this level will not ultimately benefit the consumer. Indeed, we see significant problems arising if the schemes in England and Wales, or Scotland, were implemented in Northern Ireland. Given the sums involved, lawyers, and particularly their insurers, will require representation rights, and the consumer will also require such rights. We are also concerned that potential legal proceedings will produce delays and procedural complexities. In short, the costs associated with such a system would be prejudicial to consumer interests.

- 4.56** Our alternative proposal has two elements. First, conduct and service complaints should receive the same financial redress. Purely service complaints, purely conduct complaints, or complaints that combine both elements and which are sustained should have a monetary cap set at £3,500. This level of payment should be sufficient to meet losses which could arise from actions or omissions that would not be regarded as professional negligence on the lawyer's part. We expect that in the vast majority of cases awards will be significantly lower than this maximum limit; only in the most severe cases of poor conduct or service would we expect to see payments that come near to this figure.
- 4.57** Second, where it appears to the client complaints committee that there is evidence of loss sustained by the consumer as a result of professional negligence, the consumer, rather than being required as at present to pursue a claim through the civil courts, should be entitled to have the case heard by the client complaints committee and, if successful, receive compensation up to £3,500. A method of assisting the complaints committee would be to have an adjudication to determine whether the lawyer has been negligent and the extent of the loss suffered. The adjudicator should be appointed by the LSOC from a panel of legal experts. Each side should have representation rights in accordance with a protocol to be established.
- 4.58** The advantage of such a system is that it would provide a quick way of determining meritorious claims without the need, or the risk, of proceeding through the courts. A further advantage is that the award would be no greater than the "excess" of £3,500 that a solicitor currently has to meet under the Law Society's master insurance policy, and hence insurers are unlikely to get involved in these cases and escalate the costs involved.
- 4.59** We propose that both the scheme for service and conduct complaints, and for those complaints arising from professional negligence, should

operate in tandem. In other words, if a consumer has suffered a loss of £3,500 as a result of a lawyer's negligence, and has been the victim of poor service, then that consumer could receive compensation up to a maximum of £7,000. We further believe that the LSOC should monitor these figures and make recommendations to government when change is considered necessary. In particular, we consider that the figure for loss arising from professional negligence should mirror the insurer's excess figure. Whatever the amount of a claim or an award, a consumer is entitled to pursue the claim through the ordinary civil courts without restriction. Our proposals are in addition to those rights.

**4.60** Where the loss allegedly sustained exceeds £3,500, and it appears there may have been professional negligence, the consumer should be directed to pursue the claim through the civil courts, which is essentially what occurs at present. But our inquiries suggest that not all complainants pursue their claims because of the potential risk of costs should they lose the case. We consider that all such persons should have, at the discretion of the client complaints committee, recourse to a free expert opinion as to the likelihood of success in proceeding with their claim. This would enable those claims with real prospects of success being identified, and the consumer could then consult their own solicitor with the benefit of such expert advice.

**4.61** The revised arrangements put forward in this chapter address the concerns relating to the current complaints-handling system in Northern Ireland. With strong and effective oversight, as discussed in the next chapter, we believe that these measured reforms will create a better, more accessible, more transparent and more efficient complaints-handling system, which will be cost effective and which all complainants should be confident in employing when required. It will also give the professional bodies the chance to demonstrate that they can continue to play a positive and progressive part in the handling of complaints.

## RECOMMENDATIONS

**4.64** We recommend:

- 7.** The professions should retain complaints-handling responsibility, subject to the changes recommended below that will copper-bottom the procedures to ensure best practice and to enhance the rights of consumers.

8. Lay people should be in a majority on all complaints committees and these should be chaired by a lay person.
9. Responsibility for the complaints-handling function should transfer from the Bar Council to the Benchers to achieve functional separation between regulation and representation.
10. Complaints committees should be functionally separate from the Law Society Council, with members elected to Council not being permitted to hear complaints.
11. The Solicitors' Disciplinary Tribunal should continue to perform its current range of functions, and should continue to be chaired by a legal professional, but with a lay majority.
12. A new disciplinary committee of the Bar should be established, should be chaired by a legal professional, should have a lay majority, should deal with serious conduct issues at first instance, and should act as an appeal forum for all other conduct complaints.
13. Appropriate induction and training should be given to lay members appointed to sit on complaints committees.
14. The Legal Services Oversight Commissioner should have the power to audit the induction and training given to lay members appointed to sit on complaints committees.
15. The appointment of lay persons to complaints committees should follow the Nolan principles, including public advertisement and recruitment processes, and should be subject to the scrutiny of the Legal Services Oversight Commissioner.
16. Eligibility to make a complaint should be open to anyone and be subject to oversight from the Legal Services Oversight Commissioner.
17. All solicitors' firms should have a formal complaints procedure in place that is made known to all clients and prospective clients.
18. Complaints committees should have the power to award compensation, with a limit set at £3,500 for service and conduct complaints that do not fall into the category of professional negligence.
19. For those matters in which professional negligence is identified, the clients complaints committee should have the power to award compensation, with a limit set at £3,500. The complaints committee

should be assisted in determining the value and nature of the case by adjudicators appointed from a panel of legal experts by the Legal Services Oversight Commissioner.

20. The Legal Services Oversight Commissioner should have the power to monitor the payment limits of the client complaints committee and make recommendations to the appropriate authority when change is considered necessary.

## Chapter 5

# Oversight

- 5.1** We have set out in Chapters 3 and 4 our recommendations regarding the future regulation of the legal profession in relation to both general professional matters and the more specific aspect of complaints handling. In doing so, we have accepted that the front-line regulatory bodies in Northern Ireland, the Law Society and the Bar Council, should continue to discharge their functions in a way that places the consumer at the heart of the system. Hence we have recommended that the complaints-handling function should remain with the professional bodies.
- 5.2** But we believe that the key to consumers in Northern Ireland receiving the same benefits as they will be afforded under reforms in other jurisdictions will be the creation of a new body that provides transparent and effective oversight. This chapter begins by looking at the existing provisions for oversight, then goes on to examine the evidence and views obtained during the review process, and concludes by putting forward our thoughts and recommendations as to how oversight would work in the new regulatory framework that we propose.

## EXISTING OVERSIGHT PROVISIONS

- 5.3** We have already touched on the existing oversight provisions for the legal profession in Chapter 2. The situation differs between the solicitors' profession and the Bar. The former is subject to oversight through the Lord Chief Justice, who supervises and is consulted by the Law Society on general rule-making matters. In addition, the complaints-handling function for solicitors is overseen by the Lay Observer for Northern Ireland. He has the power to access the complaints files held by the Law Society, to examine how complaints are handled, and to make recommendations for better practice. He also produces an annual report that is laid before Parliament. But the Bar Council is not subject to any public oversight. None of its regulatory functions, including the handling of complaints, are governed by statutory provisions.
- 5.4** The Lay Observer deals solely with the complaints-handling system; the post has no role in relation to other aspects of regulation. The powers have been described, most notably by successive office-holders themselves, as being "toothless". In relation to an individual complaint, for example, the

Lay Observer can investigate only the processes by which the Law Society deals with the complaint, not the complaint itself. In specific and very exceptional cases, the Lay Observer can refer a complaint back to the Client Complaints Committee or refer a solicitor to the Solicitors' Disciplinary Tribunal. While the power to audit complaints is unique among Legal Services Ombudsman, and the annual report can provide a tool to influence the Law Society, the Lay Observer has to rely on the Law Society to make any change recommended and cannot force it to do so. There is no power to award compensation or redress. This power has been available to counterparts in England and Wales, and in Scotland, even under the existing systems before Clementi and before the Scottish reforms.

- 5.5** England and Wales has two important oversight arrangements. The Legal Services Ombudsman is able to investigate the handling of individual complaints about the legal profession by the relevant front-line professional body, and it can recommend or order that compensation (without limit) for loss, distress or inconvenience is paid to the complainant by the practitioner, the front-line body, or both. There is no maximum limit on the compensation the LSO can award. The Legal Services Ombudsman may also recommend that the front-line body reconsider the complaint, or that it exercise its powers in relation to the lawyer complained about. It also has the power to investigate the original complaint, although this power is used infrequently. Finally, it can make recommendations to the front-line body about its arrangements for handling complaints.
- 5.6** A second oversight arrangement in England and Wales is provided by the Legal Services Complaints Commissioner. In February 2004, the Secretary of State for Constitutional Affairs appointed the existing Legal Services Ombudsman to act in this role. The Commissioner has the power to set targets for the handling of complaints, to make recommendations about the complaints system, and to require the Law Society to submit a plan for improved complaints handling. For example, the current Commissioner recently fined the Law Society £250,000 because she found that the Law Society's plans for the current financial year were not adequate.
- 5.7** The Scottish Legal Services Ombudsman may review the way a professional body has handled a complaint but not the substance of its decision. The Ombudsman has in certain areas greater powers than the Lay Observer, including the power to award compensation (set at a maximum of £1,000). But the Ombudsman does not currently enjoy the same audit function that the Lay Observer has in Northern Ireland.

- 5.8** Hence the powers of the Lay Observer are less than those of his counterparts in other parts of the United Kingdom. In addition, fewer resources are set aside for his role than for theirs. The Lay Observer works part-time (one or two days per week), has limited administrative support, and is paid what is basically an honorarium.

## CONSULTATION PROCESS

- 5.9** Those who responded to the Department's Consultation Paper, including the legal professions and the consumers, were generally agreed that the role of the Lay Observer required significant reforms, including additional powers, a change of name, and increased resources. The Law Society for Northern Ireland, both in its formal submission and in further evidence to us, suggested that the Lay Observer needed additional financial and staffing support, and that he required new investigative, punitive and redress powers.
- 5.10** The Bar Council and the Benchers suggested a revised model for oversight of the Bar that included the appointment of an "independent, publicly funded Legal Services Ombudsman". They recommended that the Ombudsman should oversee the complaints-handling and discipline functions to be carried out by the Benchers, and have the power to examine the complaints-handling system, whether or not it has been the subject of a complaint, and to audit complaint files from the relevant committee. The Bar Council also suggested that the Ombudsman should ensure that the complaints process was in accordance with best regulatory practice, and that the office holder should have the power to prescribe general timescales for the resolution of complaints, and to direct the professional bodies to investigate a particular complaint. The Benchers suggested that the Ombudsman should have the power to order a barrister to pay a complainant a sum up to a specified limit, and have a role in relation to other regulatory committees set up by the Benchers.
- 5.11** Both the Benchers and the Bar Council placed the Lord Chief Justice at the heart of the proposed oversight arrangements. They both advocated a key role for the Lord Chief Justice in appointing the lay persons from which the Benchers would select individual panels to hear complaints, and from which they would select lay personnel for their other regulatory committees. They believed that his involvement would assure consumers of the fairness of the complaints process. We comment on this recommendation below.

**5.12** Several other organisations proposed changes to the existing system. The Association of Personal Injury Lawyers suggested that the professional bodies should have a statutory obligation to respond within a specified time limit to any recommendations the Lay Observer made in his Annual Report for improving the complaints-handling process. The Association also suggested that the person should analyse why particular complaints were rejected in addition to assessing how complaints are handled. Finally, the Association recommended that the Lay Observer should examine ways of promoting the complaints process more widely in order to target the 20 percent of dissatisfied clients who did not pursue a claim because they “didn’t know how to go about it”.

**5.13** Several other organisations offered their comments on this issue. Law Centre (NI) noted that

the Lay Observer has a severely circumscribed and limited remit in examining how the Law Society deals with complaints. In effect, there is no proper independent scrutiny of the handling of complaints.

Citizen’s Advice (NI) suggested that the Lay Observer should have the same power as the Legal Services Complaints Commissioner in England and Wales to set performance targets and make recommendations to improve the complaints-handling process.

**5.14** Another contribution to the debate relating to revised oversight arrangements came from the Lay Observer, who argued in his submissions to the review that his role needed to be strengthened, emphasising the need to be able to award a penalty. He also suggested that the existing audit power should be retained and further enhanced, that proper resources and true independence needed to be secured, and that accountability (to Parliament and to the relevant Minister) in terms of the annual report needed to be retained and further developed. He also recommended that external oversight should be of the same nature and standard in relation to the barristers’ profession.

**5.15** The Office of Fair Trading provided the main alternative perspective on future oversight provisions. It noted that although the Lay Observer offered a form of external oversight for solicitors, his role had significant weaknesses and did not cover complaints to the Bar. In the absence of an independent Office for Legal Complaints, it suggested that the role of the Lay Observer,

under a new title, should be significantly expanded to provide, in addition to its existing powers, for:

- oversight of complaints to both the Bar and the Law Society;
- a single gateway for complaints;
- the power to monitor and to set targets for the handling of conduct and discipline complaints by the professional bodies;
- the power to rehear complaints against practitioners; and
- the power to order compensation.

**5.16** In relation to aspects of regulation other than complaints-handling, the OFT, bearing in mind the proportionality issue for Northern Ireland, suggested the following arrangements instead of a Legal Services Board:

- Placing a responsibility on an authority, external to the professions (possibly the relevant Minister of State), to ensure that professional rules and, in particular, entry (including training requirements) and conduct rules (including rules about what services may be provided) are in the public interest.
- Ensuring that the authority for the oversight and approval of professional rules is informed by appropriate consultation, in particular with the OFT on competition issues.
- Providing a mechanism whereby the OFT would be able to bring competition issues relating to the regulation of legal services to the attention of the responsible oversight authority, and to oblige that authority to respond to these issues.

**5.17** Which? also acknowledged that a Legal Services Board for Northern Ireland would be prohibitively expensive and argued for a reinforced oversight role for the Department of Finance and Personnel.

**5.18** At our regional meetings, the overwhelming message in relation to oversight centred around reform of the role of the Lay Observer. There was an acceptance in each area of Northern Ireland that we visited of a need for the oversight powers to be strengthened. In the main, this view revolved around the complaints-handling process.

## CONSIDERATION OF THE ISSUES

- 5.19** We took the above representations into account in shaping our recommendations. Given our decisions, outlined in Chapters 3 and 4, to maintain a strong role for the professional bodies in regulatory matters, we concluded that an effective oversight function must be provided to ensure consumer confidence in the process.
- 5.20** To begin with the title of the post, we feel that the term Lay Observer is too closely connected with the existing system and that the title Legal Services Ombudsman does not convey the necessary degree of oversight. We consider that Legal Services Oversight Commissioner (LSOC) would be a more appropriate title.
- 5.21** The LSOC should have its strongest powers available in relation to the complaints-handling process. And given the size of the jurisdiction, the LSOC should have oversight responsibility for the complaints-handling processes of both the Bar and the Law Society, with the same standards and nature of oversight applied equally to both branches of the profession.
- 5.22** We recommend that the existing audit power that the Lay Observer has transfers to the LSOC for the purpose of examining individual complaints files. The LSOC should also be responsible for monitoring and setting targets for the complaints-handling duties of both professional bodies. Where targets are not agreed, or are not met, the LSOC should have power to impose on the professional bodies whatever penalty, including those of a financial nature, it deems appropriate.
- 5.23** The LSOC should have a close association with the client complaints committees of both the Law Society and the Bar. The LSOC, not the Lord Chief Justice, should be responsible for selecting panels from the pool of lay representatives. The LSOC should also have oversight powers in relation to monitoring the training and induction of lay members, and be able to make suggestions and comments on how these can be improved. Where the findings of the oversight body are not followed, there should be clear avenues of redress with the power to ensure that recommendations are carried out.
- 5.24** As mentioned in Chapter 4, we also believe that the LSOC should produce and implement an action plan to publicise and promote the accessibility of the complaints-handling system. Consumers should understand how and where to make a complaint. The onus should be on the professional

bodies to provide this information in a consumer friendly and accessible form. And the LSOC should have the power to comment on how the professional bodies discharge this obligation and to make firm and enforceable recommendations if any deficiencies are noted.

- 5.25** We consider that the LSOC should be able to offer opinions and suggestions on the other regulatory functions performed by the Bar Council and the Law Society. More specifically, the LSOC, in consultation with the Lord Chief Justice, should have the ability to issue advice to the professional bodies on their rule-making powers in relation to, among other things, entry to the profession, education, and training. And should its advice be ignored, the LSOC should have the power to refer the matter to the government so that appropriate legislative or other action can be taken.
- 5.26** The LSOC should also have the power to consult with interested stakeholders. For example, both the professional body and the LSOC should consult with and take advice from the Office of Fair Trading, on rules relating to competition.
- 5.27** In conjunction with these powers, the LSOC should have a duty to provide proper accountability for actions taken. We believe that this should be exercised through an annual report that would be laid before the Assembly (or Parliament). This report should be accessible to all and user-friendly to a lay readership.
- 5.28** We turn now to the size and structure of the LSOC's office and the nature of the LSOC's appointment. We believe that the LSOC should be a single individual supported by a small staff. We consider that the exact size and structure of the office is not a matter for us to decide; these matters should be determined using the methods the government employs for staffing other similar bodies. And although proportionality must be taken into account, the resources, both financial and human, allocated to the LSOC must be sufficient to ensure that consumers in Northern Ireland are afforded the same degree of oversight as those elsewhere in the United Kingdom. We would further expect to see the standard statutory provisions by which suitable controls are placed on the size of the office and its budget.
- 5.29** In line with the arrangements proposed for other jurisdictions, the professions themselves should fund the LSOC. The principle that the polluter should pay suggests a general levy on all practitioners, plus a further element paid by those solicitors and barristers who have been found guilty of poor service

or poor conduct. We believe that the exact formula to be used, and the method of collection of funds, should be fair and proportionate, but should ultimately be a matter for the professional bodies to determine in conjunction with the LSOC.

- 5.30** The appointment of the LSOC should take place in as open and transparent a manner as possible. The normal public service recruitment procedures, including the Nolan principles, should be used. The appointment panel should consist of a chair provided by the Civil Service Commissioners, an independent lay assessor, and a member nominated by the Lord Chief Justice. The nature of the appointing panel should help to allay the concerns of the Law Society, the Bar and the Benchers that a political appointee would have undue influence over the appointment of the LSOC and compromise the independence of the legal system. It follows that the role of Lay Observer will cease once the new office is functional, although transitional arrangements will be required during the handover period.
- 5.31** Our proposals should provide greatly strengthened oversight of the legal profession, with regard to both complaints-handling and other aspects of regulation. This enhanced oversight, in conjunction with the proposals we advanced in Chapters 3 and 4, should provide the same level of consumer protection as the new arrangements in England and Wales. But, in doing so, our proposals recognise that Northern Ireland is a much smaller jurisdiction, and that it has not had most of the problems encountered in England and Wales that ultimately led to the Clementi review. In short, we are confident that the same result will be achieved for the consumer in Northern Ireland and that it will be done in a cost-effective and proportionate manner.

## RECOMMENDATIONS

- 5.32** We recommend:
- 21.** Revised oversight arrangements should be put in place, with a new office entitled the Legal Services Oversight Commissioner.
  - 22.** The Legal Services Oversight Commissioner should have the power to audit individual complaints files.
  - 23.** The Legal Services Oversight Commissioner should have the power to monitor and set targets for the complaints-handling duties of both professional bodies. Where targets are not agreed, or are not met,

the Legal Services Oversight Commissioner should have the power to impose an appropriate penalty.

24. The Legal Services Oversight Commissioner should be responsible for selecting lay persons from the available pool of lay representatives to hear specific cases.
25. The Legal Services Oversight Commissioner should assist in promoting the accessibility of the complaints-handling system by producing an action plan and making recommendations on this matter to the professional bodies.
26. The Legal Services Oversight Commissioner should be able to offer advice on other regulatory functions of the professional bodies, including rule-making powers. Should the advice of the Legal Services Oversight Commissioner be ignored, the Commissioner should have the power to refer any matter to the government for appropriate consideration.
27. The Legal Services Oversight Commissioner should have the power to consult with interested stakeholders on any aspect of regulation.
28. The Legal Services Oversight Commissioner should have a duty to produce a report, laid before Parliament, which is accessible and user friendly to lay persons.
29. The Legal Services Oversight Commissioner should be an individual supported by a small staff, the exact size of which should be determined using the usual methods employed by government.
30. The Legal Services Oversight Commissioner should have sufficient resources to ensure that consumers in Northern Ireland are afforded an effective level of oversight to protect them.
31. The professions should fund the office of the Legal Services Oversight Commissioner through a two-part levy. A general levy should be applied to all practitioners on a fair and proportionate basis, and a specific levy should be applied on all practitioners who have been found guilty of poor service or misconduct
32. The Legal Services Oversight Commissioner should liaise with the professional bodies regarding the exact nature and amount of the levies.
33. The appointment of the Legal Services Oversight Commissioner should follow normal public service recruitment procedures, with an

appointment panel consisting of a chair provided by the Civil Service Commissioners, an independent lay assessor, and a member nominated by the Lord Chief Justice.

## Chapter Six

# Competition: Alternative Business Structures

- 6.1** In this chapter we examine some aspects of legal services that relate to competition: associations between barristers, associations between solicitors and barristers, associations between lawyers and other professionals, and external ownership of a firm of solicitors by someone not holding a practising certificate.
- 6.2** In a report in July 2003, *Competition and Regulation in the Legal Services Market*, the Government expressed its support for the principle of

enabling legal services to be provided through alternative business structures. Such new structures would provide an opportunity for increased investment and therefore enhanced development and innovation, for improved efficiency and lower costs. . . . The Government accepts in principle that new business entities such as multi-disciplinary partnerships and corporate bodies should be allowed to provide legal services.

As a result, Clementi was specifically asked to examine the issues surrounding alternative business structures. Similar reviews in Scotland and the Republic of Ireland are also giving consideration to those matters. We examine the approaches of each jurisdiction in turn.

## ENGLAND AND WALES

- 6.3** Clementi considered two alternative types of business structures. The first are law practices, known as Legal Disciplinary Practices, that permit lawyers from different professional bodies — for example, solicitors and barristers — to work together to provide services to third parties. They may permit others (such as human resource professionals or accountants) to be managers, but they are there to enhance the services of the law practice, not to provide other services to the public. The second are practices, known as Multi-Disciplinary Practices, that bring together lawyers and other professionals (such as accountants, chartered surveyors, and actuaries) to provide legal and other professional services to third parties.

- 6.4** Clementi distinguished between LDPs in which the practice is owned by its managers, and a practice which is not exclusively owned by its managers. The main issue to be addressed in connection with LDPs where managers and owners are the same is whether lawyers with different professional qualifications should work together as equals. The major issues to be addressed in connection with LDPs where managers and owners are different include the following: inappropriate owners, outside owners bringing commercial pressures to bear on lawyers that might conflict with their professional duties, and the restriction of access to legal services in rural areas. Clementi provided a balanced discussion on each issue as it applies to England and Wales, and we consider many of these issues later in the chapter as they relate to Northern Ireland.
- 6.5** In relation to LDPs, Clementi concluded that liberalisation measures should be introduced, subject to appropriate safeguards that he outlined in more detail in his report. He also suggested in some detail how such bodies should be regulated. In particular, he recommended a central role for the proposed Legal Services Board for England and Wales.
- 6.6** Clementi then identified a number of issues relating to MDPs, including the following: regulatory reach, or how a legal services regulator could exercise power over people who were not lawyers; the difficulty of there being no obvious “lead regulator”; the issue of legal professional privilege; and the complications arising from external ownership. Having done so, he expressed concerns about the regulatory issues and accepted the overwhelming sentiment expressed to him during his review that it would be a good start to get lawyers working together in LDPs, and to assess the regulatory consequences of these, before proceeding with MDPs.
- 6.7** Although he had concerns about how MDPs might work, he observed that
- none of these concerns should be taken to mean that they are not capable of resolution or that MDPs are an unviable proposition. But for MDPs to be a reality there would have to be a real movement in co-operation between the different professions.

Clementi therefore recommended that LDPs should be permitted, with outside ownership of such bodies also allowed, subject to a “fit to own” test and a satisfactory management team in place, but that MDPs should not be allowed at this stage.

- 6.8** The Government responded to Clementi's proposals in its White Paper. It accepted his recommendations regarding Legal Disciplinary Practices, but went further by proposing legislation that will provide for a flexible and robust licensing scheme for allowing lawyers and non-lawyers to work together to provide legal and certain associated services. In short, the Government signalled its intention to permit Multi-Disciplinary Practices.
- 6.9** A draft Bill currently being considered by Parliament gives effect to the proposals outlined in the White Paper. It includes safeguards as flagged by Clementi and the White Paper. It includes the requirement that front-line regulators of alternative business structures ensure that these firms identify a Head of Legal Practice and a Head of Finance and Administration. External investment in such firms will be permitted, but based on a fitness to own test covering honesty, integrity and reputation, competence and capability, and financial soundness. The Legal Services Board will determine the extent of external investment in these alternative business structures according to the type of business and acting in line with regulatory objectives. And the legislation sets down a number of other safeguards, including a requirement that the Legal Services Board monitors the provision of legal services across different sectors and regions, and uses the results of that work to inform its regulatory decisions.

## SCOTLAND

- 6.10** In Scotland, as in Northern Ireland and the Republic of Ireland, advocates are obliged to practise as sole practitioners and may not form partnerships. The Working Group set up to examine the Scottish legal services market did not reach any specific conclusions on partnerships between barristers. It suggested that the market should be left to determine whether LDPs are a business structure that the users of legal services would find of value, but noted that LDPs with advocates and solicitors would be difficult to regulate under current arrangements. It also noted that the issue of MDPs appeared likely to stay on the agenda and that identifying an appropriate regulatory model would be an essential first step if they were to be introduced.
- 6.11** The Working Group further suggested that the case for alternative business structures in Scotland and the suitability of regulatory arrangements such as those proposed for England and Wales were a matter for further policy development by the Scottish Executive in consultation with interested parties. Officials in the Scottish Executive have suggested that this matter is

likely to be kept on the agenda, but, with the current Parliament entering its final session, will most likely be delayed until an election has been called in May 2007. Since further work will need to be undertaken before decisions are taken on this issue, any move towards alternative business structures in Scotland is unlikely to take place in the near future.

## REPUBLIC OF IRELAND

- 6.12** In its preliminary report, the Competition Authority in Ireland recommended removing the prohibition on barristers forming partnerships. It offered two options for reform. Option A would allow barristers to choose their own business structures. Option B would, in addition, permit practising barristers to employ other practising barristers. It suggested that these proposals would permit more barristers to enter the profession successfully, thus offering consumers more choice. The Authority indicated that its preferred structure would be a full partnership model, which, it argued, would permit greater flexibility in arranging supply.
- 6.13** The Authority also proposed that solicitors should be able to share fee income with barristers, and that the Law Society and the Bar Council in Dublin should amend their respective Codes of Conduct to permit partnerships between solicitors and barristers (LDPs). Turning to partnerships between lawyers and non-lawyers, the Authority noted that although they had benefits, they posed major problems for the legal profession. It suggested that a possible solution might be to allow lawyers to form partnerships with other professionals who have a similar ethos. It gave the example of the Netherlands Bar, which prohibits MDPs between its members and accountants, but allow its members to form MDPs with notaries, tax consultants and patent agents.
- 6.14** The Competition Authority also considered the issue of non-lawyers owning law firms. It suggested that allowing non-lawyers to own all or part of a law firm could increase access to capital, thereby increasing capacity that would lead to a fall in prices. But it did not make any firm proposals, merely asking respondents to give further thought to the matter. The final recommendations of the Authority on these issues are expected by the end of 2006.

## CONSULTATION RESPONSES

**6.15** The Department in its consultation document asked whether lawyers from different professional bodies should be allowed to practice together as equals, and whether outside ownership of such practices should be permitted. In general, those who answered this question in the negative came from the legal profession but others — such as representatives of Queen’s University Belfast, the Council of Legal Education and the Democratic Unionist Party — supported them. In contrast, other organisations, particularly the Office of Fair Trading and Which?, argued that the removal of restrictions would enhance competition and would benefit the consumer. The current Legal Services Ombudsman for England and Wales raised concerns about the practical manifestations of alternative business structures, but was generally supportive of the idea.

**6.17** The Bar Council summarised many of the key arguments against relaxing the rules prohibiting partnerships between barristers, and between barristers and solicitors. It observed that the solicitors’ profession in Northern Ireland is organised on a very different basis from that in England and Wales, with few firms having over five partners and nearly half of all firms comprising a single independent practitioner. These firms are located in all towns and many villages throughout Northern Ireland, providing consumers with a large number of firms from which to choose. Smaller firms that cannot provide specialised services rely on the independent Bar, not just for litigation but also for advice on a wide range of legal matters. They can instruct any Counsel of its or its client’s choice, on a case-by-case basis, thus giving their clients the same service they would receive if they went to a much larger firm in, say, Belfast. Hence, in the opinion of the Bar Council,

a fusion of the professions and/or the introduction of LDPs would give rise to a significant risk that the wealthiest firms would be able to attract the best advocates and therefore deny the service of these advocates to other firms. In such circumstances monopolies or near monopolies could be created.

**6.18** The response of the Bar also referred to the history of the Northern Ireland Bar, which has its roots firmly embedded in the equivalent Bar in Dublin rather than in England and Wales. The submission of the Bar gives considerable detail on its inception, but the key point is that a Bar Library system, as distinct from a system of chambers, has evolved that has a number of significant benefits that should be preserved.

- 6.19** One of these benefits, according to the Bar Council, is that the Bar is a collegiate organisation. All members have a daily point of contact with the Bar Library, with young members having access to the advice and expertise of more senior colleagues. Indeed, the Council stressed that every barrister, no matter how senior, is obliged to respond to requests from any other member of the Bar.
- 6.20** The Bar Council also argued that the Bar Library, with its collegiate structure and cohesive membership has had particular significance for Northern Ireland, safeguarding it from many of the divisive problems seen elsewhere in this divided society. It noted that “it is common for committed Republicans to be represented by Counsel of the Protestant persuasion with Unionist sympathies and for Loyalists to be represented by Counsel of the Roman Catholic persuasion with Nationalist sympathies”. As a result, the Bar Library has facilitated access to legal representation for many unpopular causes throughout the Troubles, and ensured a broad acceptance of the impartiality of the Northern Ireland legal system. In contrast, the Bar Council believes that a chambers system would have inevitably resulted in different sets of chambers being perceived, rightly or wrongly, as offering a service to one particular section of the community or being aligned to one particular political view.
- 6.21** The Benchers supported this view and suggested that allowing barristers to form partnerships would probably destroy the Bar Library system.

It is unlikely that the sole trader model would thrive, and might not even survive, alongside a model of partnerships among barristers. It is likely that those barristers who did not join partnerships would come to be regarded as second rate practitioners and that they would have difficulty in attempting to compete effectively against partnerships. This is evident from the experience in England and Wales when, in an attempt to overcome the difficulty of newly qualified barristers gaining entry to Chambers, the Bar Council in that jurisdiction tried to introduce a Bar Library model alongside the Chambers system. The purchasers of legal services perceived the Bar Library practitioners as inferior and the Bar Library model failed. In the same way permission for partnerships between Barristers would gradually lead to the failure of the sole trader model and such failure would be detrimental in terms of choice, competition and cost.

**6.22** The Bar Council believes that another advantage of the Library system is the ease of access it gives to the profession once suitable qualifications have been achieved. It noted that no one with the requisite qualifications has ever been refused entry to the Bar in Northern Ireland and that anyone qualified to practise has been provided with a place in the Bar Library and a pupil master. In contrast, many qualified barristers in England and Wales find it difficult to obtain a place in chambers. The Council also pointed out that the fees all new entrants pay for their first seven years are subsidised so that the Bar can nurture talent and offer the best legal service possible to consumers.

**6.23** A further advantage advanced for the Bar Library system is that it produces economies of scale. The Bar Council noted that the Bar Library gives each barrister excellent facilities — including office space, reception and secretarial support, library and research support — to help them carry out their work, all achieved at a relatively low cost and in an efficient manner. It stated that

the consequences which flow from these economies of scale are that the overheads of barristers in Northern Ireland are significantly lower than those in chambers operating in England and Wales and significantly lower than solicitors in private practice in Northern Ireland.

**6.24** Turning from partnerships between barristers to those between barristers and solicitors, the Bar Council noted that Northern Ireland is a small jurisdiction and that the potential exists for a small number of lawyers in specialised areas to corner the market. It believes that if LDPs were formed, this problem would be accentuated and might be impossible to resolve.

**6.25** The Bar Council further argued that if barristers and solicitors formed partnerships, they would become jointly and severally liable. It noted that an LDP would have to operate by one set of rules enforced by one regulator, a more onerous regime than currently exists for barristers who do not handle client's monies, and that the benefits in terms of economies of scale flowing from the present regime would disappear. The Law Society made a similar point in its submission as did the Benchers. The Benchers also noted that the partnership model would have higher costs than the Bar Library system and that these would be passed on to consumers. Moreover, those in partnership would be unlikely to continue to contribute to the Bar Library,

thus once again decreasing the economies of scale of the current model and increasing the costs to those continuing to use it.

**6.26** The Bar Council and the Benchers, by logical extension of their concerns about chambers and LDPs, strongly argued against Multi-Disciplinary Practices. They believed it would be very difficult for lawyers to maintain core principles such as confidentiality of legal advice when the client would be in receipt of other advice and services from the same firm in relation to the same transaction. And hence the difficulties of regulating MDPs would present a major problem.

**6.27** Finally, the Bar offered its views on the external ownership of legal firms, noting that

a legal practice which is run (perfectly legitimately) for the final benefit of its external investors/shareholders would come to have very different values and a very different culture from that which is the norm in legal practices today. Decisions as to the scope and direction of the practice would be taken (even if perfectly legitimately) in the short or perhaps medium term interests of the investors, rather than in the long term interests of the partners and of their clients.

The Bar Council also suggested that in Northern Ireland the external ownership of legal firms could, even if controls were put in place to govern how such firms were set up, lead to them being influenced or controlled by paramilitary organisations.

**6.28** The Law Society approached the issue of alternative business structures and the concept of external ownership from a different perspective than the Bar and the Benchers. Although it accepted the benefits of the Bar Library system, it focused on what it described as a position of principle. It suggested that what is at stake in relation to these issues are the core values of the legal profession, such as guaranteed independence, avoidance of conflict of interest, and client confidentiality. It argued that the failure to protect and understand such values could result in irreversible damage to the consumer and the public interest in Northern Ireland.

**6.29** It referred, in particular, to the judgment delivered by the European Court of Justice in the case of *Wouters*, which signalled that issues of structure and control are critical to the relationship between market forces and the effective protection of the core values of the legal profession. It also noted

that “there seem to be some soundings from the European Commission which indicate the particular justifiability of business structure regulations where there is a strong need to protect practitioners’ independence”. It observed that the Competition Authority in the Republic of Ireland has acknowledged that the provision of legal services to the public through organisations not owned by lawyers may not guarantee protection of consumer interests, and also could potentially lead to monopoly positions detrimental to consumers.

**6.30** In arguing against changes to business structures, the Law Society pointed to the characteristics of the Northern Ireland model for providing legal services, and the widely acknowledged positive features of solicitors’ practice in this jurisdiction. It noted that a Northern Ireland practice tends to be characterised by:

- Personal service and established relationships of trust and confidence, related in part to the relative absence of significant cross-selling and layering on of additional cost.
- A broad range of legal services offered through a range of accessible, small professional firms offering consumer choice in accordance with the needs of the market.
- A high percentage of solicitors undertaking low-margin, publicly funded legal services, together with an established culture of informal “pro bono” assistance.
- High quality services provided through a well-trained set of professionals adhering to the high professional standards recognised by the Lay Observer.
- A network of general practices that are established, capitalised, and place an increasing emphasis on good business practice, client care and innovation.

The Law Society considered that the above characteristics “represent a strong basis on which to develop rather than undermine the future provision of legal services and serve the genuine interests of the consumer in this jurisdiction”.

**6.31** An underlying feature of the Law Society’s concerns about alternative business structures is that the proposals for England and Wales are new and untested. It believes that there are real risks in imposing these proposals in Northern Ireland, especially since they have been recognised as having

a potentially devastating effect on small businesses. An unintended consequence might be that irreversible damage would be done, choice for consumers would be restricted and access to justice would be put at risk.

**6.32** These issues raised by the Bar Council, the Benchers, and the Law Society were repeated to us on several occasions during the course of our review. At each regional meeting, one of the principal concerns of those attending centred around the potential harm that could be caused to the existing general practice model and the Bar Library system. Once destroyed, such a model would be lost forever, and consumers in Northern Ireland would ultimately suffer.

**6.33** But not everyone agreed with the legal professions. The OFT argued that the case it advanced for alternative business structures in England and Wales is equally applicable in Northern Ireland. It highlighted the following advantages of allowing alternative business structures to exist:

- The opportunities to provide combinations of high-street professional services under one roof should unlock potential cost efficiencies.
- These opportunities should also enhance customer choice and convenience at this level of the market (i.e. the individual consumer).
- Potential benefits might also accrue from combinations of professionals at other levels of the market (e.g. for the business consumer).

The OFT recognised that certain issues need to be resolved in regulating MDPs, and that this might mean it would take longer to introduce MDPs than LDPs. But it suggested that these issues should not be allowed to cause delay to an early introduction of LDPs and the concept of the external ownership of law firms, which the OFT sees as a significant step towards establishing a framework for MDPs.

**6.34** Which? offered a similar view. It believes that most consumers are less concerned with business structures than with the services they receive. It suggested that the potential to deliver a range of related services under one roof — such as conveyancing, mortgage advice, estate agency and surveying — could offer significant benefits to consumers. It argued that the convenience of the one-stop shop would appeal to consumers and that the possibility of attracting further investment in MDPs would potentially open up the market and promote choice for consumers. It concluded that

the issue of ensuring robust and thorough regulation of MDPs should not justify continuing restrictions.

- 6.35** To summarise, the consultation process elicited strong and opposing views on alternative business structures. We have carefully considered the arguments from both sides of the debate in reaching our conclusions, which we now discuss in more detail.

## CONSIDERATION OF THE ISSUES

- 6.36** We start from the premise that competition is to be welcomed, and that consumers in Northern Ireland should have access to legal services that are provided on a competitive basis, with consumers receiving good quality legal advice and representation in as efficient and cost-effective a manner as possible. We believe that the Northern Ireland model, consisting of solicitors in general practice and an independent Bar Library, is a competitive model with a good range of choice available to the consumer. Indeed, we heard on many occasions of the advantage of the current system in allowing the most remote and poorest client in Northern Ireland the chance to be represented, subject to availability, by the finest Counsel at the Bar, and we consider that is an advantage that should not be lost.
- 6.37** That said, we believe it is worth raising one point that was made to us during our regional meetings by representatives of small businesses. They felt that it was difficult at times to access the correct specialist advice, and criticised the general practice model for not clearly identifying relevant expertise.
- 6.38** We consider this criticism is a challenge for the legal professions. The Law Society already sets certain standards in some areas, such as insolvency. The Bar has a directory in which members state their specialisms but it is not clear to us that this is anything other than self-nomination by individual barristers; there is no evidence of any external validation of such claims by the Bar Council. If lawyers claim to have expertise in a particular area of law, we would expect them to have achieved a certain standard. We believe that the professional bodies themselves are the best judges of such standards and consider that the professions should take appropriate steps to ensure that these standards are meaningful and more accessible to consumers.

## Associations Between Barristers

- 6.39** Barristers in the Northern Ireland Bar Library operate as sole traders selling a single product (advocacy services) in the market for legal services. On the supply side, membership of the Bar Library is available to all those who qualify as barristers. On the demand side, advocacy services are demanded by a large number of solicitors, many of whom are sole practitioners. Hence the market for advocacy services in Northern Ireland is “competitive” in the economists’ sense of that term: a large number of sellers (barristers) offer, without any collusion between them, a relatively homogenous product (advocacy services) to a large number of buyers (solicitors).
- 6.40** Allowing barristers to form associations would, by bringing them together in larger units, be a move away from the competitive model described above. Barristers specialising in certain aspects of law, in which there are a limited number of suppliers in Northern Ireland, could group together to form a local monopoly. By doing so, they would be able to raise prices, engage in price discrimination, or even deny supply to certain customers. Hence we conclude that the current prohibition on association between barristers in Northern Ireland should be viewed as a pro- rather than an anti-competitive restriction.
- 6.41** This is our main argument in favour of maintaining the prohibition on barristers forming associations with other barristers. We have listened to the alternative view that if the Bar Library is as good as people say, then it should withstand competition from alternative models. If the prohibition were removed, we might see no significant change from the present structure, with barristers continuing to act as sole traders. But we doubt if such a move would carry with it enough benefits to outweigh the risk of a reduction in competition. Indeed, we see a real risk that the choice consumers currently have of engaging the barrister of their choice would be limited by the introduction of associations between barristers.
- 6.42** We also consider that the Bar Library offers benefits to consumers through providing barristers with economies of scale. It is highly unlikely that these economies would be matched if barristers formed chambers and had to provide their own accommodation and services. And those remaining in the Bar Library would undoubtedly have to pay more for the privilege, with the inevitable outcome that these additional costs would be passed to the consumer.

**6.43** In summary, we consider that the current model of the independent referral Bar Library is one that works well in Northern Ireland and which offers consumers access to a wide choice of high quality, independent legal representation and advice. In our opinion, consumers have more to gain than to lose from retaining the prohibition on barristers forming partnerships.

### Legal Disciplinary Practices

**6.44** In recommending that barristers should not be permitted to form partnerships, we are thereby also ruling out the possibility of them forming legal disciplinary practices with solicitors. We consider that many of the arguments advanced above are relevant when examining such structures and, indeed, are more acute in relation to this model.

**6.45** We accept that there are some potential benefits from allowing solicitors and barristers to form partnerships. For example, we see the advantage of a consumer being able to avail of all legal services within a single practice. There may also be some opportunities for more risk-averse individuals who wish to become barristers to enter the profession in the potentially safer environment of a Legal Disciplinary Practice, where they would be guaranteed an income in their early years. But given the size and scale of Northern Ireland, coupled with the existing nature of legal practices, we believe that the advantages of allowing such partnerships would outweigh the disadvantages.

**6.46** One of the advantages of the existing system is that consumers in Northern Ireland, even from the most remote part of the province, are able to secure the best legal representation by engaging with their local solicitor. If LDPs were established, small solicitors firms would have difficulty in competing with them. In addition, since most of the LDPs would probably be formed in larger cities – the majority of Queen’s Counsel live in or near to Belfast – the advantage of being able to find a solicitor within a reasonable travelling distance would be lost. Instead of solicitors’ firms in seventy-four locations, they would be replaced by fewer LDPs in fewer locations. Hence both geographical convenience and consumer choice would be reduced. In addition, since LDPs would have their own in-house Counsel, consumer choice would be even further reduced. Instead of having 560 barristers to choose from, consumers would probably find that their solicitors expected them to choose from the in-house barristers so that business remained within the practice. And these barristers might not have the same level of

skill and experience, at least in the particular area of law required, as those in another LDP.

- 6.47** We consider that access to justice and competition are essential in a jurisdiction such as Northern Ireland and that anything that has the potential to hinder the achievement of these twin goals should be avoided. We consider that Legal Disciplinary Practices have that potential. Hence we believe that the current prohibition on LDPs being established here should remain.

### Multi-Disciplinary Practices

- 6.48** By suggesting that LDPs should not be established in Northern Ireland, it follows that we are also against the establishment here of partnerships between lawyers and non-lawyers. In addition to the arguments advanced above against LDPs, we accept Clementi's argument that the regulation of professionals from different backgrounds offering different services within the same firm would be fraught with difficulties, including different professional standards, conflicts of interest, and issues of confidentiality.
- 6.49** Whatever the potential benefits of MDPs, they are a new concept that is largely untested elsewhere in the world. If they are going to work anywhere in these islands, it will probably be in England and Wales, the area of greatest population. We suggest that Northern Ireland adopt a "wait and see" approach. If the "experiment" in England and Wales works well, then there may well be a stronger case for Northern Ireland to give further consideration to this matter.

### External Ownership of Legal Firms

- 6.50** A final topic to be considered in this chapter is the ownership of law firms by non-lawyers. The potential benefits of allowing external ownership is that additional capital could be brought into a law firm to allow it to grow and to offer a wider range of legal services. Some observers have given this approach the title of "Tesco Law" because one of the likely results of allowing external ownership is that supermarkets and similar organisations would begin to offer legal services.
- 6.51** But against the potential benefits have to be set the potential costs. As the Bar Council noted, the provision of legal services does not equate to "the sale of a can of beans"; other issues need to be taken into consideration,

such as the lawyer's duty to the court and to the client. And a potential conflict of interest exists in balancing such duties against interests of investors, who would be primarily interested in maximising the return on their investment. Moreover, Northern Ireland has had instances of paramilitary involvement in legal practices, when external ownership was not permitted, and the risks of further involvement are likely to be even greater should the rules prohibiting external ownership be relaxed.

## RECOMMENDATIONS

**6.52** We recommend:

- 34.** The professional bodies should take appropriate steps to ensure that professional standards are meaningful and more accessible to consumers.
- 35.** The prohibition on barristers forming associations with other barristers should remain.
- 36.** The prohibition preventing the creation of Legal Disciplinary Practices should remain.
- 37.** The prohibition preventing the creation of Multi-Disciplinary Practices should remain.
- 38.** The prohibition preventing the external ownership of a law firm should remain.

## Chapter 7

# Competition: Other Aspects

**7.1** In this chapter we examine three specific areas related to competition that have been highlighted during the course of the review. We begin by looking at the particular issue of licensed conveyancers, discussing whether the current monopoly of conveyancing work for solicitors is justified. We also briefly examine the issue of direct access to barristers, and the corollary issue of rights of audience of solicitors in the higher courts.

### LICENSED CONVEYANCERS

**7.2** The buying or selling of a house is one of the most significant transactions a consumer will make, and requires a conveyance to be undertaken to effect the sale. Only the solicitors' profession is allowed to provide such a service in Northern Ireland. It is the only jurisdiction within the United Kingdom where this restriction is still in place. In the other jurisdictions, licensed conveyancers are permitted to provide conveyancing services to the public, with close to one thousand operating in England and Wales but only twenty-two in Scotland. Licensed conveyancers are not solicitors, but most work for solicitors' firms. Some work for banks, lenders, and property developers. Some practise on their own or in partnership, and to that extent provide competition with solicitors.

**7.3** Licensed conveyancers in England and Wales are regulated by the Council of Licensed Conveyancers (CLC). In establishing the CLC, the Administration of Estates Act 1985 laid down a duty on that group to

ensure that the standards of competence and professional conduct among persons who practise as licensed conveyancers are sufficient to secure adequate protection for consumers and that the conveyancing services provided by such persons are provided both economically and efficiently.

**7.4** In the Republic of Ireland, licensed conveyancers are not permitted to operate. But the Competition Authority suggested in its preliminary report that the prohibition on them should be removed to encourage competition in the conveyancing market.

## Consultation Responses

- 7.5** The consultation document issued by the Department specifically asked whether there was any good reason why the conveyancing market should not be opened up to include licensed conveyancers. The question received a mixed response from consultees. Several consultees simply suggested that licensed conveyancers should be permitted to operate without giving reasons to support their view. Others, such as the Bar Council and the Benchers, offered no views on the subject. But several consultees offered constructive comment on this matter and we concentrate here on these.
- 7.7** The Law Society argued that it has demonstrated a clear commitment to the consumer interest by developing a conveyancing process that is efficient and competitive and is “well ahead of the game” compared with other jurisdictions. Its Home Charter Scheme regulates how solicitors undertake conveyancing services. There are no minimum fees or fee guidelines for conveyancing, and the Law Society has suggested that conveyancing in Northern Ireland is available at highly competitive prices with increases in property prices being much greater than increases in solicitors’ conveyancing charges.
- 7.8** The Law Society also pointed out that licensed conveyancers make up only 5 percent of the conveyancing market in England and Wales, with the majority working within solicitors’ practices, and that very few had developed in Scotland. It suggested, therefore, that licensed conveyancers would have little impact on an already competitive market in Northern Ireland, and that the costs of setting up and running a licensing and regulatory regime for them would not justify the costs involved, especially since regulation would need to extend to professional indemnity and compensation arrangements, standards of legal knowledge and technical competence, protection against conflicts of interests, guarantees as to freedom of choice of supplier, and regulation and control of costs.
- 7.9** Finally, the Law Society noted the particular difficulties inherent in the system of Irish land law that operates in Northern Ireland, and the differences in practice between Northern Ireland and England and Wales. In particular, it pointed to the system of undertakings that takes place in Northern Ireland, whereby solicitors, as officers of the court, enter into and exchange undertakings in the course of property transactions, breach of which can lead to serious disciplinary offences, as a relevant factor in determining the suitability of licensed conveyancers for this jurisdiction.

**7.10** The Law Society's view were supported by the Belfast Solicitors' Association, which noted that it did not fear competition from licensed conveyancers, as long as open, fair and equal regulation was in place. It also suggested that there is no public demand for licensed conveyancers and that there would be considerable costs involved in setting up a regulatory body, providing training to an adequate standard, and ensuring that licensed conveyancers offered the protection of a compensation fund and full professional indemnity insurance.

**7.11** Other consultees offered a contrary view. The Legal Services Ombudsman for England and Wales suggested that

provided there are adequate standards of professional conduct among persons who practice as licensed conveyancers and there is sufficient and adequate protection for consumers I can see no reason why conveyancing services should not be opened up in Northern Ireland.

**7.12** The Office of Fair Trading suggested that conveyancing is an example of where the introduction of an additional professional body whose members can compete with existing suppliers has proved an important means of ensuring better value for consumers. It noted that the impending arrival of licensed conveyancers was seen to bring about a marked change in solicitor's pricing in England and Wales, and it believes that licensed conveyancers, although relatively small in number, continue to exert significant competitive pressure on solicitors to the benefit of consumers. Which? agreed with the OFT's assessment, taking the view that the removal of the monopoly for conveyancing services in England and Wales had increased competition and improved access and choice for the consumer, and it was likely to do so in Northern Ireland as well.

### Consideration of the Issues

**7.13** We have considered the competing arguments regarding licensed conveyancers in Northern Ireland. Allowing licensed conveyancers might broaden choice for consumers and lead to a reduction in conveyancing charges. The threat of introducing licensed conveyancers reduced solicitors' charges in England and Wales, but the evidence also indicates the charges of the two groups began to converge after licensed conveyancers had been in operation for some time. The introduction of licensed conveyancers in Scotland, with only twenty-two in operation,

clearly has not had the effect that was intended. And given the highly competitive residential conveyancing market in Northern Ireland, with many solicitors at the regional meetings suggesting that the undercutting of prices for conveyancing is rife throughout the province, it is questionable whether licensed conveyancers would have much impact on charges in Northern Ireland.

- 7.14** If licensed conveyancers were permitted in Northern Ireland, a proper regulatory regime would have to be set up to ensure consumers were protected. Setting up an appropriate regulatory regime would be costly and difficult, particularly in a small jurisdiction such as Northern Ireland. The difficulties of doing so have been demonstrated in the larger jurisdiction of Scotland, where an attempt to set up a regulatory body for conveyancing and executory practitioners was unsuccessful.
- 7.15** Hence taking into account the size and scale of Northern Ireland, existing conveyancing process and practice, the current system of land law, the difficulties of establishing an appropriate regulatory regime for licensed conveyancers, and the limited impact they are likely to have on consumer choice and conveyancing charges, we conclude that the current restriction on licensed conveyancers operating in Northern Ireland should remain.

## DIRECT PROFESSIONAL ACCESS

- 7.16** We also considered the scheme of direct professional access currently operated by the Bar. In general, a barrister cannot act for a client unless instructed by a solicitor. A barrister is also prevented from directly or indirectly administering or handling the funds or assets of any client. Taken together, these rules prevent the general public from having direct access to the services of a barrister. The rules are subject to the exceptions provided for in the Bar Council's Direct Professional Access Scheme, which allows a number of organisations and institutions and their members to have direct professional access to members of the Bar in non-contentious matters only.
- 7.17** It has been argued that this restriction prevents potential efficiencies being realised. Buyers of legal services cannot directly engage a barrister in contentious matters but must first engage a solicitor, regardless of whether this is necessary for the case or desired by the client. In non-contentious

matters, many buyers are still required to engage a solicitor. Direct access could result in lower costs for the client.

- 7.18** We have heard, however, that allowing direct access to a barrister may create problems. It has been suggested that lay clients may not be sufficiently informed to brief a barrister in an effective manner. Barristers are not in contractual relationships with their clients and hence cannot enforce recovery of their fees. They depend upon the solicitor recovering their fees for them. But these difficulties are not insurmountable. There will occasionally be clients who may be in a position to approach a barrister directly for advice, and barristers would not be compelled to accept such instructions.
- 7.19** Hence in general terms we consider that permitting direct access to barristers for the purpose of advice is reasonable and suggest that the Bar Council give appropriate consideration to extending the current scheme to allow members of the general public to do so. In litigation, we can see that the roles of the solicitor and the barrister at the preparatory stage are quite different. The solicitor prepares the brief, interviews witnesses and takes statements; the barrister concentrates on the strategy and how the case is to be presented in court. We consider that this division of function works well and should continue.

## RIGHTS OF AUDIENCE

- 7.20** During the course of the review some solicitors raised concerns about the current restrictions placed upon their rights of audience in the higher courts. We are aware that this matter has been the subject of consideration by the courts and, in particular, of the recent judgment by the Court of Appeal in *R –v– Bothwell*. In that case, the court considered the general rights of audience of solicitors in Northern Ireland with specific attention being paid to the issue of solicitor advocates appearing in the Court of Appeal. The judges considered that, apart from some restricted categories of cases, section 106 of the Judicature (Northern Ireland) Act 1978 currently permits solicitors to appear in the High Court and the Court of Appeal in emergencies where a barrister is unable to appear or where the solicitor has not had a reasonable opportunity to instruct counsel and it is in the interests of justice that he or she be allowed to appear.

- 7.21** The Court went on to consider the inherent power available to it under section 106(4) of the Act. After careful deliberation it felt that this was the only method by which it could have permitted the application that was made in the case. It concluded that if it had been prepared to do so, it would have had the effect of bringing about a substantial change in the legal position about rights of audience in the Court of Appeal.
- 7.22** In England and Wales, and in the Republic of Ireland, solicitor advocates have rights of audience in the higher courts. Our reading of the decision in the Court of Appeal suggests that it felt that as legislative change was required in England and Wales, and in the Republic of Ireland, then such a change was required in Northern Ireland. It argued, however, that the government rather than the courts should say whether this was desirable.
- 7.23** We can see no reason why a suitably qualified solicitor, who has undertaken the necessary advocacy course, should be constrained from advocating in the higher courts. It happens in all other parts of these islands, and it is time for the government to consider a similar legislative change in Northern Ireland. But we attach an important caveat to this proposal: a solicitor advocate should be obliged to make clear to the client the issue of additional fees that would be earned by that solicitor (i.e. additional advocacy fees) and the alternative option (i.e. the use of a barrister). We consider that this recommendation should be implemented by the appropriate government department working in conjunction with the Law Society and the Bar Council.

## EMPLOYED BARRISTERS

- 7.24** We also considered an issue that was raised by Law Centre (NI): the rights of audience of employed barristers. At the moment, an employed barrister loses the right of audience when he or she ceases to practise as a sole trader. It has been suggested to us that this can lead to an anomalous situation where a fully qualified barrister is unable to present a case in court, and the employer organisation has to instruct outside Counsel.
- 7.25** This is an area in which it is difficult to find a general rule that fits every case. It is also an issue that the Bar Council is aware of and to which it is giving consideration. We believe that it is worth mentioning in this report, and that the appropriate bodies should continue to work closely with the Bar Council in finding a satisfactory resolution to the issue.

## RECOMMENDATIONS

**7.26** We recommend:

- 39.** The current restriction on licensed conveyancers operating in Northern Ireland should remain.
- 40.** The Bar Council should consider widening the existing Direct Professional Access Scheme to allow members of the general public to access barristers directly for advice.
- 41.** The Government should consider amending the Judicature (NI) Act 1978 to allow solicitor advocates to appear, subject to certain conditions, in the higher courts.
- 42.** The Bar Council should consider its current rules relating to the rights of audience of employed barristers.

## Chapter 8

# Conclusion

- 8.1** Our work has spanned a ten-month period and has been supported by the input of valuable information from a variety of sources. At the beginning of the process we were met with a broad spectrum of anticipation as to what this review might hold, mainly from lawyers who clearly felt that if the full force of the Clementi proposals were applied in Northern Ireland, the ramifications for them would be manifest.
- 8.2** As the process advanced we began to see a gradual change in attitudes. Early fears that a pre-conceived agenda was in place were allayed. As a group made up not just of practising lawyers, but also of representatives of consumers, small businesses and the voluntary sector, we approached our work with an open mind, but with two key objectives: to achieve a new regulatory framework that is best suited to the needs of consumers in Northern Ireland, and to ensure that the Northern Ireland legal professions provide choice and competition for all who need to use them.
- 8.3** We believe that our recommendations will achieve those key objectives. We see the work undertaken by Clementi in England and Wales and in the draft Legal Services Bill as an English solution for an English problem. Clementi's overriding principles are to be welcomed: from a philosophical perspective we agree with them and we fully support them. But we consider that the manner in which his principles are being implemented in England and Wales is simply not appropriate in many respects for Northern Ireland.
- 8.4** The present government is in favour of devolution. Indeed, Peter Hain stated before he became Secretary of State for Northern Ireland that devolution and decentralisation should be one of Labour's guiding principles, noting in his State of the Nations lecture to the Constitution Unit on 27 January 2004 that "it makes sense for different communities to seek their own unique solutions tailored to their different needs."
- 8.5** We agree with that sentiment. If, as was generally feared by the legal professions before this review commenced, the government simply wanted to apply Clementi to Northern Ireland, it would not have established this Review Group. We believe that Northern Ireland is different. It is different in size, different in the nature and structure of its legal professions, different in its history of regulation. Accordingly, different mechanisms are needed

that capture the principles of good regulation, but that recognise these other differences.

- 8.6** This has been our goal, and we believe that we have achieved it. Our recommendations acknowledge the different issues faced by lawyers and users of legal services in Northern Ireland. They take into account the many strengths of the existing system. For example, competition is prevalent in Northern Ireland and we believe that this provides a level of consumer choice that should be protected. The professions have also discharged their regulatory responsibilities in a reasonable manner; there is no doubt that the system here has not had the troubles encountered in England and Wales.
- 8.7** But we have found weaknesses and where we did we have recommended changes that we believe will make a difference, without unnecessarily increasing costs or over-complicating what is a relatively straightforward system. We consider that our recommendations will place the user of legal services in Northern Ireland at the heart of the system and in as good, perhaps even better, a position as those elsewhere in these islands.
- 8.8** Our proposals have been reached after a lengthy period of careful deliberation and have been unanimously agreed by representatives of a wide cross-section of opinion. It was never going to be an easy task to balance the needs and concerns of lawyers with those who use legal services, but we believe we have done so. It has involved some compromises, and there have been differences of opinion on parts of the detail, but the broad support for the general direction of our recommendations among such a diverse group should not be underestimated. We believe that it signals Northern Ireland has a strong and robust legal profession, that has provided a good service to consumers, offered choice and access to justice, but which is not perfect. Our reforms should, at the very least, set the wheels in the right direction in moving closer to that goal.

## Appendix A

# Consultation

We are grateful to all the people and organisations that helped us by providing oral and written evidence, and by participating in visits and meetings. Written submissions were sent to the Department and it forwarded them to us for our consideration.

### Written submissions were received from:

- Allister, Mr James, QC MEP
- Association of Personal Injury Lawyers
- Bar Council
- Belfast Solicitors Association
- Benchers of the Inn of Court of Northern Ireland
- Citizens Advice (Regional Office)
- Council of Legal Education
- Democratic Unionist Party
- Disability Action
- Gregory, Mr Donald
- Irwin, Mr Stephen, QC
- Law Centre (NI)
- Law Society of Northern Ireland
- Legal Services Ombudsman and Legal Services Complaints Commissioner (E&W)
- McBride, Mr Andrew
- McLaughlin, Mr Alasdair, Lay Observer for Northern Ireland
- Newtownabbey Borough Council
- Northern Ireland Legal Services Commission
- Office of Fair Trading
- Queen's University Belfast
- Which?
- Wright, Ms Eileen

**Regional meetings were held at the following venues:**

- Canal Court Hotel, Newry, Monday, 27 March 2006
- Hilton Hotel, Belfast, Friday, 31 March 2006
- Everglades Hotel, Londonderry, Wednesday, 5 April 2006
- Tullylagan House Hotel, Cookstown, Wednesday, 5 April 2006

**Formal oral evidence was presented to the Review Group by the following groups:**

- Bar Council
- Benchers of the Inn of Court of Northern Ireland
- Law Society of Northern Ireland
- Office of Fair Trading

**In addition, the Review Group received presentations from or met with the following;**

- Bailie, Mr John and Neeson, Ms Moira, Law Society of Northern Ireland
- Gerard, Mr James and Sephton, Ms Kerri, Department of Constitutional Affairs
- Lay persons sitting on the Bar Council's complaints committees

**The Chairman and/or the Secretary met with and heard from the following individuals and groups:**

- Bailie, Mr John, Chief Executive, Law Society of Northern Ireland, Mc Shane, Mr Rory, President, Law Society of Northern Ireland
- Clementi, Sir David
- Boate, Ms Carol, Devine, Mr Brian, Purcell, Mr Declan, Competition Authority, Dublin
- Garland, Mr Brendan, Chief Executive, Bar Council, McGreenera, Ms Noelle, QC, Chairman, Bar Council, Stephens, Mr Ben, QC, Vice Chairman, Bar Council, Horner, Mr Mark, QC, Cush, Mr Peter, BL.
- Harrison, Miss Emma, Restell, Miss Louise, Which?
- Horgan, Mr Grahame, Office of Fair Trading

- Johnston, Ms Carole, West, Mr Mike, Scottish Executive Scottish Executive
- Kerr, Sir Brian, Lord Chief Justice for Northern Ireland
- Lay persons sitting on the Law Society's complaints committees
- Mageean, Professor Vincent, former Lay Observer for Northern Ireland
- Maginess, Mr Alban, MLA
- McLaughlin, Mr Alasdair, Lay Observer for Northern Ireland
- Reeder, Mr Nigel, Department of Constitutional Affairs
- Spicer, Ms Sheila, Law Society of England and Wales
- Wilson, Mr Michael, President, Solicitors Disciplinary Tribunal

## References

- Clementi, Sir David, *Review of the Regulatory Framework for Legal Services in England and Wales* (December 2004)
- Competition Authority, *Study of Competition in Legal Services* (January 2005)
- Department for Constitutional Affairs, *Competition and Regulation in the Legal Services Market* (July 2003)
- Department for Constitutional Affairs, *The Future of Legal Services: Putting Consumers First* (October 2005)
- Department of Finance and Personnel, *Regulation of Legal Services in Northern Ireland* (September 2005)
- European Commission, *Report on Competition in the Professional Services* (February, 2004)
- Mageean, Professor Vincent, *Review of Legal Services Provision*, (June 2004)
- Scottish Executive, *Reforming Complaints Handling: Building Consumer Confidence* (May 2005)
- Scottish Executive, *Report by the Research Working Group on the Legal Services Market in Scotland* (May 2006)





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