

REGULATION OF LEGAL SERVICES IN NORTHERN IRELAND

THE RESPONSE OF THE BAR COUNCIL TO THE CONSULTATION PAPER

3rd February 2006

Contents

| | | |
|---|-----------------------------------------------------------|-------|
| A | Executive Summary | 2-3 |
| B | Introduction | 4-9 |
| | Role of the Barrister | 5-9 |
| | The Bar Library System | 10-16 |
| | History | 10-12 |
| | The Bar Library System Explained | 12-15 |
| | The Advantages of the Bar Library System | 15-16 |
| C | Proposals | 16-34 |
| | Regulation of the Bar | 16-17 |
| | Functions of Regulation | 17-19 |
| | Professional Self-regulation | 17-18 |
| | Public Protection | 18-19 |
| | Education | 19 |
| | Competence | 19 |
| | Quality Assurance and Standard Setting | 20 |
| | Functions of Regulation: Conclusion | 20-21 |
| | Future Regulatory System: Proposals | 21-24 |
| | The Proposal | 24-26 |
| | Legal Disciplinary Practices | 26-28 |
| | Multi Disciplinary Practices | 28-29 |
| | Ownership of Law Firms, LDPSs and MDPs by Outside Parties | 29-30 |
| | Education | 30-34 |
| D | The Future | 34-35 |
| E | The Questions | 35-39 |
| | Glossary | |
| | Annexes | |

A. EXECUTIVE SUMMARY

- i. It is of the utmost importance for the retention of public confidence in the legal system in Northern Ireland that the delivery of legal services is not only independent of the political process but that it is clearly seen to be so.
- ii. The maintenance of an independent referral Bar has a vital role to play in the delivery of a legal service that is free from political influence and the Bar Library system has proved itself to be an effective and reliable means of ensuring that independence.
- iii. Intrinsic to the Bar Library system is its freedom from sectarian divide; it is open to all who are qualified and its members provide a high quality and value for money service irrespective of the source of their instructions. Legal cases that arise out of some of the deepest divisions within Northern Irish society and between certain sections of it and the government have nonetheless been fearlessly and responsibly handled by a unified Bar.
- iv. There is no requirement for or evidence of any demand in Northern Ireland for the alternative business structures being proposed. The direct availability of barristers' advocacy services to solicitors' firms, which is an integral part of legal disciplinary practices, can presently be achieved through the ease with which both barristers and Solicitors can change professions. An experiment with multi-disciplinary practices is likely to compromise the confidentiality of legal advice given to clients and lead to conflicts of interests that would threaten the impartiality of the service provided. Both business structures are likely to reduce choice. There would be real difficulties with the Regulation of such structures.
- v. However, the significance for Northern Ireland of the change proposed by the involvement of 'outside money' in legal firms should not be underestimated; it should clearly be understood that the separation of those who deliver the service

from those who finance it will inevitably permit paramilitary infiltration and so contaminate a system that has for so long (and throughout all the “Troubles”) managed to be kept free of such involvement.

- vi. The Benchers of the Inn of Court in Northern Ireland¹, who constitute an experienced and independent body, should retain their control over the entry into the Bar and ultimate control of the disciplinary process. To allow that control to pass to a new body involving government appointees is likely to be regarded as unwarranted tampering with a system that at present ensures independent, quality representation.
- vii. Very few complaints are made against barristers and when they are received they are acted on quickly and decisively with a high level of scrutiny. It is proposed that the independence of the procedures should be increased by ensuring that the disciplinary process is controlled by the Benchers as opposed to by the Bar Council, that provision be made to secure that the majority of the Benchers are not practising barristers, by increasing the number of lay representatives on all levels of the disciplinary process and appointing an independent Legal Services Ombudsman with power to audit the whole disciplinary and appeals process.
- viii. The Bar is not complacent and recognises that its procedures and practices should be kept under regular review to ensure that they remain appropriate and effective. To that end the Bar will establish a working group to consider and make recommendations on matters such as admissions, training and accreditation; direct access; rights of audience and compensation for complainants.

¹ See Glossary

B. INTRODUCTION

1. The Bar of Northern Ireland (“the Bar”) welcomes the opportunity afforded to it by the Review Group under the Chairmanship of Sir George Bain (“the Bain Committee”) to respond to the Government’s Consultation Paper on the Regulation of Legal Services in Northern Ireland. The process has been a particularly worthwhile one for the Bar as it has enabled the Bar to examine the service which it provides, how that service could be improved, its own role in the administration of justice and how the best delivery of value for money, quality legal services can be achieved for all the citizens of Northern Ireland.

2. The remit of the Bain Committee is defined as:
“(c) Considering the regulatory principles developed by Clementi and bringing forward firm proposals for the future regulation of legal services here, in the light of those principles, the responses to the consultation, and the size of the local market.”²

3. The Consultation Paper has asked a number of questions. However it is difficult to answer those questions without fully appreciating the organisation of the legal professions in Northern Ireland, the different roles played by solicitors and barristers, how the Bar has developed and how the Bar has performed. It is simply not possible to make recommendations about how a system can be improved without a full understanding of how the system presently works, why it works in that particular way and how it delivers its services.

4. The Consultation Paper is lacking in content and in many instances does not condescend to detail. Paragraph 5.10 of the Consultation Paper contains a number of conclusions for which no evidence at all has been adduced. There is no evidence in Northern Ireland that “the present self regulatory system is in need of reform to make it more acceptable to consumers, more representative of public interest, and

² Regulation of Legal Services in Northern Ireland, Consultation Paper DFP (NI) Page 1

more relevant to promoting and facilitating access to justice in Northern Ireland.” The Bain committee must not approach the regulation of Legal Service in Northern Ireland from a point of view dictated by the failure of the regulation of Legal Services in other jurisdictions. Any changes in the regulation of Legal Service in Northern Ireland should be proportionate in the response and designed to remedy real, not imagined, weaknesses in the regulation of Legal Services in Northern Ireland. It is in the interests of everyone, both providers and consumers alike, that the system of regulation of the Legal Services is tailor made for Northern Ireland and “suits the circumstances here”.

5. It is a singular failure of the Consultation Paper that it does not acknowledge in its terms of reference the importance, in any Review, of ensuring the proper administration of justice and protection of the Rule of Law. The provision of legal services cannot be equated to the sale of cans of beans. The Bar Council has from the outset of this Review protested at the failure to recognise, in the terms of reference, the crucial importance of this proposition. (See Annex 1).

The Role of the Barrister

6. The legal profession in Northern Ireland is divided into two distinct branches, the Bar (which comprises barristers) and the Law Society of Northern Ireland (which comprises solicitors). The Bar’s Code of Conduct is designed to maintain a separate and independent referral Bar.
7. A solicitor provides a whole range of legal services which do not involve litigation, such as administration of estates, trust work and conveyancing. These services will include advisory work. The solicitor may require an opinion on one of these areas of law and he will seek the advice of a Barrister specialising in that area of law.
8. In respect of litigation, the solicitor is the first contact point for the client seeking legal representation in Court. The solicitor will issue proceedings, collect evidence,

take statements of witness and assemble the paperwork including the organisation of expert reports.

9. The Barrister, when retained by a solicitor will advise on the case, draft pleadings, Affidavits and provide advocacy services. Under the present Rules, Solicitors can provide many of the services provided by barristers, and therefore there is no rule restricting solicitors from competing with barristers provided they are qualified advocates, although solicitors do not have automatic rights of audience in the High Court. However, there are certain legal services that Barristers are not able to offer. These legal services which include conveyancing, the administration of estates and commercial services involve the maintenance of accounts of the funds of clients or third parties and require significant administrative resources. Firms of Solicitors are in direct competition with one another for this work and their ability to compete is enhanced by the presence of an independent referral Bar who can provide specialist advice on many of the issues that arise out of conveyancing, the administration of estates and the provision of commercial services.

10. There are a number of core duties which define and shape the independent referral Bar. These have been identified and set out at length in the submission of the Council for the Bar of Ireland³. These are:
 - (a) *Duty to the Court.*

Barristers have an overriding duty to the Court to act with independence in the interests of justice and to ensure in the public interest that the proper and efficient administration of justice is achieved.
 - (b) *Duty to promote the client's interests fearlessly.*

Subject only to their paramount duty to the Court, barristers must promote and protect fearlessly and by all proper and lawful means the best interests of their lay client and do so without regard to their own interests or to any consequences for themselves or any other person.

³ See Response to the Preliminary Report of the Competition Authority dated 24th March 2005

- (c) *Duty to accept instructions in any case in the field in which a barrister professes to practice at a proper professional fee unless justified by special circumstances.*

This rule, known as the “Cab Rank Rule”, ensures that a barrister is obliged to accept instructions in any case in the field in which he or she professes to practice at a professional fee irrespective of whether the client is paying privately or is publicly funded and irrespective of the parties on whose behalf the barrister is instructed, the nature of the case and the brief or opinion which the barrister may have formed as to the character, reputation, cause, conduct, guilt or innocence of the person.

- (d) *Duty to act as a sole trader.*

A core feature of the independent referral Bar in Northern Ireland is the obligation of each barrister to act as an independent sole trader.

- (e) *Duty of independence.*

Barristers are individually and personally responsible for their own conduct and for their professional work and are required to exercise their own personal judgement in all professional activities and to be absolutely independent free from all other influence. Section 6.06 of the Code of Conduct prohibits a barrister from “*engaging in any other profession, carrying on or taking part in any other trade or business without first obtaining the consent of the Benchers...*” This further safe guards a barrister’s independence and limits potential conflicts of interest.

- 11. The consequences that flow from these core duties are many. The chief ones are these:

- (i) *Confidence of the judiciary.*

A barrister’s responsibility to the Court ensures that the judge hearing the case has all the material necessary to enable that judge to make a decision. There is a proud tradition at the Bar here of making sure that the Court is kept properly informed. In the very rare case where a barrister fails in his duty, it is regarded as a most serious breach of professional conduct and is almost certain to be the subject of a referral by the judge to the Professional Conduct

Committee. The consequence of this is that judges here do not need law clerks as in the United States and can rely on those barristers appearing in Court to highlight all the relevant facts in cases and other materials necessary for his judgement. This system which is based on trust is not one that is acquired overnight. It is built up over the years, it is nurtured by the Members of the Bar and its importance is emphasised by all barristers, one to another, from Senior to Junior and from Master to Pupil. It is a principle interwoven in the fabric and the tradition of the Bar.

(ii) *Independent fearless representation by the counsel of choice.*

A number of perpetrators of the most savage crimes imaginable have been brought before the Courts in Northern Ireland. Regardless of the abhorrent nature of these offences, those charged with them have the right to choose (subject to availability) any advocate of their choice from the Bar. The members of the Bar have acted without fear or favour when so retained. The serial sectarian murderer, the child murderer, the bomber and the institutional child abuser have all been able to choose who they want to represent them. “The Cab Rank Rule” is not a rule to which mere lip service is paid. It has been followed to the letter. Moreover those advocates retained over the past years in crimes of the most horrific nature committed for the most unpopular of causes, have provided fearless independent representation to all those so charged.

(iii) *Availability of advocacy and specialist expertise.*

The solicitors’ profession in Northern Ireland is organised on a very different basis from the solicitors’ profession in England and Wales. There are few firms with over five partners. There are a large number of practices with three or fewer partners. Nearly half of all firms comprise a single independent practitioner⁴. This has a number of consequences. There is considerable consumer choice in Northern Ireland. There are a wide number of solicitors’ firms from which consumers may make a choice when they are deciding to retain a solicitor to act on their behalf. There is a widespread representation of solicitors’ firms throughout Northern Ireland. Most small towns (and even

⁴ See 3.22 of the Consultation Paper on Regulation of Legal Services in Northern Ireland

villages) have more than one firm of solicitors' offices in that town. If not, then the next nearest small town will have such representation. Smaller firms cannot provide the specialised services that bigger firms can provide. These small firms and one man practices need access to the skills of an independent Bar not just for litigation but also for advice on a wide range of legal matters. However the size of the firms makes no difference to that firm's right to instruct any Counsel, Senior or Junior, of its or its client's choice. This allows these small firms to give their clients the same service they would receive if they went to a much larger firm situated in one of the major centres of population in Northern Ireland. Thus any solicitors' firm, no matter how small, can purchase barristers' services on a case by case basis, thus greatly reducing the cost to them and ultimately to the consumer. Furthermore there is no difficulty in any of these firms contacting a member of the Bar to arrange a consultation at short notice. These local firms are part and parcel of the fabric of the system of justice in Northern Ireland and they are dependent on a thriving, independent referral Bar. A fusion of the professions and/or the introduction of LDP's 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.

12. There is considerable force in the argument of the Canadian Bar Association that having an independent Bar is a pre-requisite to an independent judiciary and the weakening of the one necessarily undermines the other.⁵

⁵ See submission letter dated the 6th December 2004 from the CBA in its submission to Clementi

The Bar Library System

History

13. The Northern Ireland Bar evolved from the former North East and North West Circuits of the Irish Bar, as it was prior to the 1st October 1921. Following the passing of the Government of Ireland Act 1920, the right of all then existing members of the Irish Bar that practice both in Northern and Southern Bars was preserved. At this time, the Irish Bar had, as the focus of its operation, the Bar Library in the Four Courts in Dublin.

14. Prior to 1921 there had been a small local Bar in Belfast, centred mostly in Chambers in Rea's Buildings, in North Street. On the 26th October 1921, the first General Council of the Bar of Northern Ireland was elected by the twenty-two former members of the Irish Bar, who had chosen to practice in the new jurisdiction. Early the following year, the new Bar Council debated the motion that the chamber system was contrary to the traditions and best interests of the Irish Bar. The motion further called on those members then holding chambers to surrender their tenancies. The motion, which had been proposed by a member, himself a tenant of chambers, was carried. The Bar Library of Northern Ireland had effectively come into being.

15. The membership of the Bar was quite small at this stage, and remained so for many years. Great expansion in the numbers of the Northern Ireland Bar occurred largely during the late 1960s and onwards during the thirty or so years of civil unrest. In Northern Ireland there are 560 qualified barristers, drawn from all religious and political persuasions.⁶

16. Since its origins in the 1920s, the Bar has been a collegiate organisation. This ensures that all members have a daily point of contact in the Bar Library. Young members have access to the advice and experience of more Senior colleagues. It is an etiquette of the Bar that every barrister no matter how senior is obliged to

⁶ See Table 2(b) at page 16 of the September 2005 Consultation Paper

respond to requests for assistance from any other member of the Bar no matter how junior. In practise this opportunity for professional discussion is an invaluable aid and the Library plays a crucial role in maintaining a high degree of contact between members of the profession and in maintaining high standards among the profession. In Northern Ireland's divided society, the Bar Library has had particular significance, the fundamental importance of which cannot be underestimated. The collegiate structure and the cohesion of the membership have safeguarded the Bar from the divisive problems so prevalent elsewhere in Northern Ireland. It has facilitated unhindered access to legal representation for many unpopular causes throughout the troubled history of Northern Ireland. The cohesion and collegiality of the Bar has thus ensured a broad acceptance of the impartiality of the Northern Ireland legal system, thus aiding the administration of justice, a fact which has been acknowledged on many occasions by the judiciary and successive British governments⁷. It is highly likely that the administration of justice in Northern Ireland would have broken down in the mid 1970s without an independent Bar prepared to represent any client regardless of religious, political or cultural sympathies.

17. The question of a system of chambers was looked at again in the 1990s as an increase in the number of barristers created difficulties in the existing accommodation in the Bar Library. A number of members considered opting out of the Bar Library and forming sets of commercial and criminal chambers, with a view to improving the facilities and service they could offer to clients. While this option would have had benefits for those members, most likely, it would have proved disastrous for the Library and the Bar as a whole. Instead those members who wished to set up chambers recognised that it was in the overall interest of the legal system in Northern Ireland to maintain the Bar Library system and to support the construction of the new Bar Library building. In the event, the agreement to proceed with the New Bar Library effectively ended the move towards chambers, with all members going into the new building. The preservation of the ethos of the

⁷ For example see:- Green Paper "A Northern Ireland Supplement on the Work and Organisation of the Legal Profession, Contingency Fees, Conveyancing by Authorised Practitioners" issued by the Department of Finance and Personnel. May 1989; Observations by the Judges of the Supreme Court of Northern Ireland in response to the Green Paper. (Annex 2)

Library system was seen as having greater value than the commercial interests of a minority of members in establishing chambers.

18. The Bar as a whole has invested £16.5 million in the New Bar Library, an investment which will benefit not just the present members but all future members of the Northern Ireland Bar and their clients. In order to fund this development, the Bar took out loans totalling £16.5 million which its members are currently repaying. Any changes to the Bar Library system which would reduce the number of members will make it much more difficult for the continuing members of the Bar to meet those financial commitments and retain the level of expertise necessary to ensure the success of the Bar Library system. There have been no subsidies, no tax breaks, and no government assistance. The Bar has not attempted to pass the costs on to consumers by way of increased fees. It is a cost that the Bar has borne itself because of its members' belief in the Bar Library system and the need to provide a service which is fit for purpose in the 21st Century. A Bar Library system also continues to operate in Scotland and the Republic of Ireland.

The Bar Library System Explained

19. The consequences of all barristers working together from the same building, using the same facilities and sharing the same ethos is that the religious and political differences that have so disfigured Northern Ireland has not been permitted to operate. The all embracing culture of the Bar, cultivated over the years, the collegiality of the Bar which requires a sharing of knowledge, the traditions of the Bar, the instruction of barristers across the religious and political divide, the necessity of all members of the Bar working together on cases, has meant that the Bar has been able to face down the great issues such as internment, the hunger strikes, the alleged "shoot to kill" policies, the physical and mental threats and attacks on its members and other highly divisive issues with a united front.
20. 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. There

is no doubt that for a whole host of reasons, cultural, traditional and historical, a chambers system would have inevitably resulted in different sets of chambers being perceived whether fairly or not as offering a service to one particular section of the community or being aligned to one particular political point of view. There is every reason to believe that the Bar Library system will continue to serve the people of Northern Ireland as it becomes more religiously and ethnically diverse.

21. In the history of the Northern Ireland Bar no-one who has had the requisite qualifications has been refused entry because he or she has been unable to obtain a pupil master. Anyone who is qualified to practice as a barrister in Northern Ireland has been provided by the Bar Council with a place in the Bar Library and a pupil master. This is to be contrasted with the system of chambers in England and Wales in which every year many fully qualified barristers are never given the opportunity to test their skills, because they cannot either find a Master or obtain a tenancy in a set of chambers. The Bar Library in Northern Ireland is a welcoming organisation, open to all who are qualified to use its facilities and dedicated to giving everyone so qualified a chance to practice as a barrister.
22. The Bar subsidises all new entrants to the Bar for a period of seven years. There is a sliding scale of fees payable by all Bar Library members for a period of seven years. This is to allow all barristers an opportunity to practice as independent barristers, to earn a reputation and to develop a practice. The Bar does not know of any other profession whose members so generously subsidise their future competition. However this generosity is not motivated by altruism. All practitioners of the Bar realise that it is in the long term interests of the Bar that it attracts the best talent available and that that talent be given an opportunity to flower, if the Bar is to continue to offer the best legal service possible to consumers in Northern Ireland.
23. The Bar, as previously stated, has invested £16.5million of its own money in the New Bar Library building and also in:
 - (a) Additional library staff and expertise.

- (b) Additional IT staff and expertise.
- (c) IT and books.
- (d) Cataloguing the decisions of the Northern Ireland Courts and Tribunals.
- (e) Facilities for lectures.

24. As a consequence any member of the Bar has the ability to retrieve online a wide range of legal material ranging from unreported Northern Ireland cases to Halsbury's Laws. Furthermore, every member of the Northern Ireland Bar has access to a fully qualified member of the library staff who will carry out any independent research on any area of law which he or she requires. This means that every member of the Bar has unparalleled access to a wide range of legal materials. Every member can research judgements in cases which have been personally collated by the Bar Library staff and that might not otherwise be available. The Bar Library has been able to provide a lecture room which enables large numbers of the Bar to attend lectures on a wide range of subjects, all as part of each member's continuing professional development. In fact the facilities available at the Bar Library for research and Information Technology are unmatched by any other legal grouping in the British Isles. This has only been made possible because of the very heavy capital investment of the Bar. This investment has also enabled the Bar to give increased assurances to judges, magistrates and chairpersons of tribunals that those appearing before them are in a position to fully advise the Court on the appropriate legal authority or legislation.
25. The Bar Library has provided different levels of accommodation to suit the various requirements and resources of its members. Practising barristers can choose whether simply to occupy a desk in the Library, whether to enjoy shared office accommodation, or whether to take a room on their own. State of the art technology and research facilities are available twenty-four hours per day for the use of all barristers within the Library. There is access to the Library facilities out of office hours for those wanting to carry out study or research.

26. The economies of the scale of the Bar Library mean that all members of the Bar share:
- (a) Office space.
 - (b) Reception and secretarial costs.
 - (c) Rates of insurance (apart from professional indemnity premiums).
 - (d) Library, IT and research costs.
 - (e) Services charges and maintenance fees.
27. There can be no doubt that the Bar Library delivers the most cost effective service for independent practitioners. 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.

The Advantages of the Bar Library System

28. There are many advantages to the consumer which flow from the Bar Library system which can be summarised as follows:
- (i) The homogeneous nature of the Bar and the ability of solicitors to retain any barrister with the requisite degree of expertise.
 - (ii) The Northern Ireland Bar because of the way in which it is organised provides opportunities for dispute resolution in many cases and allows these cases to be disposed of in a pragmatic and practical way without the need for a full Court hearing. This has a major impact on the costs involved in litigation.
 - (iii) There are a considerable range of cases to which scale fees apply in the civil and criminal spheres.
 - (iv) The scale fees allow a consumer to assess what the costs of bringing an action will be and typically inform the fees applicable in other cases which are not the subject of scale fees.
 - (v) Unlike the position in England and Wales, there are no success fees in Northern Ireland which enable lawyers to double their normal costs and which increase the costs of obtaining an insurance policy. These inflated costs have

been the subject of considerable criticism, and in particular from Lord Phillips, the Lord Chief Justice of England and Wales and Lord Carswell in *Campbell –v- M.G.N. Limited (No. 2) 2005 UKHL 61* at para 49 et seq⁸

- (vi) It is very rare in Northern Ireland for a barrister to demand costs over and above the fee which has been agreed between the solicitors acting for the Plaintiff and the Defendant or which has been allowed on taxation. Accordingly, if a client recovers his or her costs, there will almost certainly be no additional fee to be paid by the successful client to Counsel.
- (vii) The Bar is non discriminatory in the fullest sense of the meaning. It is open to all those who are properly qualified. It has been tried and tested in the most troubled of times. It has resisted polarisation and sectarianism to offer an independent legal service to all citizens of Northern Ireland regardless of their creed, class, colour, religion or sex.

C. PROPOSALS

Regulation of the Bar

- 29. There is not one comprehensive definition of Regulation. Some commentators have defined regulation in the context of four key characteristics:
 - (i) Acknowledged authority of the regulator with a formal remit to regulate.
 - (ii) Regulator with central powers of oversight on behalf of others.
 - (iii) A framework of accountability and control.
 - (iv) Action in the public interests that serves wider societal goals.

- 30. There are also different approaches to regulation which have taken place over the last three decades. These have been described as:

(a) Deterrence

Regulation relies on sanctions for failure to meet clear standards set out by the Regulator (Reiss 1984)⁹

⁸ See newspaper article "Top judge says legal aid reforms have backfired" The Guardian December 7 2005 at Annex 3

(b) Compliance

Regulation relies on trust and a mutual willingness to give and receive support and guidance when standards fall (Kagan 1984)¹⁰

(c) Responsive

Regulation also known as “smart” regulation which is adaptable, flexible and situation specific (Ayres and Braithwaite 1992)¹¹

31. Regulation has several different functions and regulatory structures cover individuals, professional settings and organisations, and practice. The regulation of the legal profession is one dimension within this.
32. The functions of regulation can be categorised as follows:
- (i) Professional self regulation.
 - (ii) Public protection.
 - (iii) Education.
 - (iv) Competence.
 - (v) Quality assurance and setting standards.

Functions of Regulation

Professional self regulation

33. The need to secure and preserve the status of the two branches of the legal profession was a key factor for the establishment and development of professional regulatory structures. In this context the role of the regulator was to:
- (a) Protect professional boundaries;
 - (b) Protect professional title;
 - (c) Establish professional standards
 - (d) Remove from practice those whose performance fell below those standards

⁹ Reiss A.J. (1994) Selecting strategies of control over social life in enforcing regulation

¹⁰ R.A.J. Kagan (1984) The Criminology of the Corporation and Regulatory enforcement strategies

¹¹ Ayres I and Braithwaite J (1992) Responsive Regulation: Transcending the Degregulation Debate

Self regulation by the professions has been the paramount principle but has become a matter of more recent debate. Some argue that professional self-regulation is an important mechanism to reinforce the *apolitical* and *independent* autonomy of professions from governments and others to work in the best interests of the client.

Others, such as consumer organizations, suggest that professional self-regulation may actually separate the interests of clients from the profession and not operate in favour of the users of services (Consumers Association 2000). For example, Friedson argues that professional self regulation encourages:

“the profession to see itself as the sole possessor of knowledge and virtue, to be somewhat suspicious of the technical and moral capacity of other occupations, and to be at best patronising and at worst contemptuous of its clientele”¹²

There have been recent major reforms of professional regulatory bodies. For example:

- (i) An increased remit for public protection and increased lay representation on governing councils
- (ii) The government has secured the power for quick reform of each regulatory body by way of statutory instrument (secondary legislation)
- (iii) Oversight regulators have been created to set standards for each regulatory body and ensure they act in a consistent manner

Public Protection

34. Since the 1990s public protection has become the major function of professional regulation and professional regulatory bodies. Regulatory bodies established by statute frequently have this principal objective stated in the legislation which creates them.

¹² Friedson E. (1970) *The Profession of Medicine: A Study of the Sociology of Applied Knowledge* New York: Dodd Mead and Co.

Public protection as the key rationale for *professional* regulation has been reinforced by the creation of oversight regulators with the power of external review of the decision making of professional regulatory bodies.

The oversight regulator must assess any decision the professional regulatory bodies make about individual professional conduct and can either refer the matter back to the professional regulator with a recommendation or in some instances refer to the High Court those decisions that it believes to be too ‘lenient’.¹³

Education

35. The traditional entry gate to a profession and professional regulation is via standards of education. Historically the professional body has set educational standards for entry to vocational education and subsequently to professional practice.

Education for practice beyond initial admission to the profession has become a hallmark of current forms of professional self-regulation. The implementation of compulsory continuing professional development as a condition precedent to being licensed to practice is now common among regulatory bodies.

Competence

36. It is a feature of professional self-regulation that practitioners are required to undergo a period of training under direct supervision of fully qualified and experienced practitioners. The purpose of this period of training is two-fold:
 - (i) To satisfy the professional body and the public on the competence of the new practitioner to practise as a fully accountable member of the profession.
 - (ii) To allow the new practitioner the opportunity to demonstrate sustained, continuous, effective competence in the workplace linked to practice certification requirements.

¹³ For example, the Council for Regulation of Healthcare Professionals (CRHP) – although it should be noted that the CHRP has no power to refer decisions which the registrant believes to be unduly harsh. This affirms the principle of public protection as their *modus operandi*.

Quality Assurance and Standard Setting

37. Quality assurance is a major rationale behind the creation of regulatory agencies for professional settings rather than individuals. New agencies have been created with a remit to assess the quality, safety, efficiency and effectiveness of services provided by professional groups. An example of such an agency is an ombudsman who has the power to review and overturn the decisions of professional bodies. Such agencies constitute a whole systems approach that challenges the traditional view of practitioners and professional standards as sole determinants of quality service. Setting standards is a component function of *most* regulatory activity, both within and outside professional regulation. However there are not clear linkages between standards set by professional regulatory bodies and those set by agencies responsible for standards across organisations.

Functions of Regulation: Conclusion

38. The functions of regulation outlined above are not of course mutually exclusive. For example standard setting clearly overlaps with both quality assurance and competence. Regulatory functions are also applied to individuals, professions, organisations and/or contextual settings, sometimes simultaneously and not necessarily in alignment with each other. They are in addition open to different interpretation both at a policy, practice and individual.
39. The Bar considers that it is of paramount importance that the regulatory framework should not only meet the challenges of the twenty-first century but also should be designed to give the Northern Ireland consumer the best possible professional service.
40. The confidence that members of the public in Northern Ireland have in the system of justice is based fairly and squarely upon its independence from the political process. Even in these less troubled times the importance of this classic separation of power cannot be underestimated. The recent “Stormontgate Affair” should serve as a warning of the risks should the legal process be seen to be compromised by

political interference. It is not enough that the legal process is independent; it must be seen clearly to be so. Trust is a fragile commodity. Once lost, it can be extremely difficult to regain. The prospect of political appointees determining who can and cannot practice as advocates in the Northern Ireland Courts or setting the rules or codes which govern their practice must give rise to a deep concern. No less a cause of anxiety must be an arrangement whereby political appointees determine whether a barrister has breached his Code of Conduct in cases where he owes a duty to represent his client fearlessly and independently even though that might bring him into conflict with the State.

Future Regulatory System: Proposals

41. It is important in determining what the appropriate regulatory regime for Northern Ireland should be, to recognise the following:
- (i) The very low level of complaints made against members of the Bar¹⁴.
There are between 30,000-40,000 Court appearances by barristers each year in Northern Ireland. During the course of the year there will be many meetings between barristers and their instructing solicitors and clients. Barristers will provide Directions and Opinions in very many cases. The number of complaints made has to be seen against this background.¹⁵
 - (ii) There is no basis for stating that the very low level of complaints is because members of the public do not know how to complain. Firstly complaints made to the Law Society are re-directed to the Bar. Secondly the Bar's website makes it clear how complaints can be made¹⁶ The Court service have included in their leaflets available at all Court buildings how members of the public can complain about their barristers if they are unsatisfied with their performance.¹⁷
 - (iii) Out of the small number of complaints, a portion of those complaints are made by members of the Bar.

¹⁴ See breakdown of the number and nature of complaints made against members of the Bar in the past 5 years (Annex 4)

¹⁵ Letter from the Chief Executive of the Bar Council to the Chairperson dated 2 February 2006 (Annex 5)

¹⁷ See www.courtsni.gov.uk/NR/rdonlyres/15656591-24D2-4402-9089-8D19703D7BBA/0/p_ucs_complaint.pdf (Hard copy sent under separate cover)

- (iv) The widespread anecdotal evidence of those sitting on the Disciplinary Committees that the members of the profession are far tougher on other members of the profession than lay representatives who sometimes may not appreciate the fundamental nature of some of the core duties of a member of an independent referral Bar.
- (v) The litigation process necessarily produces winners and losers. It can sometimes be difficult to distinguish between those who are dissatisfied with the result as opposed to the process. The fact that a litigant does not achieve the results that he or she honestly believes that he or she is entitled to, does not mean that the solicitor or barrister has failed that particular applicant. As the Complaints Commissioner has pointed out in England¹⁸
- “Blaming the barrister may, in some cases, be right but in most, the complainant has had the misfortune to find that the law works against their interests and has not given the answer that they perceive to be right. The complaints system, however sympathetic, is not going to be able to remedy that. This, inevitably, leads to dissatisfaction with the outcome when it cannot.”*
- (vi) Barristers require a quite different regulatory regime than solicitors because the latter handle their clients’ money, they may take much greater responsibility for their clients’ affairs and frequently act as trustees for their clients. The regulatory regime necessary to ensure that clients’ money is safeguarded is necessarily much more onerous and strict.
- (vii) The present regulatory regime is based upon a Code of Conduct dated 6th March 2003. The Code of Conduct is available to the public and is published on the Bar Council web site. There have been no complaints in relation to any aspect of the Code of Conduct. The Code is regularly reviewed and up dated. Allegations of breaches of the Code of Conduct are dealt with by the Professional Conduct Committee which determines whether any particular complaint whether made by a member of the public, a member of the profession, a Judge or whomsoever, shall be the subject of a charge. Indeed there is no need for there to be a complainant or a complaint as the

¹⁸ See Annual Report of the Complaints Commissioner 2002

Professional Conduct Committee can act of its own motion. The Professional Conduct Committee is chaired by the vice chairman for the time being of the Bar Council. It comprises senior members of the profession taken from all areas of practice. Two lay members also sit on the Committee. If charges are to be preferred then there is a summary panel which deals with the more straight forward matters involving less serious breaches of the Code of Conduct.

42. For more serious breaches of the Code of Conduct a Disciplinary Committee is constituted. The Disciplinary Committee is usually chaired by a High Court Judge or a Lord Justice of Appeal. It comprises members of the profession representing different levels of seniority and experience at the Bar and two lay representatives. The involvement of individuals holding high judicial office in the disciplinary process ensures objectivity and impartiality.
43. There is an appeal from the Disciplinary Committee to the Disciplinary Appeals Committee. The Disciplinary Appeals Committee comprises three Benchers of the Inn of Court of Northern Ireland and one lay member. The Lord Chief Justice nominates the chairman, a Judge, usually of no less standing than a Lord Justice of Appeal. There is usually a High Court judge representing the Benchers and a senior member of the profession. All disciplinary hearings are in public. In the case of a finding of a breach of the Code of Conduct, the finding is published on a notice board in the Bar Library and in the Great Hall of the Royal Courts of Justice.
44. All those involved whether from the Bar or Bench give their time without making any charge. Lay observers are paid out of the Bar's funds. This means that the very best of the Bar's advocates are retained to prosecute these complaints at no cost to the complainant. The costs of running the disciplinary process are approximately £2,500-£3,000 per annum and these costs relate exclusively to the payment of lay representatives. Any proposed change to the disciplinary process needs to be costed against the present system to ascertain whether such additional costs are proportionate.

45. The Bar would welcome the Bain Committee approaching the lay representatives who sit on the various Disciplinary Committees as the feedback the Bar receives from them is positive.
46. The authority of the Bar to regulate itself derives from the judiciary¹⁹. The Lord Chief Justice, as the head of the judiciary, selects the lay representative who may be appointed to sit on the various Committees. His independence is acknowledged and accepted by the vast majority of those living in Northern Ireland
47. The Bar Council has given careful consideration to the Clementi Report, to the requirements of good regulation and to the importance of ensuring that consumers have confidence that the Bar is being fairly and transparently regulated. In doing so the Bar Council has looked at a number of different models of regulation, including the present framework regulation. It has done so in the context of how the Bar has operated in Northern Ireland and the issues which require to be addressed. Its proposal is one that the Bar Council feels is best suited to the circumstances of Northern Ireland, is proportionate and represents best practice.

The Proposal

48. There should be an appointment of a Legal Services Ombudsman (“the Ombudsman”). He or she should be independent of the Bar. There is much force in the Scottish Executive’s standing committee’s recommendation that in order to ensure that he is seen to be independent of the legal profession, he should be paid for by the government.²⁰
49. Any complaint directed to the Bar would be considered by the Professional Conduct Committee, on which there would be increased lay representation. The constitution of the Benchers will be amended so that the majority of Benchers must not be practising barristers. No barrister sitting on the Professional Conduct Committee

¹⁹ See page 2 of the Honourable Society of the Inn of Court of Northern Ireland Constitution & Bye-Laws

²⁰ See paragraph 9 of the summary of Justice I Committee’s recommendations and comments

(or the Disciplinary Committee or the Disciplinary Appeals Committee) can be members of the Bar Council. Lists of eligible barristers to sit on such Disciplinary Committees would be made available to the Benchers. A Committee of Benchers, none of whom would be members of the Bar Council, would select those barristers who would sit on the various committees. On both the summary panel and the Disciplinary Committee, there would be increased number of lay appointees. A High Court Judge would continue to chair the Disciplinary Committee. Any review of the Code of Conduct would be the responsibility of the Benchers.

50. Any barrister convicted of a breach of the Code of Conduct would have an automatic right of appeal to the Disciplinary Appeals Committee which would comprise one senior member of the Bar (who would not be a member of the Bar Council) and one Bencher who is not a practising barrister and be presided over by a judge of the rank of Lord Justice or higher. There would be two lay appointees on the Committee. The complainant would have a right to appeal to the Disciplinary Appeals Committee only if such an appeal was supported by the Ombudsman.
51. The responsibility for the appointment of lay representatives on all the above Committees would rest solely with the Benchers from a panel whose members had previously been approved by the Lord Chief Justice.
52. The Ombudsman would have power to conduct a general audit of the complaint files held by the Bar and the Law Society. The Ombudsman would ensure that the process was in accordance with the best regulatory practice. The Ombudsman would have power:
 - (i) To prescribe general timescales for the resolution of complaints.
 - (ii) To make recommendations, if appropriate, to improve the disciplinary process.
 - (iii) To direct the professional bodies to investigate a particular complaint.
53. The involvement of the Lord Chief Justice and Senior Judges in the disciplinary process will provide reassurance to the consumers of the fairness of the complaints

process. After all these are the individuals who have been entrusted to deal with and who have dealt with the most controversial and difficult cases that come before the Courts in Northern Ireland. By their fairness, independence and impartiality, these Judges have won the confidence of the great majority of the Northern Ireland public.

54. This regulatory system would be a proportionate response to the concerns of Clementi. It would be accountable, it would be consistent, it would be transparent and it would be targeted on the problem with minimal, if any, adverse side effects.

Legal Disciplinary Practices

55. The three core principles of partnership law are:
- (a) All instructions accepted and work performed by an individual partner are, as a matter of law, accepted and performed by that partner as an agent of all the other partners in the firm.
 - (b) All the partners in the firm are liable for any wrongful act or omission of any partner acting in the ordinary course of the firm's business.
 - (c) If money or property of a third person is received by a partner (or by the firm) and is misapplied, then all the partners in the firm are personally liable to make good the loss.²¹
56. In Northern Ireland, which is a small jurisdiction, there is a continuing, ongoing problem with conflicts of interest. Any practitioner who works in one of the more specialised areas of law, such as planning or landlord and tenant, to take only two examples, is repeatedly faced with problems that arise from the limited number of consumers seeking their services. If members of the Bar formed legal disciplinary practices (LDP's) comprising both barristers and solicitors, this problem would become almost impossible to resolve. It would not be a question of a conflict of interest arising from a particular barrister's work, but a conflict of interest arising because of the work carried out by any of the partners or members of the firm. While this problem of conflict may be capable of being overcome in England given

²¹ See sections 5, 10, 11 and 12 of the Partnership Act 1891

the size of its population, it is likely to cause insuperable difficulties in Northern Ireland.

57. If there are different members of the legal profession in partnership, then given the principles of partnership law, if one partner is permitted to handle a client's money, then the other partners become liable for any misuse of that client's money. It is difficult to see how an LDP could operate without there being one set of rules enforced by one regulator. Those rules would necessarily require all the parties to be subject to the more onerous regulative regime. All the benefits which flow from present regime presently experienced by the Bar would disappear.
58. If a solicitor wishes to retain a member of the Bar, he has the choice of the whole of the Bar, subject to limitations of expertise and experience. If a barrister is unable to act, he has the opportunity, with the solicitor's permission, to pass the papers to any member of the Bar who is sufficiently expert and experienced to act in his place. With an LDP it would be very different. The temptation of any solicitor in the LDP would be only to instruct another barrister from that LDP. Similarly if a barrister could not do a particular case for whatever reason, he would be likely to pass the papers to another member of the LDP. All this would serve only to limit a consumer's choice and that consumer's ability to obtain the best representation possible.
59. As the costs of running a solicitor's office are much greater than the costs of running a barrister's practice, it is likely that the costs of an LDP, especially given the regulatory regime that would have to operate, would be much closer, if not identical to the present solicitors' model. The regulation of barristers and solicitors would have to be the same because such practices would handle clients' money. In those circumstances an efficient model for the delivery of legal services, a self employed barrister, would be replaced by an inefficient model, an employed barrister, or a barrister as a partner of an LDP.

60. If LDPs were permitted in Northern Ireland, then there would be a real risk of a number of barristers and/or solicitors cornering a particular area of law. It is very difficult for one barrister in Northern Ireland to achieve such pre-eminence so that he can effectively ask his own price. However it would be relatively straight forward for a small number of barristers (and solicitors) to create a virtual monopoly in a specialist area of law. The likely consequence of such a state of affairs would be to drive up fees in that area and would certainly not be to the advantage of the general public.
61. There is no evidence of any demand for LDP's. In Northern Ireland solicitors have long had the right of audience in the County Court. There is a recent history of some members of the Bar leaving to provide advocacy services in those solicitors' firms and acting as advocates in the County Court. However, the numbers have been few, and most of those who have left the Bar to act as advocates in solicitors' firms, have ended up returning to the Bar to resume their practices. In any event if a barrister wants to become a solicitor, or vice versa it is a straight forward process. In either case they have to show their competence in three areas of law particularly relevant to the new profession..
62. The litigation costs are substantially higher in those jurisdictions where there is only one profession e.g., USA and Canada²².

Multi Disciplinary Practices

63. In July 2000 the American Bar Association (ABA) rejected recommendations for relaxation on the ban of MDP's. Following extensive discussion the ABA resolution affirmed eight core principles including the following:
- “The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by non-lawyers were inconsistent with the core values of the legal profession.”*

²² See paragraph 6.17 of the submission of the Council of the Bar of Ireland dated 24th February 2005

64. The problems in respect of the regulation of an MDP are going to be formidable. How can the core principles of practice as a barrister possibly be reconciled with the principles of other, different professions which do not share those principles? For example, a lawyer owes a duty to maintain the absolute confidentiality of legal advice given to a client, and of information provided by that client for the purposes of obtaining such advice. Members of other professions do not owe such a duty and may indeed be under a positive obligation to make use of the information for another purpose or disclose it to a third party. Furthermore, the law accords protection to communications covered by legal professional privilege which it does not accord to communications, however confidential with other professional advisors. How could a client's right to legal confidentiality be effectively preserved in circumstances where the client was receiving other professional advice and services from the same firm in relation to the same transaction?
65. The problems in respect of establishing an effective regulatory regime in respect of an MDP are going to be enormous. In his Final Report Sir David Clementi recognised the real difficulties in putting in place a consistent regulatory framework that would govern the different disciplines that operate in an MDP.²³

Ownership of Law Firms, LDPs and MDPs by Outside Parties

66. There does not appear to be any country in the world where legal practice is carried on generally by incorporated entities owned by third parties. The need for the partners in a firm to have personal responsibility is regarded everywhere as a desirable safeguard and discipline. Such a change which would permit ownership by outside third parties would create a dangerous precedent.
67. 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

²³ See *inter alia*, paragraph 104, page 139 of his Final Report

than in the long term interests of the partners and of their clients. The need in particular for the maintenance of very high standards in contentious cases would on any view justify a prohibition upon the exercise of rights of audience by a partner or employee of an externally owned legal practice.

68. In Northern Ireland the pernicious influence of paramilitary organisations is widespread. It is generally accepted that there are a number of apparently legitimate, commercial enterprises in Northern Ireland which are owned by paramilitaries. Some of these enterprises operate in areas which are the subject of strict regulatory control e.g., the licence trade. It is not a good point to say that controls could be set up in Northern Ireland that would prevent paramilitary capital being used to purchase interests in law firms whether they comprised LDPs or MDPs. The prospect of paramilitary groups, and it would be a very real risk, having an interest, never mind a controlling interest in legal partnerships apparently wedded to the core principles of the Bar (or of the Solicitors profession), is too shocking to contemplate.²⁴

Education

69. The traditional entry gate to a professional regulation is via standards of education. Historically the professional body has set educational standards for entry to vocational education and subsequently to professional practice.
70. Legal education should concentrate on providing the lawyer with the best possible introduction so as to enable him, with the help of experience and continuing education after qualification, to become a fully equipped member of the profession.
71. Education for legal practice requires training at two levels: the academic and the professional. Formal professional education is provided in two ways:
- (a) A period of organised vocational training in an institutional setting.
 - (b) A period of in-training practice, in a real professional setting under supervision.

²⁴ There has already been two cases in which a solicitors' firm has been closed down because of paramilitary involvement.

72. The body responsible for the training and admission of barristers in Northern Ireland is The Honourable Society of the Inn of Court in Northern Ireland. The Inn of Court is governed by the Benchers. All Benchers are senior lawyers drawn from the Bench and the Bar. They comprise all the judges of the Supreme Court (the Lord Chief Justice, all Lord Justices of Appeal and all High Court judges), the Attorney General for Northern Ireland, the Solicitor-General, the Chairman for the time being of the Bar Council of Northern Ireland, four County Court judges and senior members of the profession. It is proposed in the future that the majority of Benchers will not be practising members of the Bar. This change will be implemented as soon as feasibly possible. Entry to the profession is therefore controlled by a body which includes those holding the highest judicial office.
73. All applicants for admission are students of the Inn of Court and must satisfy the Benchers of their eligibility under the Rules of the Inn of Court. It is a condition precedent to entry to the Bar that all applicants must have obtained a law degree of not less than second class honours standard. More specifically, each applicant must demonstrate that he has passed an examination of degree standard in eight prescribed core subjects. The Benchers also require applicants to evidence their good character. Every student of the Inn of Court must undertake the vocational course at the Institute of Professional Legal Studies, Queen's University, Belfast.
74. The Institute initiates the process of professional formation by introducing trainees to the practice of law. It inculcates understanding of the nature and role of the legal profession and develops a strong sense of professionalism. The course develops trainees' academic, intellectual and personal skills and adapts those skills to the resolution of practical legal problems. Pressure for places at the Institute is intense and entry is highly competitive. The academic calibre of candidates is extremely high and the selection criteria are rigorous, objective and applicable to all candidates.

75. The Council of Legal Education provides a formal link between the professional bodies and the Institute. Membership of the Council comprises representatives of the University, Inn of Court, the Law Society and the Institute. All Institute staff are qualified and experienced members of the legal profession; specialist practitioners act as course advisors and are integrally involved in curriculum design and development. All practical exercises are conducted by tutors drawn from a panel of experienced practising barristers and solicitors.
76. The Bar has supported and continues to support fully the work of the Institute and endorses the current approach to the vocational training of advocates in this jurisdiction.
77. A further period of in-practice training commences upon call to the Northern Ireland Bar. All barristers who intend to practice are required to undergo a period of compulsory pupillage for twelve months under the supervision of a Master, an experienced Junior Counsel. The purpose of this period of training is two-fold; (a) to satisfy the Bar and the public of the competence of the new practitioner to practice as a fully accountable member of the profession; (b) to allow the new practitioner the opportunity to demonstrate sustained, continuous, effective competence in the work place linked to practice certification requirements.
78. New practitioners entering pupillage are barristers, not students. They are, therefore, subject to the Code of Conduct. Barristers undergoing pupillage cannot accept work on their own account until they have completed six months of their pupillage. However, pupil barristers who have completed to the satisfaction of the Bar Education Committee not less than three months pupillage may conduct on behalf of or at the request of their Masters' cases or parts of cases before a Master of the Supreme Court.
79. Pupillage is designed to ensure that new practitioners have made the transition from student to practitioner. The Bar facilitates this process by providing induction, training and development opportunities to help newly qualified advocates to

practice effectively and prepare for new and changing roles and responsibilities. The Bar requires all new practitioners to undertake compulsory Advocacy and Professional Ethics courses during the first year of practice. The practice restrictions imposed during pupillage support a managed case load commensurate with the knowledge, skills and experience of the new practitioner. The allocation of such work, by Masters, enables the pupil to demonstrate competence as an advocate. The Master provides supervision, support and appraisal and timely, behaviour related, feedback on performance. The Master is also able to imbue the pupil with the ethics and culture of the Bar, making sure that the pupil understands the importance of the core principles of an independent referral Bar and accepts those principles as being paramount in governing the way in which he should conduct his future practice. The structure and governance arrangements for pupillage at the Bar are kept under regular review by the Education Committee of the Inn of Court to ensure that new practitioners are enabled to become fully equipped members of the profession.

80. Education for practice beyond initial admission to the profession has become a hallmark of current forms of professional self regulation. The implementation of compulsory continuing professional development as a condition precedent to being licensed to practice is now common among regulatory bodies. Setting standards is a component function of most regulatory activity, both within and outside professional regulation. The functions of professional regulation are complementary not exclusive. Standard setting clearly overlaps with both quality assurance and competence. The Bar's commitment to these regulatory functions is demonstrated by the establishment of a Compulsory Continuing Professional Development Programme for all members of the Bar.
81. The Northern Ireland Bar believes that the system of education and training of barristers in Northern Ireland has worked well and has demonstrated a self generated capacity for change. The system reflects the unique character of the Bar Library and the collegiate nature of the Bar. By contrast the functions of other professional regulators have been set out in a prescriptive manner which affords

little scope to police levels of practice beyond initial registration with minimum standards of behaviour and safety.

82. The Bar does not consider that there is a case made out for government intervention or regulation of this system. It believes that a profession which must remain as independent as possible of the state should continue to be self regulating in relation to education and training. It does believe that there is a case for lay representation in the admissions process whereby students of the Inn of Court have to satisfy the Benchers of their eligibility under the Rules of the Inn of Court. The Bar proposes to set up a working committee to look at this particular aspect.
83. The Bar believes that any system whereby government is involved in training or supervision of applicants is against the public interest. An advocate, to do his job properly, must be independent and be seen to be independent particularly in the divided community of Northern Ireland. If government has the power, whether actual or potential, to control the requirements which aspiring advocates must fulfil or the standards the qualified advocate must meet during his career that advocate is not independent. Loss of the advocate's independence would inevitably hamper the citizen in asserting and defending his or her rights and privileges before the Courts.

D. THE FUTURE

84. The Bar has implemented and in conjunction with the judges and lay representatives enforced a disciplinary Code of Conduct. The regulatory regime has been successful in maintaining a strong, independent and effective profession. The standards of the profession have enjoyed unequivocal public confidence as is demonstrated by the lack of any substantial number of complaints against barristers. The Bar has demonstrated and continues to demonstrate a desire to continue to implement procedures for ensuring the maintenance of professional standards in the interests of the public, the administration of justice and the profession. The Bar will continue to anticipate and to respond to changes in Society. What was acceptable in

the past may not be acceptable in the future. However it is essential that the immutable core principles of the Bar are preserved so that its members can operate independently offering effective representation to all the citizens of Northern Ireland, without fear or favour.

85. In the light of the above, the Bar proposes to set up a working group to consider the following matters with a view to making recommendations.
- (i) The process for the admission of students of the Inn of Court.
 - (ii) The training and accreditation of barristers as Masters prior to them accepting pupils.
 - (iii) Direct access to barristers for a wider range of organisations and groups and in a wider range of circumstances.
 - (iv) Whether there should be a right to award compensation to successful complainants or whether they should be left to the traditional remedies available to them at common law.

E. THE QUESTIONS

The structure of this paper means that the Northern Ireland context is discussed in some detail and the proposals made have been considered in the light of that context. The Bar's position in relation to these questions therefore follows on as a conclusion from the preceding sections.

Question 2.1

Have you any comments on any issues raised in relation to designing a regulatory regime appropriate to the legal services market in Northern Ireland?

Response

The Bar has commented fully on the issue of regulatory design for the delivery of legal services in Northern Ireland under the preceding sections B and C but more particularly under the

subsections titled ‘The Proposal’, ‘Legal Disciplinary Practices’, ‘Multidisciplinary Practices’, ‘Ownership of Law Firms, LDPs, and MDPs by Outside Parties’, ‘Education’ at section C on Proposals.

Question 3.1

Have you any comments on how the current regulatory system operates or on the other points made about the comparability of the legal services market here?

Response

The Bar has commented upon the current regulatory system in the Northern Ireland governing the delivery of legal services in this jurisdiction and the distinctive features of the market for those legal services have been made in ‘The Bar Library System’, ‘at section B on Introduction, together with ‘Functions of regulation: Conclusions’, ‘Legal Disciplinary Practices’ and ‘Multi Disciplinary Practices’ at section C on Proposals.

Essentially this is a small jurisdiction with a history of division and conflict. It is also a jurisdiction where the existence of an independent Bar (whether from sectarian influence or from State involvement) and a regulatory system that recognizes and supports that independence and enables impartial and fair representation to be provided to what remains a troubled community. Those twin elements of geography and history serve to distinguish Northern Ireland from the other jurisdictions in the United Kingdom.

Question 4.1

What are your views on the relevance of the matters discussed in this Chapter for the regulation of the legal professions in Northern Ireland?

Response

The Bar has set out its proposals for future regulation of the disciplinary process and the admissions procedure. The experience of other jurisdictions and in particular the proposal of the Faculty of Advocates in Scotland, have informed our discussion. Whatever mode of regulation or admissions procedure to the Bar is introduced it is of paramount importance that they are not only completely separate from the political process but are also seen to be and accepted as being wholly independent of it.

Question 6.1

Clementi recommended a fully independent Legal Services Board (LSB) to deal with the regulation of legal service providers on matters other than complaints with powers to delegate the functions to front line bodies, such as the Law Society, where the LSB is satisfied that satisfactory arrangements on the split between regulatory and representative functions have been made. Given the different scale of the Northern Ireland market, what do you think would be appropriate arrangements here?

Response

The Bar's views on the regulation of the services provided by its members (other than in relation to complaints) are set out under 'Functions of regulation' and 'Education' at section C on Proposals.

The Northern Ireland market for legal services is smaller in scale than that of the other jurisdictions in the United Kingdom but nonetheless there is independent oversight in the two key areas of entrance to the profession and practice at the profession. The Benchers, who include those holding the highest judicial office, are a sufficient guarantee of access and standards. The regulation of the manner in which members of the Bar conduct their practice is addressed in response to Question 6.2.

Question 6.2

Clementi recommended a single complaints body – the Office of Legal Complaints – for all legal services consumer complaints. What arrangements do you think would be appropriate in Northern Ireland?

Response

The Bar has addressed the issue of complaints under 'Future regulatory system: Proposals' and 'The proposal' at section C on Proposals.

The Bar therefore proposes that there would be an increase in lay representation at all levels of the disciplinary process. The lay representation would be appointed by the Benchers from panels of lay representatives approved by the Lord Chief Justice. The constitution of the Benchers of the Inn of Court, a body independent of the Bar, would be amended to ensure that the majority of Benchers could not be practising members of the Bar. No barrister sitting on the Professional Conduct Committee, the Disciplinary Committee or the Disciplinary Appeals Committee could be a member of the Bar Council. The Benchers would select those barristers who would sit on the Professional Conduct Committee, the Disciplinary Committee and the Disciplinary Appeals Committee.

The legal services Ombudsman, who would be entirely independent of the Bar would have power to conduct a general audit of all the complaint files each year and he would have the obligation to ensure that the disciplinary process was in accordance with the best regulatory practice. He would have power to prescribe general time scales for the resolution of complaints, to make recommendations to improve the disciplinary process and to direct investigation of any particular complaint.

Question 6.3

At present in Northern Ireland we do not have Licensed Conveyancers. Is there any good reason why the conveyancing market here should not be opened up in this way? Are there any other areas of legal services that could also be opened up?

Response

The Bar makes no response in relation to either question, except to say that the Bar is strongly opposed to any initiative that will compromise the independence, standard of service and value for money that its members provide to the community, or that would restrict the ability of any one to have full access to the range of expertise at the Bar as and when their circumstances required it.

Question 6.4

Clementi recommended that lawyers from different professional bodies should be allowed to practice together as equals and that outside ownership of such practices should be permitted. Should such practices be allowed in Northern Ireland and why or why not?

Response

The Bar does not consider that the real issue is one of 'equality' as the question suggests but rather the best structure for the delivery of the range of legal services required.

Furthermore, it should always be appreciated that lawyers from different professional bodies do work closely together, very often as part of a larger team involving those from other disciplines, their skills and experiences complimenting each other in an effort to deliver the best result for the client.

The issue is then whether the best structure for the delivery of legal services should include those lawyers practicing together in a common business structure. The Bar considers that such a development in Northern Ireland is likely to be damaging to the very principles that are said to have prompted its proposal.

Dated this 3rd day of February 2006

GLOSSARY

1. ***Inn of Court***: The Honourable Society of the Inn of Court of Northern Ireland is the professional body to which all practising barristers in Northern Ireland belong.
2. ***Benchers of the Inn of Court***: The Benchers of the Inn of Court share the government of the Inn of Court with the Executive Council of the Inn of Court and the members of the Inn in General Meeting. The Benchers are comprised of the Judges of the Supreme Court of Northern Ireland, that is, the Lord Chief Justice, the Lords Justices of Appeal, and the Judges of the Court. The Attorney General and Solicitor General are Benchers ex officio, until they cease to hold the respective offices of Attorney General and Solicitor General. There are at present 22 Benchers appointed from the barrister members of the Inn of Court.
3. ***Bar Library***: The Bar Library building in Chichester Street, Belfast, is the physical base for all practising barristers in Northern Ireland. In addition to the provision of library facilities, it provides barristers with office and other support services.
4. ***Chambers***: The sets of premises shared by groups of barristers in England and Wales, in which they hold tenancies, and from which they conduct their business.
5. ***Lord Justice of Appeal***: A Judge of the Court of Appeal in Northern Ireland, other than the Lord Chief Justice of Northern Ireland.