

Legal Services Review

BSA Response to the Consultation Paper

Part One - Introduction

The Belfast Solicitors Association

The Belfast Solicitors Association ('BSA') is an independent association of solicitors who practise in the greater Belfast area.

The membership of the BSA is currently 671 individual members and 17 corporate members representing 135 firms of Belfast solicitors.

The BSA is managed by a committee of 20 solicitors who all practise in Belfast and who are elected annually by the members. There are 8 sub-committees to take forward the activities of the BSA: Conveyancing, CPD, Criminal, Matrimonial, Litigation, PR, Social and Finance.

The BSA was founded over fifty years ago and its constitution provides that it :-

“ . . . is established to promote the welfare and interests of the legal profession in general and the solicitors profession in the greater Belfast area . . . in particular, and to take such steps as are available to the Association to ensure the provision of ethical and efficient legal services to the community in Belfast.”

In furtherance of its objects the BSA organises on a yearly basis an extensive programme of lectures, seminars and other training events for members. This has been carried out since the formation of the BSA and so long pre-dates the compulsory Continuing Professional Development requirements recently put in place by the Law Society of Northern Ireland.

The BSA also maintains contact with and makes suggestions and representations to all appropriate bodies including other similar associations and the Law Society of Northern Ireland, with a view to the better regulation of the legal profession and the better provision of legal services.

The BSA also may make recommendations and issue guidelines to its members in relation to all matters of professional conduct and etiquette in the provisions of solicitors services.

The BSA raises funds for charity: last year for the Sir Malcolm Sergeant Cancer Appeal Fund and for the tsunami relief work and this year for NSPCC.

The BSA has recently opened an office in Howard Street and engaged an administrative secretary to make better provision of its services to members.

Structure of this Response

In the next part we set out what we consider are key issues of principle. These are of constitutional importance for the future of Northern Ireland and for government under law. We put forward our views on the clear basis that on such issues there is no conflict between lawyers and consumer interests. We recognise the need, nevertheless, for justifiable change in regulation of the legal profession and for control to be imposed on the provision of all legal services (the currently unregulated sector). We put forward our proposals in that regard.

In the final section we set out our responses to the specific questions raised in the Consultation Document.

Part Two – Key Issues

Introduction

We suggest that the key issues are: -

- The role of the legal profession in regard to the rule of law and maintenance of essential independence from government
- The role of the Law Society as regulator
- New markets

We examine each of these as follows: -

The role of the legal profession in regard to the rule of law and maintenance of essential independence from government

We suggest that the Consultation Paper is defective that it fails to appreciate need *in the public interest* for the complete independence of the legal profession from any form of governmental control or influence – direct or indirect.

We seek to make that case here, and suggest that everyone in Northern Ireland has a fundamental interest in this principle. We go on to explain that this does not mean that the legal profession is unaccountable or self serving. We put forward proposals to improve in the public interest, for instance the complaints handling process and we agree that the body or bodies regulating the legal profession should no longer have any role in representing the interests of the legal profession.

The reason that this is so important is because lawyers have the role of defending clients from government and if necessary challenging government on behalf of clients. Thus government must have no perceived role or influence direct or indirect in regard to the disciplinary procedures or else it could be perceived to be

encouraging such disciplinary procedures against such lawyers who are only acting in the best interests of their clients.

These principles apply to government under law in any democratic society but they have particular resonance in Northern Ireland where there are contested viewpoints on the form of government. Throughout ‘the troubles’ the legal profession has demonstrably had the trust and confidence of all sections of the community. The fundamental reason is that we could demonstrate our total independence from government.

So, bluntly speaking, we are concerned that government under the guise of concern about the need for competitiveness seeks to accrete to itself long desired powers of control over the legal profession.

As later sections of this Submission will show, we have no problem with measures to improve competitiveness (on a level playing field) but we suggest that it is not in the public interest or in consumers’ interests to vest further control in the hands of government – which is not necessary to achieve the stated aim.

The role of the Law Society as regulator

The BSA notes that the Review is to consider whether it is tenable for any profession or occupation to retain independent self-regulating powers in respect of complaints by members of the public (viz. the police, financial services etc).

It must be pointed out, of course, that the Law Society of Northern Ireland is not an entirely independent self-regulator. Its regulatory powers are conferred and governed by legislation and it is subject to supervision by the Lord Chief Justice and by the Lay Observer. In addition, the Disciplinary Tribunal is independent of the Law Society. The Lord Chief Justice appoints the members of the Disciplinary Tribunal and the Law Society plays no part in those appointments.

Nevertheless, the BSA accepts that there could be improvement of the current Law Society complaints procedure and of the disciplinary procedures that apply to us. But this is subject to the most important proviso that the essential independence of the legal profession should be maintained.

BSA suggests that the appropriate model would have the following elements: -

- There should be substantial lay or consumer representation on the bodies within the legal profession handling complaints – whether against solicitors or against barristers
- The appointments of such representatives should not be in the hands of government.
- The most economic and efficient way to achieve this would be for the Law Society to continue to have regulatory powers but with lay or consumer representation on the complaints handling aspects

- There would be a ‘one stop shop’ so that any member of the public would receive attention, no matter what was the variety of complaint they wished to make. (We develop this point further in our response to Question 6.2.)
- There should be provision for appeals from the decisions of the Disciplinary Tribunal (both for the client and the solicitor concerned in the complaint). Judicial review is not, we suggest, a sufficient remedy because it does not generally examine the merits of the previous decision. In addition, judicial review is a daunting and expensive procedure for litigants
- There should be specific provision for the award of compensation to the complainant where it is held that the complaint is justified

New Markets

The Consultation Paper fails to recognise or take account of the great growth in the legal services market. The market is much larger than the legal services provided by practising lawyers and is steadily expanding – examples include:

- ◇ Debt recovery
- ◇ Claims farmers/handlers
- ◇ Employment claims – applicant and respondent services
- ◇ Wills writing and estates administration
- ◇ General advisory services - for individuals and for business

Furthermore, substantial volumes of corporate legal services are increasingly supplied to the Northern Ireland legal market by lawyers from other jurisdictions. They can achieve this because of the very limited nature of the ‘monopoly’ of Northern Ireland solicitors granted by legislation in regard to conveyancing.

The BSA considers that its members in Belfast (and indeed the entire legal profession of Northern Ireland) are ready and able to meet and beat this competition.

As solicitors we take great pride in our ethical and professional standards particularly as officers of the court. These are essential in the public interest. They mean that our duties are to the best interests of our client and to the essential principles of justice. Thus we offer all clients a confidential and independent service. As we have explained earlier, where necessary in our clients’ interests we will confront the government or any public body to obtain justice for our clients. We will also defend our clients against commercial and corporate pressures. A solicitor’s office is a safe haven for each client.

But we submit there must be rigorous and effective regulation of all who seek to offer varieties of legal services. Primarily this is in the public interest to afford the necessary protection to clients who wish to avail of such services. Such regulation would also provide the level playing field in the interests of competition between solicitors and other providers of legal services.

We give some examples of dangers in the unregulated areas:

- Members of the BSA are particularly concerned that some insurance companies are making direct approaches to claimants who have suffered personal injuries and encouraging them towards early settlement. Such settlement is not in the client's best interest before full medical prognosis on the injuries has been given. It is understandable how a lay person may be tempted by the offer of what may appear to be a substantial sum. But the individual may live to have great cause for regret that independent medical and legal advice was not taken if the injuries worsen after time. This cannot be said to be in the public interest. There is great cause for concern if this practice spreads to settlements of claims involving children. All such settlements should be under the control of the judiciary who will scrutinise the medical evidence to be assured that the settlement is in the best interests of the child. In addition, arrangements will be made for proper holding of the compensation funds in trust for the child. These protections may be stripped away in any case of direct settlement.
- Where wills writing services are offered by those who are not solicitors the testators (and their estates and beneficiaries) do not enjoy the protection of the solicitors compulsory professional indemnity insurance and the Law Society Compensation Fund.

Part Three - The Questions raised in the Consultation Document

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?*

We refer to our representations in Part Two on the constitutional importance in the public interest of independence from governmental control. This issue must be fundamental when considering the structures of the legal profession.

We also submit that the Consultation Paper is deficient in failing to consider whether any new regulatory structure would itself turn out to be in the public interest. The fact that a regulatory system is outwith the legal profession does not lead to the conclusion that such will be more effective. Indeed, we suggest that it is likely that such system will prove ineffective and more expensive. Under such system it will be difficult to read or act upon the important 'early warning' signs that enable effective regulation.

The Paper should have referred to the well-known dangers of 'regulatory capture' and the large literature which suggests that state appointed regulators do not avoid capture by those whom they regulate:

“Regulators suffer from a lack of information and are prone to be misled by those they regulate. Regulators are not disinterested agents who act only in the public interest, regulators pursue their own interests too.”¹

Question 3.1 *Have you any comments on how the current regulatory system operates or on the other points made about the compatibility of the legal services market here?*

We refer to our submissions in Part Two

Question 4.1 *What are your views on the relevance of the matters discussed in this Chapter [the Chapter is headed ‘Regulation of the legal professions in other jurisdictions’] for the regulation of the legal professions in Northern Ireland?*

We suggest that this Chapter fails to identify the core requirement of any regulatory system that it must be wholly independent from government

Question 6.1 *Clementi recommended a fully independent Legal Services Board (LSB) to deal with the regulation of legal services 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 representatives functions have been made. Given the different scale of the Northern Ireland market what do you think would be the appropriate arrangements here?*

We suggest that Clementi itself is defective in failing to give in the public interest adequate protection for the legal profession in defending the interests of the individual against government. A fortiori, Clementi is unsuitable for Northern Ireland

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?*

- we accept that complaints (not resolved by a law firm) should go to the complaints machinery of the Law Society. Lay or consumer representatives would play a full part in the handling of the complaints
- there should be a ‘one stop shop’ for members of the public who have a problem with the provision of legal services which could fall into any of the following categories: -
 - ◊ a ‘consumer complaint’ such as discourtesy, inefficiency or slow response

¹ Patrick Massey and Professor Frank Stephen ‘*Raiding the Four Goldmines*’ Paper presented to Dublin Economics Workshop Annual Economic Policy Conference, Kenmare, 15 October 2005

- ◇ an issue which constitutes professional negligence such as statute of limitations, failure to register a charge etc
- ◇ an issue of professional impropriety such as failing to honour an undertaking

As lawyers we recognise that each of these must receive different treatment - but this is not understood by the public. So the Law Society is 'blamed' when they say they cannot deal with a matter of professional negligence and the client must seek another solicitor. They are also 'blamed' when they say they cannot deal with a matter of professional discipline as this must go to the Disciplinary Tribunal. These decisions of the Law Society are of course entirely proper, but it leaves the Law Society open to allegations (whether arising from innocent misunderstanding or malevolence) of 'cover up' or obfuscation.

There is no reason why the Law Society should not offer the whole range of services in this regard to the public, albeit that 'behind the counter' each complaint would be dealt with in the appropriate way in regard both to the rights of the complainant and the rights of the solicitor, the subject of the complaint.

We would also suggest that the Law Society should offer mediation or ADR in cases even of professional negligence. We consider that this could be in the interests of both parties (particularly to encourage quicker resolution of often difficult issues). Of course, it would be essential that both client and solicitor would always retain the right to exercise an option without penalty to take the case to court.

Question 6.3 At present in Northern Ireland we do not have Licensed Conveyancers. Is there any good reason why the conveyancing market should not be opened up in this way? Are there any other areas of legal services that could also be opened up?

We refer to our submission in Part Two ('New Markets' section) that the legal services market in Northern Ireland has already expanded and is continuing to expand

As we have put it there, we do not fear competition but there must be open, fair and equal regulation of all sections of the legal services market not just the solicitors section.

We do not see that there is any public demand for licensed conveyancers. We suggest, also that there would be considerable costs 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.

Question 6.4 *Clementi recommended that lawyers from different professional bodies should be allowed to practise 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?*

This question wraps two in one: (1) should practices of solicitors and barristers be allowed? and (2) should outside ownership of such practices be allowed in Northern Ireland? Technically we could answer question (2) in terms that it applies only to solicitor/barrister practices and not to ‘pure’ solicitor firms. But we suggest we need to address the question of the ownership of solicitor firms (or the introduction of outside capital into solicitor firms).

We treat the questions separately:

Question (1)

We feel that this proposal is quite contrary to the interests of the public. One of the greatest strengths of the complementary practices of barristers and solicitors is the availability of all members of the independent bar to all solicitors throughout Northern Ireland. This is significant for equality and social cohesion. It means that a solicitor in any part of Northern Ireland has access to obtain the services of the most eminent members of the Bar.

Were firms of solicitors and barristers allowed this would mean that leading barristers could be captured by the largest law firms to serve exclusively the interests of their clients.

This would not be in the overall public interest, nor could it be said to be a ‘pro competition’ innovation.

Question (2)

Outside capital (in the ‘Tesco Law’ form) could lead to the wipe out of the network of solicitors firms across Northern Ireland

Outside capital would infringe the principle of the professional independence of lawyers to act in clients’ best interests without extraneous pressures.

The following concerns in particular need to be addressed:

- the pressure on clients from attempts to cross sell other services (those of the external owner) to them when they are visiting their solicitor
- problems of conflicts of interest between the best interests of the client and the corporate interests of the external owner
- preserving the confidentiality of the client’s business from the external owner
- additional pressures in Northern Ireland if external ownership created opportunities for black economy or paramilitary capital to intervene
- loss of the personal nature of the service offered by solicitor to client

- effective exclusion from the market of those willing to undertake legal aid and other low margin work for clients
- loss of social value to each local community afforded by the presence of local solicitors