



## **“Regulation of Legal Services in Northern Ireland”**

# Response of the Law Society of Northern Ireland

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**LAW SOCIETY OF NORTHERN IRELAND (“LSNI”)  
RESPONSE TO CONSULTATION PAPER  
“REGULATION AND REVIEW OF LEGAL SERVICES”**

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## SECTION 1: EXECUTIVE SUMMARY

- 1.1 In September 2005 the Government issued a Consultation Document entitled “Regulation of Legal Services in Northern Ireland”. This marked the beginning of a review process which is taking place against the background of similar reviews being undertaken in England and Wales, Scotland and the Republic of Ireland. The purpose of the consultation is to inform the work of the Review Group set up by the Government under the chairmanship of Sir George Bain.
- 1.2 The response of the Law Society of Northern Ireland (“LSNI”) to the Consultation Document and the questions it raises is set out herein. In this response we also identify the issues on which we believe the LSNI can contribute to, and assist, the Review Group in discharging its commission.
- 1.3 In this Executive Summary we set out the principal points made in each of the subsequent sections of this response.

### ***Section 1 A: Preface and Preliminary Observations***

- 1.4 In Section 1A the LSNI explains its general position in respect of the regulatory and reform issues raised in the review exercise. We also outline the main themes developed in the course of the response.
- 1.5 Welcoming the review process, the LSNI confirms a commitment to contribute to debate on how to improve and enhance the regulation of legal services in Northern Ireland. We commit also to address constructively the issues raised by the Consultation Document.
- 1.6 We suggest that the review process should proceed on a basis which is:
  - Properly informed
  - Based on a full and integrated understanding of the context
  - Prepared to recognise the strengths and weaknesses of the present arrangements
  - Designed to serve the public interest in this jurisdiction
- 1.7 We caution against the importation of solutions from another jurisdiction. We explain our reservations about the obvious pre-dominance of an analysis derived from England and Wales, as reflected in the Consultation Document and the Terms of Reference. We explain why we think the Consultation Document is unbalanced in the promotion of this comparator, and the grounds on which we question the adequacy of the Consultation Document as a basis for public consultation.
- 1.8 The LSNI explains the developed and extensive statutory framework of regulation and independent oversight within which the solicitors branch of the legal profession is already regulated. We confirm our commitment to accountable self-regulation applied in an effective, proportionate, accessible and client-focused way which serves the public interest and meets public expectations.

- 1.9 In respect of competition issues, we recognise that any practice or regulation, properly understood which is restrictive of competition and not otherwise justified need not be maintained.
- 1.10 We do not accept the pre-supposition that regulation as it has evolved and operated in Northern Ireland by the LSNI within the present statutory framework has failed in some fundamental way to serve the interests of consumers. We contrast the position in Northern Ireland with the position in England and Wales where there has been clear evidence of systemic regulatory failure and dysfunction.
- 1.11 We confirm that we are neither complacent nor uncritical of the present framework. We affirm our commitment to the review process, and bring forward recommendations for reform for consideration by the Review Group. We commend an approach to reform which is evidence-based, does not proceed on unwarranted assumptions, and is proportionate to the issues in this jurisdiction.

## ***Section 2: Regulation***

- 1.12 In Section 2 of the response the LSNI confirms that it accepts the principles and objectives of regulation as rehearsed in the Consultation Document, and suggests that its present regulatory responsibilities are applied consist with those principles and objectives. We do not accept that these objectives and principles are irreconcilable with self-regulation, properly understood and effectively applied.
- 1.13 We explain the reasons, which we regard as compelling, why the analysis of regulatory and other issues conducted in respect of England and Wales should not be regarded as determinative of the position in Northern Ireland. We point out that a premise against accountable self-regulation is inconsistent with the position being taken in other jurisdictions which are more comparable in terms of scale and regulatory issues than England and Wales. In particular such a premise is inconsistent with the conclusions reached in all other review exercises conducted by independent observers based on extensive first-hand knowledge of the regulation of the solicitors branch of the legal profession in this jurisdiction.
- 1.14 Accordingly in answer to the Question posed by the Consultation Document, the LSNI
- Agrees that the principles and objectives of regulation should inform the review process in Northern Ireland
  - Considers that the design of a Northern Ireland model should not proceed on the assumption that the present model is inconsistent with those objectives nor ineffective in the protection of and promotion of the interests of consumers
  - Suggests that any re-design of the Northern Ireland model should be based on proper analysis and appreciation of the differential characteristics of this jurisdiction

## ***Section 3: Current Regulation Arrangements in Northern Ireland***

- 1.15 In this section of the response the LSNI comments on and amplifies the description of the current regulatory arrangements for Northern Ireland given in the Consultation Document.

- 1.16 We provide a fuller explanation of the current system of regulation within a statutory framework of oversight and accountability which applies at present only to the solicitors branch of the legal profession. We explain how this operates as a matter of public law, and subject to other checks and balances.
- 1.17 We explain how the purpose and application of the regulatory structure, including the relevant primary legislation and regulations made thereunder by the LSNI, is focussed on consumer protection. We explain further the consumer-orientation of the present arrangements in Northern Ireland, specifically by reference to the Master Policy of professional indemnity insurance and the Compensation Fund.
- 1.18 We acknowledge fully the public perception and confidence issues which relate to complaint-handling, draw attention to the extent to which we have responded positively to recommendations for change within the present statutory limitations, and commit to assist the Review Group in further reform.
- 1.19 We comment on the distinctive characteristics of the legal services sector in Northern Ireland as outlined in the Consultation Document. We explain why we think this analysis is limited, and accordingly draw attention to a range of other factors which we consider relevant to any assessment of the “scale and set of issues” for Northern Ireland.
- 1.20 In summary, these other main differential factors are:
- An absence of sustained or systemic regulatory failure
  - The absence of a regulatory maze, by reference to the approach to regulation taken to date in Northern Ireland which has been coherent, practical and proportionate
  - The extent to which in a key area of the market for consumers (residential conveyancing) the Northern Ireland regulatory system is demonstrably “ahead of the game”
  - Distinctive factors which apply in another significant area of practice (civil litigation) which are directly connected to the consumer interests and access to justice, including the absence in Northern Ireland of the layering on of unnecessary costs
- 1.21 We draw attention to the importance of the operation of a legal profession in Northern Ireland which provides a unique protection against unlawful exercise of state or economic power. We suggest that in terms of a jurisdiction on the scale of Northern Ireland that role cannot be divorced from the status of its regulatory body operating within an appropriate framework of accountability.
- 1.22 We comment on the useful analysis in the Consultation Document of the “profile” of solicitors practice. We suggest that this confirms:
- The dissimilarity between the Northern Ireland model and that in England and Wales
  - The extent to which solicitors in Northern Ireland operate within the small business sector, providing a range of legal services accessible within local communities
  - The validity of the potential relevance of comparisons with other jurisdictions such as the Republic of Ireland and Scotland

#### ***Section 4: Regulation of Legal Professions in Other Jurisdictions***

- 1.23 In this section of the response the LSNI responds to the question posed in Chapter 4 of the Consultation Document concerning the relevance of comparisons with other regulatory models. We confirm that all of the comparisons have value in different ways and to different degrees. We suggest that no single model should be regarded as determinative in deciding the correct structure to meet the public interest in this jurisdiction.
- 1.24 We make clear that in so far as the Consultation Document is based on the premise that self-regulation by the solicitors profession operating within an appropriate framework of accountability cannot serve the public interest, that premise is not accepted by the LSNI. We suggest by reference to the comparative models cited in the Consultation Document that this premise has not been applied anywhere else other than in policy development in relation to England and Wales.
- 1.25 We suggest that a debate about the extent to which an accountable model of self-regulation is acceptable cannot be separated from the context and circumstances in which that debate arises.
- 1.26 We question whether the Consultation Document establishes any sound basis for suggesting a fundamental failure in public protection or public confidence. We do so by reference to the absence of research on the current regulatory framework, and the explicit positive findings of reports from successive independent commentators well-placed to make an informed judgement about the regulatory mechanisms by which the interests of the public are secured.
- 1.27 As regards the comparisons set out in Chapter 4, we comment briefly on the position in Scotland. We comment more extensively on the position in the Republic of Ireland. We comment also on the brief summaries given in the Consultation Document on regulation models applicable in non-legal sectors, drawing attention to some of the distinctive features of regulation of solicitors services.

#### ***Section 5: Case for Review of Regulation***

- 1.28 In this section of the response the LSNI challenges the validity and relevance of much of the analysis in Chapter 5 as a proper underpinning of the review process in this jurisdiction.
- 1.29 We agree fully that it is appropriate that change should be considered. We suggest that the basis on which such a review should take place is without any prior determination of the issues, and should be directed to identifying the appropriate regulatory structure and arrangements for Northern Ireland. It should proceed on a fully informed basis, by reference to all relevant comparators, on the basis of evidence rather than assumptions.
- 1.30 We point out that parallel exercises in all other jurisdictions have been preceded by analysis and studies before any conclusion has been reached. We point out that in no other jurisdiction has there been a prior assumption that the regulatory system is fundamentally flawed.

- 1.31 Insofar as Chapter 5 purports to set out a series of justifications for reform, we comment on each of these systematically and, where required, in detail. We explain the reasons why many of the justifications add nothing to a proper debate in this jurisdiction, are based on a misconception, or are not fully-informed.
- 1.32 We point out that no examples are given within the Consultation Document of any regulatory provision or process which is designed for any purpose other than the protection of the public and consumer interests, is unlawful as an unjustified restriction or competition, out of date or irrelevant to the purpose for which it was designed.
- 1.33 To the contrary, by reference to a worked example, (the Home Charter Scheme) commended by the General Consumer Council, we suggest that we can demonstrate a proactive commitment to client care and consumer protection.
- 1.34 We re-iterate our recommendation that a proportionate approach to reform in this jurisdiction should involve a full understanding of the strengths and weaknesses of the present regulatory arrangements, should be designed to build on the recognised strengths, and address those aspects of the Northern Ireland system which can and should be improved.

#### ***Section 6: Summary and Way Forward***

- 1.34 In this section of the response the LSNI comments on the conclusions set out in the Consultation Document, expands on its commitment to assist the Review Group, and answers Question 6.1, 6.2, 6.3 and 6.4.
- 1.35 We confirm our concerns about the limitations of the Consultation Document (which apply equally to the Terms of Reference set by the Government).
- 1.36 Nevertheless we welcome the recognition given by the relevant Government Minister that the degree and extent of reform appropriate to the scale and set of issues in Northern Ireland is a matter to be considered in the first instance by the Review Group.
- 1.37 On this basis, consistent with the analysis of the distinctive features of the Northern Ireland jurisdiction contained in this response, we recommend to the Review Group that an appropriate reform process should:
  - Be based on a holistic understanding of the operation of regulation and the provision of legal services by solicitors in Northern Ireland
  - Be proportionate and aligned to issues and circumstances here
  - Be designed to reinforce and command the confidence of the consumer and the profession
  - Be cost-efficient
- 1.38 Accordingly we set out (as regards the regulatory role of the LSNI) a reform agenda which we believe is consistent with this approach and which, in a developed form, we believe will be consistent with the reform objectives indicated in the Consultation Document. This generally will include a new client complaints model, a revised model of lay participation, and revised oversight arrangements. We believe that this model has the potential to enhance the effectiveness, transparency and accountability of

regulation, while also representing a proportionate reform which we believe is suitable to the scale and set of issues in Northern Ireland.

- 1.39 In responding to **Question 6.1 (Legal Services Board)** the LSNI suggests that as regards regulation of the professional practice of solicitors, such a superstructure is disproportionate and inappropriate for Northern Ireland.
- 1.40 We explain that our position on this matter is based on the following reasons:
- We have major reservations about a proposal which without adequate justification or analysis is inconsistent with effective and accountable self-regulation which will guarantee the independence of the legal profession
  - We suggest that while the independence of the legal profession is a universal principle, it can have a particular significance depending on context. We explain the circumstances in Northern Ireland which mean that independence from external control of the operation of the legal profession has particular resonance in this jurisdiction
  - We suggest that a particular strength of effective regulation in this jurisdiction has been the commitment of solicitors to serve the public interest. We explain why we think it would be a negative and counter productive outcome in this jurisdiction for the solicitors profession to be divested of its regulatory responsibility without good cause
  - We consider that it would operate further to the detriment of consumers to create an additional layer of bureaucracy. We believe it is unsustainable to suggest that the overall cost of regulation in these circumstances would be cost-neutral, and additional costs would inevitably be passed on to the consumer of legal services
  - We suggest strongly that there would need to be clear evidence of regulatory confusion or dysfunction, sustained regulatory failure, a certainty that any new structure would not be any less effective and efficient than the present arrangements, and a compelling reason to think that objectives such as improved regulatory transparency and enhancement of public confidence could not be achieved in a different and more proportionate way
- 1.41 We identify a range of considerations which we believe should be taken fully into account in connection with any regulation or de-regulation measure affecting service providers other than solicitors. We suggest it is not possible to make a proper judgement on these matters without a soundly-based understanding of the effects on consumer choice, access to justice and the network of community-based solicitors practices.
- 1.42 In response to **Question 6.2 (Office of Legal Complaints)** we acknowledge fully the particular importance which attaches to public perception and public confidence issues as they relate to the handling of complaints.
- 1.43 We explain the reasons why we consider that the establishment of a separate Office may not be the best option in this jurisdiction. We suggest that experience elsewhere to date may indicate that there is no universal model which can be guaranteed to be satisfactory.
- 1.44 We draw attention to some of the advantages which may be achieved by retaining a complaint-handling function within the LSNI as part of a wider and integrated

regulatory process, but with enhanced oversight and with complaints handled through a new model. We suggest that this new model has considerable potential to work in an effective and cost-efficient way, within a framework which is more accessible, convenient and transparent.

- 1.45 We recommend to the Review Group that reform in this area should be approached on the basis of a prior full understanding of the advantages and disadvantages (from the consumer perspective) of the present model.
- 1.46 In response to **Question 6.3 (Licensed Conveyancers etc)** the LSNI draws attention to its demonstrable and widely-commended commitment to the consumer interest in pioneering a residential conveyancing process which is efficient, client-focused and designed to deliver a high-quality value-for-money service within a competitive environment.
- 1.47 In relation to any de-regulatory proposals in this area, the LSNI advocates that the following principal factors be taken into account:
- Conveyancing services are provided by solicitors within an already competitive and increasingly competitive environment, including competition as to costs
  - We understand that the number of licensed conveyancers in England and Wales, and the manner in which they operate in the market, suggest that the impact of licensed conveyancing would be marginal
  - Experience elsewhere, in particular in a jurisdiction where scale is more similar to that in Northern Ireland, suggests the option of licensing subject to “level playing field” requirements would not produce sufficient demand to justify a new licensing and regulatory structure
  - We emphasise why any opening-up of the market in this respect would need to operate on a “level playing-field” extending not only to professional indemnity and compensation arrangements, but to standards of legal knowledge and technical competence, effective protection against conflict of interest, guarantees as to freedom of choice of supplier, and regulation and control of costs
  - Such reform should not be undertaken without a full understanding of the impact and consequences on the residential conveyancing process in Northern Ireland
- 1.48 In response to **Question 6.4 (Legal Disciplinary Partnerships etc)** the LSNI draws attention to the fact that in England and Wales Sir David Clementi was not prepared to recommend that other than by way of the LDP model, there should be business structures which allow for external ownership (by non-legal commercial entities) of the provision of legal services to the public.
- 1.49 In relation to Legal Disciplinary Partnerships, the LSNI explains the process which already exists to facilitate transfer as between the two branches of the legal profession. A barrister transferring under this arrangement and becoming a partner or employee in a solicitors practice would in those circumstances be made subject to LSNI regulatory requirements.
- 1.50 Insofar as the Question gives rise to wider issues of external ownership and provision of services by employed solicitors, the LSNI sets out reservations:

- About the principle and concept of external ownership and control
  - About the experimental and untested nature of the proposals in England and Wales, including particular concerns about consumer choice and access to justice
- 1.51 In this analysis we articulate a principled position directed to ensure that commercial interests do not prejudice the core values of the legal profession which serve to protect the interests of the public. We emphasise that an ill-considered de-regulation of an existing protection with no certainty as to the consequences and outcome will operate to the detriment of consumers.
- 1.52 Based on real-world regulatory experience, the LSNI takes a position of healthy scepticism about whether effective consumer protection will not be prejudiced in these planned and experimental structures. We explain that in Northern Ireland there are good reasons not to experiment or take risks in this respect.
- 1.53 We point out that no attention is given in the Consultation Document to an analysis and proper understanding of the legal services market in Northern Ireland. In all jurisdictions with a demographic profile such as that of Northern Ireland there has been an acknowledgement that the proposed removal of restrictions in the legal services market may have a significant and detrimental effect on small solicitors firms, including those who practice in rural areas. These factors are of emphatic importance in this jurisdiction.
- 1.54 Further in relation to consumer interests, predictive risk assessment and concerns about access to justice and consumer choice, we highlight positive features of solicitors practice as it operates in this jurisdiction. These strengths include:
- Personal service and established relationships of trust and confidence
  - Absence of significant cross-selling and layering on of additional cost to the detriment of consumers
  - A broad range of legal services offered through accessible small professional services firms, providing wide consumer choice in accordance with the needs of the market
  - A high percentage of solicitors undertaking low-margin or no-margin publicly funded legal services
  - High quality services provided in a suitable and accessible way by a well-regulated profession subscribing to high professional standards
  - An established network of general practices with an increasing emphasis on good business practice, client care and innovation
- 1.55 The LSNI asserts that these positive factors, taken together, represent a strong basis on which to develop the future provision of legal services here. We caution strongly about the irreversible damage which will be done if these positive features are undervalued or undermined.
- 1.56 Accordingly we suggest that because of the risks involved, and without any guarantee or certainty of the full implications and consequences, these models should not be adopted in Northern Ireland at this time.

## SECTION 1A: PREFACE AND PRELIMINARY OBSERVATIONS

### ***Commitment to Review and Reform***

- 1A.1 The review process initiated by the Consultation Document is welcomed by the LSNI on the basis that it provides an opportunity to test the suitability of the established regulatory arrangements, to assess how they meet the public interest in the circumstances of this jurisdiction, and the extent to which improvements and changes can and should be made.
- 1A.2 The LSNI will support and is fully committed to a reform process and programme which is properly informed; based on a full and integrated understanding of the context within which regulation and delivery of legal services has evolved; recognises the strengths and weaknesses of the present arrangements and produces proposals which will serve the public interest in this jurisdiction.
- 1A.3 The public interest does not equate with the interests of consumers, the interests of commerce or the interests of the legal profession. It does include the key role played by solicitors in upholding the administration of justice, the rights of individuals, the core values of the legal profession and the promotion of access to justice founded on a network of solicitors firms whose transparent independence is constitutionally guaranteed. The public interest is given little attention within the Consultation Document, nor does it appear in the Terms of Reference set by the Government for the Review Group. In this respect the Terms of Reference differ markedly from those set for the review exercises undertaken for England and Wales and for Scotland.
- 1A.4 Despite reservations about the adequacy and fairness of the consultation process (see below) the LSNI has confirmed its commitment to participate in, and contribute constructively to, the review process. It will do so as part of its continuing commitment to maintain develop and promote the high standards of a profession committed to the service of the public interest. As part of that contribution, the LSNI will continue to warn of the ill-advisability and dangers of importing solutions to non-existent problems, and in particular the importation of a pre-determined or derivative policy from a different jurisdiction.

### ***Critique of the Consultation Document***

- 1A.5 In the course of a 45-page presentation the Consultation Document highlights 8 statements. Presumably this is done because these are considered to merit particular prominence in a debate about appropriate regulatory arrangements in Northern Ireland. It is a simple but telling observation that of these, 8 (100%) are made in connection with the regulatory position, experience, circumstances and problems in England and Wales. By contrast the number of citations highlighted from parallel review processes in the Republic of Ireland, Scotland and in Northern Ireland is 0.
- 1A.6 The significance of this may appear more clearly when consideration is given to an alternative point of view which, in a balanced presentation of the issues, might be thought to merit some mention. This is particularly so, bearing in mind that the reform debate in England and Wales has been grounded on and justified by concerns about

regulatory failure and the interests of consumers. Based on some five years first-hand experience, the Lay Observer for Northern Ireland reported:

**“I would state that the efforts of the vast majority of solicitors in dealing with complaints were of a high order. The elected officials of the Law Society and the executive staff ..... run a competent operation which compares most favourably with other parts of the UK. Factors which contribute to this position I believe include the comparatively small membership of the Law Society, the largely cohesive concerns of that membership, the size of legal operations, the comparative closeness (e.g. geography, size of firms) to the elected officials and the highly professional standards shown by the vast majority of solicitors. These factors (et alia) should be given due cognisance when new and appropriate self-regulation frameworks are being considered thus avoiding unnecessarily imported solutions which may search for non-existent problems” (Annual Report of the Lay Observer, 2000/2001)**

- 1A.7 It is a central tenet of this response to challenge the premise underpinning the Consultation Document (and the stated position of the Government therein) that the present regulatory structures have been designed or applied in a way which is contrary to the interests of consumers of legal services in Northern Ireland. The LSNI, operating through its governing Council and Committees, has always sought to discharge all of its functions responsibly, in a manner which serves the public interest and protects consumers in this jurisdiction, and within the scope of the discretion and powers conferred on it by the legislature.
- 1A.8 It is also a central tenet of this response that the approach reflected in the Consultation Document by which pre-eminence is given to a policy and proposals already developed for another jurisdiction is flawed and contrary to recognised principles of good practice in developing policies appropriate for Northern Ireland. These flaws are identified in more detail in subsequent sections of this response.
- 1A.9 For immediate purposes, the LSNI notes that the review process initiated by the publication of the Consultation Document involves an examination of regulatory structures and responsibilities, and also an examination of competition principles as they apply to the market for legal services in this jurisdiction.

### ***LSNI Position on Reform of Regulation***

- 1A.10 In respect of regulation, the position of the LSNI is that we are committed to a model of self-regulation of the solicitors profession which is:
- Effective
  - Accountable
  - Efficient
  - Proportionate
  - Consistent
  - Accessible
  - Client-focussed

- 1A.11 This commitment reflects an acceptance of what the Consultation Document describes as the “higher principles” of regulation and the regulatory objectives set out

in Chapter 2 of the Consultation Document. The aspiration and intention of the LSNI is that a developed and appropriately enhanced model of regulation will serve the public interest in the maintenance of a strong independent solicitors profession in Northern Ireland, and also be capable of commanding the confidence of the general public, solicitors clients, and the profession.

- 1A.12 As we explain later in this response, the use of the term 'self-regulation' can be an over-simplification with some potential to mislead. A fuller outline of the regulatory architecture is set out in Appendix A to this response. From this it will be apparent that in the exercise of the responsibilities allocated to it by Parliament the LSNI is operating as part of a framework of co-regulation, all of which is predicated on consumer protection.
- 1A.13 Thus a significant number of substantive regulatory matters are determined by the primary legislation. It should be noted that the Consultation Document in several places incorrectly suggests that regulatory provisions which in fact in Northern Ireland are contained in the Solicitors Order were put in place by the LSNI. There are clearly defined roles within the framework for oversight and directions by the Lord Chief Justice, for the Lay Observer, for the Department of Finance and Personnel, for the independent Disciplinary Tribunal and for the High Court.
- 1A.14 This being so it is obvious that this structure of accountability, involving primary legislation and functions assigned by Parliament to the LSNI and to others, could perhaps more accurately be described as co-regulation or profession-led regulation. Nevertheless for convenience in this response we propose to adopt the use of the term 'self-regulation' because it is used in the Consultation Document.
- 1A.15 The LSNI is neither complacent nor uncritical of the present framework. We do consider that there are good reasons to consider that the regulatory model as applied in this jurisdiction to date has distinctive strengths which should be recognised and reinforced rather than undermined. We suggest that proper recognition needs to be given to the prior context of generally effective regulation by the LSNI, as opposed to the legacy of sustained regulatory failure and over elaboration which has tended to characterise the position in England and Wales.
- 1A.16 The LSNI does not participate in this review process on the basis that the status quo is satisfactory. Any regulatory system is capable of improvement. We believe that an analysis of developments in regulation since the time of the Solicitors (Northern Ireland) Order 1976 will demonstrate the LSNI's willingness and ability to adapt to changing circumstances whilst preserving key ethical principles. We believe generally that effective regulation has been applied in a proportionate and cost-efficient way. In addition to commenting on the issues raised by the Consultation Document, the LSNI will be in a position to put forward to the Review Group suggestions for enhancement of the present structures and process. These recommendations will be based on the first-hand experience of the LSNI as the lead regulator of the solicitors profession in Northern Ireland, and also on its experience and perspective as the representative body for all solicitors qualified to practice in this jurisdiction.
- 1A.17 The LSNI recognises the importance of the particular emphasis within the Consultation Document on public perception, confidence and the expectations of clients in relation to the structures, processes and redress mechanisms which apply to client complaints. This is particularly so where the complaint relates to the quality of

service provided by a solicitor to a client. As had been noted by previous observers “although complaint handling is certainly not the only function of self-regulation, it is in a very real sense the public face of the legal professions self-regulation and its effectiveness”.

- 1A.18 The LSNI recognises also that distinctive considerations apply to complaints-handling. This regulatory responsibility requires that the LSNI performs a quasi-adjudicative function in determining what is in essence a dispute between two contracting parties (a solicitor and consumer). This factor requires particular consideration because it goes to the independence and integrity of the decision-making process and public perceptions of fairness.

### ***LSNI Position on Market Issues***

- 1A.19 In respect of competition issues, the LSNI accepts that there is a need to make sure that regulatory systems and content are fit for purpose and adapted to take account of changing social and economic conditions. Accordingly where any practice or regulation, properly understood, is restrictive of competition and not otherwise justified we would not seek to defend it.

- 1A.20 A pervasive theme and pre-supposition in the Consultation Document is that the present system in some fundamental way fails to meet the needs of the consumer, and that regulation until now has been designed for the benefit of the legal profession. We need to make clear that, insofar as these matters fall within the responsibility of the LSNI, these contentions are not accepted.

- 1A.21 We think it is reasonable to point out that nowhere in the Consultation Document is a regulatory provision identified which is asserted to be unjustified or not designed for safeguarding the interests of consumers of legal services. This reflects the fact that protection of the consumer interest has been at the heart of the regulatory framework. De-regulation which involves the removal of a necessary existing consumer protection will always work to the detriment of consumers irrespective of the interests of providers. This is why an ill-informed reform based on a partial and non-holistic understanding of the context, and of the consequences of that reform, should be avoided.

### ***Northern Ireland Solutions to Northern Ireland Problems***

- 1A.22 The LSNI welcomes the indications given at several points within the Consultation Document that the Government is conscious of the need to be “wary” of importing inappropriate solutions. We welcome also the extent to which cognisance is given to review exercises in other jurisdictions which, in the view of the LSNI, are equally if not more comparable and relevant to the situation in Northern Ireland.

- 1A.23 Nevertheless, the mandate given to the Review Group is unmistakably predicated on a superficial and limited analysis leading to a pre-conceived policy position, as determined by the Government for England and Wales.

- 1A.24 The LSNI considers that, judged by any fair and objective standard, this approach is defective. Our concerns about the Consultation Document are of substantial (rather than merely semantic) importance for the following reasons:

- (a) The failures in the Consultation Document to provide a balanced, accurate and comprehensive description of the present regulatory framework and processes will inevitably influence and affect the responses to it in circumstances in which many respondents will (understandably) rely heavily on the contents of the Consultation Document;
- (b) In particular, we draw attention to the misleading impression, based on no discernible facts or evidence about actual regulatory experience in Northern Ireland, that the present arrangements are fundamentally flawed;
- (c) The Consultation Document espouses the encouragement of a strong, effective and independent legal profession. The genuine and guaranteed independence of the legal profession in Northern Ireland (by which we mean accountability to democratic institutions, and freed from external control or undue interference, whether by way of Government directly, through a Government-appointed body, or through powerful economic and commercial interests) is an issue of singular importance and resonance in this jurisdiction. This point is highly significant because the LSNI considers that there is every prospect that the potential consequences of the inappropriate application of these proposals to Northern Ireland will be to significantly undermine the strength, effectiveness and independence of the legal profession;
- (d) The primacy which is given to Government policy as determined for England and Wales is inconsistent with the constitutional status of regulation of the solicitor's branch of the legal profession. This was a transferred matter under the previous constitutional arrangements, has been recognised as requiring distinctive Northern Ireland consideration in the past, and potentially falls within the competence of a devolved administration.

1A.25 As we point out at para.5.2 of this response, there is no reason why a process could not have been put in place which would have been tasked to review, by reference to other relevant comparators and based on an examination of the facts and evidence, whether and if so how the present arrangements in Northern Ireland should be amended. No pre-determined policy position need have been adopted.

1A.26 We have been prepared to make all reasonable allowances for the need for a Consultation Document to present the issues in a summarised and accessible form. However in our view this makes it all the more important that information provided is balanced and accurate, that it identifies a range of options, fairly reflects appropriate comparators, and presents arguments in a way which allows for proper debate. We have reached the conclusion that regrettably this has not been done in this instance. Accordingly, as well as addressing the specific questions posed, we have been obliged by way of this response to expand and comment on the issues raised in the hope that this will be of assistance, in particular to the Review Group.

### ***Summary of Main Themes and Approach to Reform***

1A.27 In the course of this response we set out a fuller explanation of the NI framework of accountable self-regulation. We also explain the process by which that framework has evolved and been adapted, with particular reference to the interests of consumers. We identify strengths in the operation of self-regulation within this jurisdiction, and acknowledge areas of reform in which we think there is a clear need,

whether by statutory amendment or otherwise, for revisions and improvement. Consistent with this analysis we set out views as to the principles of reform which should apply, and some indications of the key elements in regulatory reform for further consideration by the Review Group (see Section 6, paras 7-10 of this response).

- 1A.28 As we indicate later in this response, we agree with the Government assessment that it is appropriate for change to be considered. We also acknowledge fully the proper concern of the Government to ensure that the genuine interests of consumers of legal services in Northern Ireland are met in a manner appropriate to the “set and scale of” issues in this jurisdiction. We think it is responsible and reasonable to request a corresponding recognition of the value of the commitment of the solicitors profession to date to effective accountable self-regulation and the promotion of high professional standards in a competitive environment through a structure providing ready access to independent legal services which put the customer first.
- 1A.29 We suggest that the cornerstone of the reform process in Northern Ireland, by reference and contrast to the “prescription” which may or may not prove successful in England and Wales, might be: Remember Occam’s Razor.

## SECTION 2: REGULATION

### *Objectives and Principles of Regulation*

- 2.1 Much in Chapter 2 of the Consultation document is accepted. For example the principles identified by the Better Regulation Task Force, as developed and applied to legal professional regulation, are clearly right.
- 2.2 It follows from the LSNI Preliminary Observations that we already subscribe to these principles and have sought to discharge our regulatory responsibilities accordingly. The degree to which the present arrangements in Northern Ireland meet the principles and objectives of good regulation is a matter for assessment, and a review exercise properly directed to that question will obviously be worthwhile.
- 2.3 Contrary to the impression given in the Consultation Document, none of these objectives or principles are inconsistent with self-regulation, properly understood and effectively applied. The present arrangements are designed to reflect these principles and achieve these regulatory objectives: they have not been designed by the LSNI in fact, or for the benefit of the solicitor's profession.
- 2.4 The analysis and conclusions reached by Sir David Clementi cannot and should not be regarded as definitive or authoritative as regards the acceptability of self-regulation outside the context of England and Wales for the following reasons:
- (a) His analysis cannot be divorced from the context of that jurisdiction, in particular the sustained failure of regulation to effectively meet these objectives;
  - (b) His analysis and conclusions were based upon a series of prior studies carried out in respect of the regulatory systems in England and Wales only which preceded the formulation of his recommendations;
  - (c) The application of the Clementi analysis to Northern Ireland as an asserted justification for the pre-determined government position that there needs to be a "fundamental shift away from self-regulation" is inconsistent with the view taken by Clementi himself. Addressing the Annual Conference of the International Bar Association in 2004 Sir David said:  
  
**"I wish to make it clear that my analysis arose only out of the circumstances prevailing in England and Wales and is not intended to be a prescription for the regulation of the legal profession in any other jurisdiction";**
  - (d) It is also inconsistent with the approach taken in two other comparator jurisdictions in which similar regulatory and competition reviews are taking place, directed to the achievement of the same regulatory principles and objectives. In both the Republic of Ireland and in Scotland the starting-point has been to research and then develop policy appropriate to those jurisdictions. In neither jurisdiction was the starting-point that there is an a

priori inconsistency between accountable self-regulation and the achievement of the agreed regulatory objectives;

- (e) This approach and conclusion is also inconsistent with the conclusions reached by the former Lay Observer (Professor Vincent Mageean) in a strategic review report commissioned by the Government and delivered in the summer of 2004;
- (f) To the contrary, there is considerable force in the view that, provided self-regulation is effective in meeting the defined objectives and operates within an accountable framework, it has distinctive strengths which assist in securing those objectives most effectively;
- (g) In competition terms, equally, there is no suggestion in either the European Commission Review nor the jurisprudence of the European Court of Justice which suggests that self-regulation is per se anti-competitive or against the interests of consumers;
- (h) The application of the Clementi analysis, as a method of policy development in Northern Ireland, is also inconsistent with Government guidelines on policy development which require that policies should be designed 'specifically to meet the needs of the Northern Ireland population, rather than primarily adapting policies developed in Whitehall' (Practical Guide to Policy-Making, OFM/DFM, para 1.4).

### ***The Clementi Prescription***

- 2.5 In this context the LSNI draws attention (by way of example) to Paragraph 2.6 of the Consultation Document. This presents as a statement of fact what is in fact a reported opinion of a generalised perception based on experience in England and Wales, i.e. "the professions react unsympathetically to public complaint and are slow to embrace reform". The LSNI in the course of this response will address the validity of this observation. For immediate purposes it is noted that this selective presentation is unsubstantiated in terms of this jurisdiction and generalised comments of this type which are not grounded in fact are clearly prejudicial to any fair or informed debate.
- 2.6 Accordingly, and in response to Question 2.1 raised in the Consultation Document the LSNI
- agrees that the principles and objectives of good regulation should inform the review process in Northern Ireland
  - considers that the design of a Northern Ireland model should not ab initio proceed on the basis that the present model is inconsistent with those objectives, nor ineffective in the protection of the interests of consumers in particular and
  - suggests that any re-design of the Northern Ireland model should be based on proper analysis and appreciation of the differential characteristics of this jurisdiction

## **SECTION 3: CURRENT REGULATORY ARRANGEMENTS IN NORTHERN IRELAND**

### ***NI Framework of Regulation***

- 3.1 The Consultation Document (Chapter 3) describes the present regulatory arrangements (as applicable to solicitors) in 11 paragraphs, including a description of the role of the Lay Observer (5 paragraphs). The present system is characterised as “broadly self-regulation with oversight of some regulatory functions”. In several key respects, this part of the Consultation Document is incomplete, over-simplistic, misleading or inaccurate.
- 3.2 The LSNI has provided for ease of reference at Appendix A to this response a fuller explanation of the framework which regulates solicitors in Northern Ireland. From this it is apparent that the regulatory framework has been determined by Parliament, not the LSNI. Thus, for example, the primary legislation determines either principally or to a significant extent the reservation to solicitors of certain functions in relation to conveyancing, the circumstances in which solicitors may or may not act as agents of non-solicitors.
- 3.3 As indicated in Appendix A, to the extent that it is authorised to do so within the statutory framework, the LSNI may, subject to the concurrence of the Lord Chief Justice, make secondary regulations which specify requirements and standards in a range of areas of practice. These include educational qualifications, admission and Continuous Professional Development standards; the handling of client’s monies; the operation of the Compensation Fund and the Master Policy of professional indemnity insurance (see fuller explanation of this at Appendix B); practice, quality, conduct and service standards; and the handling of client complaints.
- 3.4 In its stewardship of all these statutory responsibilities, the LSNI is exercising functions of a public law nature. We are subject accordingly, not only to European and national competition law, but also to challenge by way of judicial review where there is any question of improper use of the relevant powers.
- 3.5 It is obvious from an examination of all of these functions that the common purpose and objective of these evolved structures and processes are to maintain and uphold the high ethical and competence standards of the profession, and specifically thereby to guarantee the interests of clients/consumers. The interests of the profession is not the rationale of the present regulatory system.

### ***LSNI Approach to Regulation***

- 3.6 As a broad rule and consistent with the “general practice” nature of solicitors businesses in Northern Ireland (see elsewhere in this response) the approach of the Society has been to regulate formally by laying down general principles, and develop more specific and detailed codes or best practice guidelines where this seems sensible and merited (see later analysis, in particular of the Home Charter Scheme).

### ***Additional information on Complaints-Handling***

- 3.7 The Consultation Document sets out primarily the position on complaints handling. The LSNI recognises that this function is very much the “public face” of regulation. Because of this, we think it is unfortunate that the Consultation Document is inaccurate in several respects and, more importantly, omits any reference at all to the extent to which the efficacy of the LSNI in discharging its complaints-handling responsibilities has been validated and commended by successive independent observers.
- 3.8 As to complaints, the limitation on complaints relating to the services provided by solicitors is not (as stated by the Consultation Document) a matter of the devising by the LSNI of its own definition of a complaint. Rather this is a function of the statutory framework within which the LSNI is obliged to operate; this is explained in more depth in section 5 of this response.
- 3.9 There are several other factors relevant to the effectiveness of the present system which are not identified in the Consultation Document, namely:
- (a) The absence of any criticism by successive Lay Observers of the actual outcomes of complaints;
  - (b) The fact that experience has shown that, contrary to the postulated and theoretical contrast between the involvement of professional peers and lay persons, there has never been an occasion when the relevant Committee has differed on a professional/lay basis;
  - (c) The extent to which there is no interference in practice with the work of the Client Complaints Committee by the Council;
  - (d) The Consultation Document reports the perception reported by the Lay Observer that his office “lacks teeth”. Although we think that some in-depth analysis is required to understand what this means and the basis of such perception, the LSNI is supportive of the proposition for other purposes that the role of the Lay Observer should be enhanced (and re-named as considered appropriate.) However, the point may have more force if there was any suggestion that successive Lay Observers had in fact found that decisions made by the Client Complaints Committee (including the lay membership) were wrong.
- 3.10 The LSNI has responded positively to recommendations for improvement in the existing arrangements within the present statutory possibilities. We will continue to do so and bring forward suggestions as to how public confidence in the present arrangements can be enhanced, while maintaining the recognised advantages of retaining complaints-handling within an integrated regulatory approach.

### ***Solicitors Disciplinary Tribunal***

- 3.11 The Solicitors Disciplinary Tribunal is constituted statutorily with the status and powers of the High Court. It operates wholly independently of the Law Society, contrary to the reference to “The Disciplinary Tribunal of the Law Society” which appears at paragraph 3.8 of the Consultation Document.

### ***The NI Legal Services Commission***

- 3.12 As indicated in the Consultation Document, the NI Legal Services Commission has broadly the same role as the equivalent Commission in England and Wales, with the same range of powers and options (including the ability to enter into franchises and contracts) as its English counterpart. The Commission's relationship with Government is defined in the same manner: that is, major policy decisions are reserved to the Lord Chancellor, who also has retained powers (in conjunction with the Treasury) to allocate funds and direct the operation of the Commission.
- 3.13 The Consultation Document is right to identify the important role of the Commission in the sector of the legal services market which involves public expenditure. The LSNI is committed to working with the Commission in the shared objective of maintaining and improving access to justice.

### ***Differential Characteristics of NI***

- 3.14 The Consultation Document also sets out an analysis of the distinctive characteristics of the legal services sector in Northern Ireland. We think this analysis is limited in several important respects. We propose to comment briefly on the factors mentioned, and to identify other relevant factors which we consider need to be understood and taken into account in any holistic appraisal of the position in this jurisdiction.
- 3.15 The LSNI suggests other respects in which Northern Ireland can and should be differentiated from other jurisdictions. We believe all of these to be relevant to 'the set and scale' of issues for Northern Ireland.
- 3.16 We cross-refer also to the range of factors (nine in total) identified by a former Lay Observer (Professor Mageean) for purposes of the review of regulation commissioned by the Government which he suggested should be taken into account in any other strategic review process.
- 3.17 The LSNI summarizes the other main differential factors as follows:
- (a) an absence of sustained or systemic regulatory failure. It is clear from the Clementi Report that it originated in a situation in which the interest of consumers had not been protected adequately by means of the established regulatory system, in particular the handling of client complaints. This is clearly not the case in Northern Ireland, where the performance of the LSNI in the discharge of its stewardship of its regulatory functions has been consistently commended by successive Lay Observers. It is notable that no case for a legacy of failure in consumer protection as a function of regulation by the LSNI in Northern Ireland is made in the Consultation Document;
  - (b) the absence of a "regulatory maze". Again this was a key factor underpinning the Clementi review and recommendations. No assertion of a regulatory maze or dysfunction is made in the Consultation Document in relation to Northern Ireland. Although this term is not always used with precision, the regulatory maze is characterised by a significant numbers of regulators or layers of regulation in different areas of practice or business. It is also contributed to by over elaborate regulation rather than a construction of regulation by a set of common rules and principles. By comparison, the situation and the approach

to regulation taken up to now in Northern Ireland has been comparatively coherent, practical and proportionate. We include below some comments as to the direction of the Clementi proposals as they are now being worked through in the White Paper for England and Wales;

- (c) in a key area of the market for consumers (residential conveyancing) the Northern Ireland regulatory system is demonstrably “ahead of the game” as regards consumer protection and the consumer interest in making the house buying process as effective as possible while, at the same time preserving professional competence and skills, and (for example) the avoidance of conflict of interest, (see more extensive discussion of the Home Charter Scheme at section 5 of this response). This level of consumer protection has been achieved as a product of self-discipline and regulation in Northern Ireland in a way which we suggest could not be achieved elsewhere;
  - (d) there are a range of distinctives in connection with another significant area of practice (civil litigation) which are directly connected to the consumer interest and access to justice. These include the absence in Northern Ireland of the layering on of costs to the consumer which has been an exceptionally negative feature in England and Wales arising from the introduction of conditional fees, success fees, referral fees, the bartering of clients, the cross-selling of unnecessary insurance and loan products, and generally the growth of a claims management culture;
  - (e) by contrast in Northern Ireland, the solicitors profession operates litigation processes which are recognised for their efficiency, accessibility and cost-predictability (again well ahead of England and Wales). The use of scale costs approved by the Lord Chancellor and the application of a cost-control mechanism which limits the amount which can be charged by solicitors to clients are examples of forms of market regulation (not by the LSNI) which have been accepted to date by the profession and promote the wider public interest.
- 3.18 As referred to above the Clementi proposals and the White Paper setting out the resulting legislative proposals for England and Wales are directed to a ‘clearing up’ of current regulatory confusion in that jurisdiction. We think it is reasonable to suggest, by reference to the superstructure and the multiplicity of regulators and sub-regulators emerging in that jurisdiction, that it is at least possible that this objective may not be achieved. In any event the LSNI would suggest that the bureaucracy, expense and complexity arising, which may be justifiable on the scale of England and Wales, would clearly be inappropriate in this jurisdiction.

### ***The independence of the profession***

- 3.19 We deal elsewhere in this response with the context of Northern Ireland in which particular importance attaches to the operation of a legal profession which upholds the rule of law and provides a unique protection against unlawful exercise of state or economic power. We consider that the strength and independence of the solicitors branch of the legal profession in this jurisdiction and the contribution it makes, as a function of scale and the legacy of the past 30 years, cannot be divorced from its status as a cohesive regulatory body operating within an appropriate framework of accountability.

### ***Structure of solicitors practice in NI***

3.20 The Consultation Document correctly draws attention to the key issue of the “profile” of solicitors business in Northern Ireland. The figures given confirm the LSNI position in support of the “general practice” model as of particular appropriateness in Northern Ireland and to the needs and interests of consumers here. The profiles confirm

- the dissimilarity between the Northern Ireland model and the England and Wales model
- the extent to which solicitors in Northern Ireland do not typically operate as sole practitioners, but do operate within the small business sector providing a range of generalist legal services accessible within local communities and
- that comparisons with the Republic of Ireland and, in particular, with Scotland are more valid and meaningful than the approach taken in the Consultation Document

3.21 The LSNI refers to all of the contents of this section as its reply to Question 3.1.

## **SECTION 4: REGULATION OF LEGAL PROFESSIONS IN OTHER JURISDICTIONS**

- 4.1 Chapter 4 of the Consultation Document presents a comparative analysis of regulatory models applicable to the legal professions in the two other law districts within the United Kingdom and also in the Republic of Ireland. A brief comparative commentary is provided also on several other models, albeit focused primarily on complaints handling and redress mechanisms.

### ***The value of comparative models***

- 4.2 The question posed at the end of Chapter 4 concerns the relevance of these comparisons to the matters under review in Northern Ireland. In summary, the position of LSNI is that all of the cited examples, in particular those that relate to the legal profession, are informative, in different ways and to a limited degree. However, no single model should be regarded as determinative or as a dominant comparator in deciding the correct structure to meet the public interest in this distinctive jurisdiction.
- 4.3 There are, nonetheless, a number of comments which can usefully be made on the analysis presented for consultation. In part, and regrettably, this is necessary to correct or balance the limited and partial information provided in the Consultation Document.

### ***Premise against accountable, effective self-regulation***

- 4.4 The introductory paragraphs of Chapter 4 (specifically Para 4.2) give the misleading impression that the concept of self-regulation by a legal profession operating within an appropriate framework of accountability is somehow an outdated concept which “in the past” met the public interest but now does not and cannot do so. It appears that this is so even if it generally operates effectively within parameters of oversight and accountability laid down by Parliament and meets the principles and objectives of good regulation whereby the standards of any profession are established, monitored, upheld and enforced effectively in the public interest. This premise against self-regulation is not accepted by LSNI nor, by reference to the comparators cited in this Chapter, is this premise suggested anywhere else other than possibly in the context of the Clementi Review and Government policy in relation to England and Wales.
- 4.5 As indicated previously in this response, the LSNI has been and remains conscious of the importance which attaches to public protection, and the significance of maintaining public confidence. The LSNI questions whether there is any basis for suggesting systemic or sustained failure in public protection in this jurisdiction, or any reasoned or empirical basis for suggesting a fundamental undermining of public confidence.

### ***England and Wales distinguished***

- 4.6 The LSNI suggests that a debate about both of these issues (public protection and public confidence) and their relationship to regulatory models cannot be separated from the context and circumstances in which that debate arises. In England and

Wales (which again is the comparator given prominence in this Chapter) the debate in relation to the legal professions has taken place in circumstances characterised by:

- (a) a wholly different scale and demographic profile of the solicitors profession, which, inter alia, has militated against consistent and effective self-discipline, and the willing acceptance of a shared collegiate responsibility for effective and responsible regulation with the primary purpose of public protection;
- (b) a framework commonly described as a “regulatory maze”;
- (c) a well-documented systemic failure of self-regulation, specifically in a key public protection area, namely the handling of complaints;
- (d) the commercial interests of large legal firms, operating in areas of practice remote from private client work (the LSNI understands that some 70% of all solicitors in England and Wales work in firms larger than the norm in NI).

4.7 The LSNI recognises and fully accepts that no system is perfect, nor will any system of regulation (self-regulatory or otherwise) provide a failsafe guarantee against regulatory failure in every instance. The LSNI considers that the best way to secure appropriate levels of public confidence is to regulate effectively, so as to maintain the high standards of competence, ethical behaviour and conduct which the public is entitled to expect from the legal profession. We recognise also that this needs to include, with sustained emphasis, the importance of standards of service appropriate to consumer expectations.

4.8 As already indicated, the LSNI is not complacent about its regulatory obligations, nor do we seek to suggest that there is no scope for improvement by reference to the agreed regulatory objectives. Through a ‘best practice’ review process commencing in June 2004 we have already completed an exercise designed to ensure that LSNI regulations are competition-compliant and proportionate. This review exercise is continuing, with several projects in hand to bring about practical improvements (such as to consolidate Practice Regulations).

4.9 However, it is unsustainable for the Consultation Document to assert or assume, in connection with Northern Ireland, and without analysis or evidence a degree of absence of public protection or public confidence which suggests that the present structure is fundamentally flawed, or which makes a fundamental change to the present comparatively effective systems imperative at this time.

4.10 The assertion and attempted justification of a fundamental need for change based on public protection and public confidence concerns is further developed in Chapter 5. It is made despite and in face of the following pertinent factors:

- (a) there has (according to the Consultation Document) been little research as to the efficacy of the current regulatory framework in Northern Ireland (Para 5.8);
- (b) the explicit findings of the reports from successive independent commentators well-placed to make an informed observation about the high standards of professionalism of the ‘vast majority’ of solicitors in NI;

- (c) the disingenuous concession that the extreme examples of regulatory failure highlighted by the Government as part of the justification for the review process “have no connection to the professionalism of lawyers in Northern Ireland” (Para 5.4);
  - (d) the absence of any evidence of widespread dissatisfaction with the professionalism of the work done by solicitors in Northern Ireland, nor of widespread dissatisfaction or lack of confidence in the discharge by the LSNI of its range of regulatory responsibilities.
- 4.11 As already indicated, the LSNI fully recognises and accepts that in a specific aspect of regulation (i.e. the process of investigation and adjudication on client complaints) there are particular confidence and perception issues which require to be addressed. Experience in Northern Ireland (as elsewhere) indicates that the significant preponderance of dissatisfaction manifested in complaints by clients against solicitors arise not from fundamental failures in professional conduct or competence but in terms rather of inadequate professional service. The extent to which and the means by which this can be addressed more effectively is examined in more detail in section 6 of this response.
- 4.12 Chapter 4 proceeds by drawing out several points of comparison with other Law Societies, and we agree that this is a useful and appropriate exercise. We have already commented on the primacy given to the proposals being put forward by the Government for England and Wales.
- 4.13 As regards the commentary on the position in Scotland and the Republic of Ireland, the LSNI has already explained the reasons why a fully-informed comparison between Northern Ireland and those jurisdictions is at least as meaningful as the proposed read-across of proposals from England and Wales.

### ***Scotland***

- 4.14 As regards the Law Society of Scotland, there is no fundamental difference in practice in the range of regulatory functions or approach between the two jurisdictions. There is, however, a greater degree of oversight by the Ombudsman there in some respects. Equally the holder of that office does not fulfil a file audit function in respect of complaints equivalent to that which has been put in place with the Lay Observer by the LSNI.

### ***Republic of Ireland***

- 4.15 As regards the position in the Republic of Ireland, it is perhaps helpful to deal in more detail with this comparison. There are some obvious historical considerations which have led to some substantive law and legal system similarities distinctive to Ireland, relevant in particular to land law and the conveyancing process. This comparison is also of particular relevance because of the extent of both cross-border legal transactions and practice (a number of solicitors practice in both jurisdictions).
- 4.16 Comments on the Republic of Ireland comparator (Law Society of Ireland; ‘LSI’) are suggested as relevant. Contrary to the impression given in the Consultation Document, the role of LSI is not primarily about education. In terms of regulation the LSNI model is arguably closest in fact to the Republic of Ireland model structurally.

The range of regulatory responsibilities vested in the LSNI, including complaints handling, is similar to those in that jurisdiction.

4.17 The Consultation Document draws particular attention to the Regulatory Review Task Force Report of January 2005 and highlights six of the 56 recommendations made in that Report. The recommendations highlighted, which clearly represent commendable reform measures, are relevant and instructive in terms of an assessment of the adequacy of the present position in Northern Ireland, as explained below:

- (a) a majority of the Law Society's Disciplinary Body should be non-members of the Council of the Law Society and there should be no communication between the Council and this Committee on specific cases. In Northern Ireland no member of the Council is a member of the independent Disciplinary Tribunal, nor is there any mechanism for control or direction by the Council of the operation and decisions of the Disciplinary Tribunal. In so far as the LSNI operates internal mechanisms for the examination of complaints, powers are statutorily delegated to the Client Complaints Committee which reports regularly to the Council on its work but does not require the sanction of the Council for any decision in any individual case. The only exception to this is where the matter is sufficiently serious to merit a recommendation from the Committee to the Council that an application be made to the Disciplinary Tribunal. The Council is clear that its functions as regards those individual cases is limited to ensuring that there is a proper evidential and procedural basis on which a matter should proceed to the Disciplinary Tribunal. Even in those circumstances, the Council does not interfere with or second-guess the decision of the Committee, but will refer back only for clarification by the Committee of its recommendation. Other than in this exceptional instance, the role of the Council is limited to strategic oversight;
- (b) a client who has made a justifiable complaint should be eligible for compensation up to a maximum of €3000. In Northern Ireland it is correct to say neither the LSNI nor the Disciplinary Tribunal have been empowered to date to award compensation. The advantages and disadvantages of such a redress mechanism is clearly a matter which merits examination in more detail. It should be noted, however, that the recommendation made in the Review Report and accepted by the LSI does not relate to claims for loss sustained as a consequence of professional negligence;
- (c) there should be an independent panel of solicitors to assist members of the profession about whom complaints are made. This is not directly relevant to the consumer protection and public confidence debate, but it is the case that as regards the more serious complaints giving rise to an application to the Disciplinary Tribunal there is no evidence in Northern Ireland of solicitors having difficulty in obtaining assistance as required independently of the LSNI. In addition the LSNI has facilitated for many years a separate Practice Advisory Service whereby a panel of senior solicitors is available to provide practice management advice and general guidance to solicitors;
- (d) there should be more information to members about regulation, with a mandatory course on practice management for new entrants. This recommendation will self-evidently always be apposite, and LSNI is committed

to improvement of information about regulation both to LSNI members and more generally to increasing public awareness. In Northern Ireland it has been for some time a regulatory requirement that those assuming partnership responsibilities should undertake a mandatory course on practice management. All entrants to the solicitors profession already undertake, as a mandatory requirement, courses on both practice management and client care;

- (e) there should be more information to the public about complaints procedures. This is clearly relevant and the LSNI is committed to promote the provision of information in this respect;
- (f) solicitors who refuse to deal with the Society's Disciplinary Committee should be severely dealt with and where there is a history of complaints a special investigation should be triggered. In both respects these are established features of the regulatory processes in Northern Ireland. We refer in particular to the findings of a former Lay Observer as to the seriousness with which the majority of solicitors deal with the LSNI. Where solicitors do not co-operate it is the practice of the LSNI to refer defaulting solicitors to the Disciplinary Tribunal. A major benefit of the relatively small scale of the regulatory system in Northern Ireland is that it facilitates an integrated approach to risk assessment and management through the range of risk indicators that manifest across the LSNI's regulatory functions and also the sanction of the shared collegiate "intelligence" of the solicitor's profession. This includes a mechanism which allows the LSNI, within its present statutory remit, to trigger a special investigation by reference to a history of complaints.

4.18 More generally, and on a reasonably conservative estimate, a sizeable majority of the recommendations in the LSI Review Report are already well-established practice in NI. A number of recommendations are not directly relevant, and of most of the remainder the LSNI would favour their adoption as and when enabling legislation is available.

### ***Other Comparators***

4.19 Chapter 4 also contains brief notes on the complaints-handling and consumer redress mechanisms in other sectors, namely the financial services industry, and the accountancy and medical professions. The LSNI agrees that there is value in learning from parallel models where appropriate analogies can be drawn, and provided the similar is not mistaken for the same.

4.20 In this connection two points are worth noting:

- (a) in the case of the accountancy and medical professions, it is clear that these are still based largely on and contain major elements of self-regulation. We note that no mention is made of redress or compensation mechanisms in these comparators;
- (b) the comparison with financial services complaints and redress mechanisms is of limited relevance and in important senses a potentially misleading analogy. In that sector no considerations apply related to client confidentiality and legal professional privilege, or to higher obligations to the court. Nor is there any circumstance in which a financial services adviser will act other than in the

provision of an advisory service direct to the client, as opposed to acting in pursuit or defence of the interests of a client against other individuals or other parties (for example, the other parties in family proceedings, the state in public law matters, financial institutions in non-contentious work). The operation of the financial services industry is characterised by the selling of a product or in providing independent advice on a choice between products. Accordingly the regulatory mechanisms tend to be centred around process and compliance.

4.21 The LSNI adopts the contents of this section in reply to Question 4.1.

## SECTION 5: CASE FOR A REVIEW OF REGULATION

- 5.1 In this Chapter the Government purports to set out a justification not (as the Chapter heading suggests) for a review of regulation, but for a more limited process which is to be conducted within the constraints of a pre-determined policy position.

### ***Starting-point for review and reform***

- 5.2 There is no reason why a review process could not have been put in place in Northern Ireland which would have been tasked to examine in an open-minded and fair manner whether, and if so how, the current arrangements in Northern Ireland for the regulation of the legal profession, and the extent of any restrictions in the Northern Ireland legal services market, require to be amended. No pre-judgements need have been made. Such a process would have facilitated a balanced and properly informed debate, based on an examination of the facts and evidence, preceding the adoption and development of any policy position. The LSNI agrees with the proposition that in light of developments elsewhere it is appropriate for change to be considered.

- 5.3 It is worthy of particular note that this research-based and open-minded approach has been followed in all other jurisdictions within these islands, with relevant studies and research having been undertaken prior to any conclusion being reached. This applies in England and Wales, in Scotland and in the Republic of Ireland. In none of the other jurisdictions to date has it been suggested that the starting-point for the review process should be this:

“The present self-regulatory system is in need of reform to make it more acceptable to consumers, more representative of the public interest, and more relevant to promoting and facilitating access to justice in Northern Ireland “ (Para 5.10 of the Consultation Document).

- 5.4 This is a surprising assertion by any standard when considered in light of the acknowledged absence of research and evidence (Para 5.8) on the efficacy of the present system. It is the more remarkable and significant in light of the exclusion from the Terms of Reference for the Review Group of any reference to the public interest or access to justice.

- 5.5 It is of particular concern that the contents of this Chapter, unsupported, are presented not for consideration and response, but as a grounding for a conclusion in these terms:

“It has been acknowledged throughout this document that the professionalism of lawyers in Northern Ireland is clear and that the evidence of dysfunction is perhaps not as strong as in other jurisdictions. However, the Government regards the argument of principle in favour of change as compelling in terms of the regulatory framework, complaints systems and business structures. How that change will be identified and the extent of change are considered in the next Chapter” (para 5.30).

- 5.6 This is the only Chapter in the Consultation Document in which no question is posed, as to the issues and propositions set out. This absence of invitation to comment on

the propositions in this Chapter is unfortunate. The absence of adequate information, and an unbalanced presentation have been compounded in this Chapter, and as a consequence in the view of the LSNI the value of the consultation process has been undermined. As lawyers are prone to say, the prejudicial effect of the selective method of presentation in this Chapter far outweighs its limited probative value.

### ***Analysis and critique of justifications for reform***

- 5.7 Paragraphs 5.1 and 5.2 deal with what is described as the “Impetus for Regulatory Reform”. The first generalised justification (i.e. the interest at European level in competition restrictions arising from professional rules) of itself adds nothing to a debate on the regulatory framework in Northern Ireland in absence of any relevant research or evidence. No competition restriction arising from the professional rules governing solicitors in NI is identified in the Consultation Document.
- 5.8 The LSNI position on competition considerations is as set out elsewhere in this response. In so far as any restrictions in competition in this jurisdiction are a function of professional regulations made by the LSNI, we are satisfied that these comply with competition principles as determined by the European Court of Justice. In so far as any restriction (such as restriction to solicitors of certain limited areas of legal practice, for example some conveyancing functions) are concerned these are a matter for determination by Parliament.
- 5.9 A recurrent error in the Consultation Document is to suggest that the rationale or purpose of any restriction is the protection of the legal profession. The balance to be struck (recognised as a matter of competition law) is between the perceived benefits of unrestricted and unregulated competition, and the need through regulation or restriction to protect the consumer and safeguard the public interest.
- 5.10 We have commented already on the prejudicial effect of the citation of regulatory “scandals” (as highlighted in paras 5.3 to 5.5) as if in some ill-defined way these are relevant to the debate in Northern Ireland. There is some irony here. In respect of Enron, on its true construction that example demonstrates and confirms the reservations expressed elsewhere in this response by the LSNI as to the dangers inherent in the provision of multi-disciplinary services within a framework which does not adequately guarantee the independence of the service provider. The example also illustrates the naivety of the view that questions of control and undue influence can be separated from questions of ownership.
- 5.11 The highlighted quotation from the General Medical Council is again merely prejudicial. Apart from the obvious point that self-regulation of the solicitors profession in Northern Ireland does involve the public, this quotation establishes nothing about the efficacy or acceptability of accountable self-regulation in this jurisdiction.
- 5.12 Paragraph 5.6 the Consultation Document refers to the policy paper issued in respect of Northern Ireland in 1991. No explanation is provided as to why those proposals were not taken forward at that time, nor is any analysis provided as to how the issues considered at that time have been affected by the “studies” conducted in every relevant jurisdiction except Northern Ireland.
- 5.13 This is misleading because part of the reason why the Government proposals were not taken forward at that time was that the case for change in Northern Ireland was

less pressing, and in particular the premature creation of a bureaucracy for the meeting of a hypothetical demand was not a high-priority in this jurisdiction. Nor was it assumed that the introduction of reforms in the market in England and Wales automatically necessitated the same changes in Northern Ireland.

- 5.14 The LSNI considers that none of the matters referred to at paragraph 5.9 are inconsistent with an effective model of self-regulation. It adds nothing to the debate either as to a correct diagnosis of problems within the Northern Ireland jurisdiction, nor solutions to those problems.
- 5.15 The presentation of the “tension” between regulatory and representative roles as described in paragraphs 5.10-5.18 of this Chapter is simplistic and problematic. It proceeds on the basis of highlighting:
- (a) a view against self-regulation in principle taken by Lord Chancellor on the basis of an analysis of the position in England and Wales and;
  - (b) a statement by the Council of Licensed Conveyancers in response to Clementi.

In both cases these are cited to suggest that there is an irreconcilable conflict between self-regulation and representation, and that these different responsibilities cannot be discharged together effectively and in the public interest.

- 5.16 This is simplistic because the reality is that the present regulatory model and structure is self-regulatory not in the sense that the regulator (LSNI) is autonomous and independent in the discharge of regulatory responsibilities, but rather operates within defined structures of accountability, checks and balances.
- 5.17 The analysis in this Chapter is problematic because if, as suggested, this tension cannot be reconciled then the logic of the stated doctrine that “the two don’t go” is that the Government could not and should not contemplate under any circumstances or in any form an arrangement whereby the LSNI (or any regulatory body of any profession) could or should continue to have a role, even on a delegated basis.
- 5.18 If on the other hand there is no inherent irreconcilability, but rather the question is one of separation, accountability and reinforcing public confidence, then there is a useful debate to be had as to an appropriate and proportionate approach based on the circumstances in this jurisdiction. It is worth noting again that the “conflict of interest” justification advanced in this Chapter, if valid, would apply with equal force to the regulation of the legal profession elsewhere in the UK and Ireland, and to all self-regulating professions. It would also apply with more force to professions which are self-regulating subject to voluntary codes and do not already operate within a relatively sophisticated structure of accountability.
- 5.19 We think that paragraph 5.12 of the Consultation Document illustrates a fundamental misunderstanding. The independence of the legal profession in a democratic society is not a “trade union” function, nor is it an end in itself. It is a key part of the administration of justice in terms of solicitors obligations as officers of the court. Independence from external control is championed not in the interest of the profession but in the interest of clients.
- 5.20 The superficial nature of this analysis is demonstrated by reference to the example cited at paragraph 5.16 of Chapter 5. The point of the newspaper article as regards

legal aid rates was specifically to assert the public interest in ensuring that the legal aid service provided by solicitors to consumers is adequately resourced. How that proposition inhibits the effective operation of the regulatory responsibilities assigned to the LSNI is not explained.

- 5.21 The putative tension between the two roles would have more force if any evidence was presented as to the circumstances in which the public interest has been prejudiced. In this connection it is a telling point that nowhere in the Consultation Document is a single example given of a provision within the governing legislation (Solicitors (NI) Order 1976) or regulations made by the Society and enforced in exercise of the powers conferred on it which is asserted to be:
- (a) unlawful as an unjustified restriction on competition;
  - (b) designed for any purpose other than the protection of the public and consumer interest;
  - (c) out of date or irrelevant to the purpose for which it was designed.
- 5.22 We suggest that the reason that no example is cited is because, as already pointed out, the *raison d'être* for the present structure is the public interest and consumer protection. The principles of good and “higher” regulation which are espoused (rightly) in the Consultation Document are not radical or new. They have always underpinned the structure and operation of the regulatory system, they are not out of date, nor irrelevant, nor against the interest of consumers, nor have they been rendered irrelevant by the consumer agenda having moved on.

### ***A Proportionate Approach to Reform***

- 5.23 Once this misconception is recognised, this lends force to the LSNI position that an appropriate and proportionate approach to reform in this jurisdiction would involve:
- (a) understanding the strengths and weaknesses of the present regulatory arrangements;
  - (b) building on the recognised strengths, avoid importing prescriptions and remedies originating in sustained and recognised illnesses in another jurisdiction; and
  - (c) address those aspects of the Northern Ireland system which can and should be improved.
- 5.24 Paragraph 5.19 to 5.22 of the Consultation Document deal with issues of concern about complaints-handling, and refer also to research on customer satisfaction. The value and relevance of this analysis is limited. Despite the apparently favourable position in Northern Ireland (as indicated by the complaint levels), the LSNI does not consider (nor has it ever argued) that the volume of complaints should in any event be a determining factor in assessing the suitability and effectiveness of a complaints system.

- 5.25 However because of the inaccurate nature of the analysis as presented, a number of corrective or balancing comments may be of value as the review process is taken forward.

### ***Definition of Client Complaint***

- 5.26 The first concerns the assertion that the LSNI 'alone' decides whether "a concern received from a member of the public regarding their solicitor constitutes a complaint". In terms of a complaint as to the conduct or standard of service by a person about his or her solicitor, the powers of the LSNI are defined by reference to the fact of whether the person concerned is a client of the solicitor. The governing legislation (the Solicitor's Order) contains a definition of "client" (reflected duly in the structure of Practice Regulations made by the LSNI) in these terms:

"client", in relation to non-contentious business, includes any person who, as a principal or on behalf of another or as a trustee or executor or in any other capacity, has power, express or implied, to retain or employ, and retains or employs or is about to retain or employ, a solicitor, and any person liable to pay to a solicitor any costs for his services; and, in relation to contentious business, includes any person who is a principal or on behalf of another person retains or employs, or is about to retain or employ, a solicitor, and any person who is or may be liable to pay a solicitor's costs;"

- 5.27 In legal professional terms, the definition also reflects the nature of the obligation owed by the solicitor to his or her client, particularly the obligation of maintaining client confidentiality.
- 5.28 The Consultation Document refers also to the fact "only clients can make complaints" against solicitors. This is misleading. The LSNI may and does investigate the conduct of solicitors on the basis of information and evidence received from any third-party/non-client.
- 5.29 The Consultation Document records (correctly) an example which the Society does not treat as a client complaint, namely a complaint by a third-party beneficiary about the performance of a solicitor in the "execution of a will". (It may be that the Consultation Document means to refer to the performance of a solicitor in the administration of a deceased persons estate).
- 5.30 In any event "the client" of the solicitor (in the first case the Testator and in the second case the Executor or Administrator) is the person to whom a duty of service (and confidentiality) is owed and therefore the source from whom the complaint needs to originate to come within the statutory definition.
- 5.31 Thus it is a statutory definition which restricts the scope of the LSNI powers to deal with this example as a client complaint, as would be the case with any statutory regulator. The point is illustrated well by the fact that in the neighbouring jurisdiction (the Republic of Ireland) the statutory definition of "client" since 1994 has included "a beneficiary to an estate, intestacy or trust".
- 5.32 It is appreciated that this may well seem technical if not legalistic, and clearly there may be a case for statutory reform. It is dealt with here only to balance the misleading impression given in the Consultation Document that this exemplifies a

failure in self-regulation by the LSNI. It is perhaps worth noting also that considerable care is taken by the LSNI in terms of dealing with third-parties who are not clients, and in particular beneficiaries, to explain in those circumstances the reasons why the LSNI cannot be of direct assistance, and also in suggesting alternative ways in which their concerns can be addressed.

### ***Client Dissatisfaction***

- 5.33 Secondly, we do not propose to examine in detail the reported outcomes of the October 2004 Omnibus Survey. This is so in part because it is of limited relevance, and in part also because we accept that (as is the case in every other complaint system) there is never likely to be a direct correspondence between measured “satisfaction” levels and the incidence of complaints. This in turn reflects that there will always undoubtedly be a range of factors which influence decisions as to whether or not to complain.
- 5.34 In the interest of balance, however, the LSNI considers it reasonable to point out:
- (a) no explanation is given in the Consultation Document as to how the conclusion is drawn that the survey results suggest that dissatisfaction with solicitors is higher than the level of complaints received by the LSNI;
  - (b) similarly no explanation is given as to the suggested significance of that conclusion. No comparative norm is given, indeed there is no indicator given by reference to other complaints systems elsewhere. Accordingly there is no indication of what one would expect to find as regards the ratio between dissatisfaction levels and complaints;
  - (c) the results appear flawed because it seems that no attempt was made within the Survey to enquire as to whether the respondent understood the question to refer to a complaint “pursued” (whether formally or informally) with the solicitor concerned, and/or with LSNI.

### ***General Consumer Council Report***

- 5.35 Thirdly of relevance and interest for several reasons is an exercise undertaken by the General Consumer Council for Northern Ireland in 1999/2000. This included a general survey as to satisfaction in Northern Ireland with the House Buying Process (Homing in on Buying a House, 2000).
- 5.36 Perhaps not surprisingly, a degree of dissatisfaction with the process overall was recorded. However, of the professions and agencies covered by the survey, the highest satisfaction levels were recorded in respect of solicitors (second lenders, third estate agents, fourth builders).
- 5.37 This exercise resulted in a series of conclusions and recommendations which are relevant to the present consultation exercise. Of those recommendations (a total of 8) directed to the LSNI all have been implemented. Of particular relevance to the present review are these:
- (a) requiring all solicitors doing residential conveyancing work to join the LSNI Home Charter Scheme. The Scheme (details of which below) was made

mandatory by the LSNI with the approval of the Lord Chief Justice, in on 1<sup>st</sup> January 2001 and;

- (b) increasing consumer representation on the LSNI Professional Conduct Committee substantially above the level of 2 lay members. The lay membership of this Committee was doubled with effect from June 2000 (together with the re-naming of the Committee as the Client Complaints Committee on the recommendation of the Lay Observer);
- (c) publishing more information of complaints handling and providing more details on the outcomes of the redress process. The LSNI Complaints Leaflets were revised in the course of 2000 and, in addition to the established communication routes, all of these leaflets are available on the Society website. Working with the Lay Observer outcomes of complaints are now recorded on a regular basis agreed with the Lay Observer, and are published in his Annual Report.

5.38 It may be worth noting also that arising out of the review and survey, the General Consumer Council recommended the establishment of a Legal Services Ombudsman (but did not recommend in favour of the introduction of Licensed Conveyancers).

### ***The Home Charter Scheme***

5.39 This independent review exercise and outcomes is instructive in a number of respects not least as an example of the willingness of the LSNI to embrace change and improvement. The Home Charter Scheme was devised and introduced by the LSNI in 1994. It was a pioneering scheme, and in particular well-ahead of the introduction of “sellers information packs” now in train in England and Wales. The Scheme combines the setting of professional standards, and standards of client care including organising the legal work in connection with the conveyancing process in such a way as to require the vendor to take responsibility for the pre-contract preparation of title and other documents, thus avoiding unnecessary delays.

5.40 From the outset the Scheme was endorsed by the profession on a voluntary basis, the membership consistently running at between 65% and 75% of the practising profession. The success of the Scheme, and the willingness of the profession to self-regulate in this positive consumer manner, was reflected in the Scheme standards becoming compulsory as a matter of regulation as indicated above. Finally it should be noted that the standards laid down by the Scheme, again on a wholly innovative basis and at no cost to the consumer, are regularly confirmed by inspection in solicitors’ offices by LSNI personnel. Inspection Reports are made to one of the Society’s Committees (the Home Charter Committee) with two lay members, including a former Chair of the Consumer Council for Northern Ireland.

5.41 This Chapter touches also on some market issues which are dealt with more extensively in our response to Chapter 6 and QQ 6.3 and 6.4.

## SECTION 6: SUMMARY AND WAY FORWARD

- 6.1 From the previous sections of this response it follows that the LSNI has been, and remains, fully committed to the maintenance and development of a self-regulatory system which is focused on consumer protection and serves the public interest in Northern Ireland. The LSNI has been, and remains, fully committed to a review process and outcome which will meet those criteria.
- 6.2 We agree that it is appropriate that the present arrangements are examined at this time. Accordingly, we will seek to engage constructively with the Review Group as the process goes forward, our objective being to help identify improvements to the regulatory framework and processes, with particular emphasis on consumer interests and public perception.
- 6.3 In the preceding sections of this response we have set out the basis on which we suggest that the Consultation Document is an inadequate grounding, for consultation in the first instance and also as a starting-point for the process to be taken forward as described in this Chapter. The concerns we have expressed about the limitations of the Consultation Document apply equally to the Terms of Reference which have been set by the Government.
- 6.4 It follows therefore that within the LSNI analysis we have a preliminary concern about the potential implications of the terms of paragraph 6.3 in which the Government policy position is stated in respect of Northern Ireland as follows:
- (a) that there should be a fundamental shift away from the self-regulation of the legal professions;
  - (b) that complaint handling in particular must be fully independent of the professions.
- 6.5 It is difficult to regard this as other than a conclusion which has already been reached rather than an attempt to review and establish an appropriate regulatory framework for Northern Ireland. It reflects a judgement which has been made as the outcome of an analysis and review process set in a different context.
- 6.6 To the extent nevertheless that the relevant minister and the Consultation Document have recognised that different considerations may apply in Northern Ireland, these are welcome. We welcome also the commission of the Review Group “to consider how these principles could or should be applied in Northern Ireland” (Paragraph 6.4). On this basis the LSNI proposes to deal with the four questions posed in this Chapter, and in particular Question 6.1 and Question 6.2.

### ***Principles of Reform***

- 6.7 Consistent with our analysis of the evolution and distinctive features of the Northern Ireland system of regulation and the legal services market contained in this response, we recommend to the Review Group that an appropriate reform agenda for this jurisdiction should adhere to the following principles:

- (a) be based on a full and holistic understanding of the operation of regulation and the provision of legal services by solicitors in Northern Ireland;
- (b) be proportionate and aligned to the issues and circumstances of this jurisdiction;
- (c) be designed to reinforce and command the confidence of the consumer and the profession;
- (d) be cost-efficient.

### ***Outline Reform Agenda***

6.8 In line with these principles, and insofar as these relate directly to the regulatory role of the LSNI, we propose to bring forward recommendations to the Review Group comprising the following key elements:

- (a) a new client complaints model (see also paragraph 6.26 of this response), to include:
  - (i) formal separation of adjudication function from the Council;
  - (ii) lay majority Committee and Chair;
  - (iii) a rationalised gateway to suitable client redress options;
- (b) a revised model to provide for lay participation in regulatory casework;
- (c) revised oversight arrangements.

6.9 We believe that a reform agenda based on these principles, in a developed form, is consistent with the reform objectives indicated in the Consultation Document. We believe that taken together reform on this model has the potential to enhance the effectiveness, transparency and accountability of regulation. They represent a proportionate reform which we believe is suitable to the scale and set of issues in Northern Ireland.

6.10 These reform proposals are presented for the assistance and consideration of the Review Group going forward. They are separate from other “best practice” reforms being considered by the LSNI which can be taken forward within the scope of the current framework without statutory or structural revisions.

### ***Reply to Question 6.1***

6.11 **Question 6.1 in the Consultation Document is in these terms: 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 frontline 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?**

6.12 The LSNI suggests that it is neither necessary nor appropriate to establish a Legal Services Board in this jurisdiction, in so far as the purposes of such a body would be to regulate and control the professional practice of solicitors. The LSNI position is based on considerations of principle and proportionality, in both cases related to the public and consumer interest in this jurisdiction.

These are:

- (a) we have major reservations about a proposal which, without adequate justification or analysis (certainly in this jurisdiction) is inconsistent with a proper, effective and accountable system of self-regulation which will guarantee the independence of the legal profession. The LSB proposal involves a Government-appointed body being vested with the full range of regulatory powers, apart from complaints-handling, which determine and control the terms of practice conduct and standards of a profession which, as officers of the court accountable through the Lord Chief Justice, assures the political, personal and property rights of individual citizens;
- (b) we propose to leave aside for present purposes the appropriateness or otherwise of the LSB proposals in England and Wales as brought forward now in a more developed form in the White Paper published in October 2005. It seems clear that these proposals are being advanced to address problems of regulatory complexity, failure and dysfunction which do not apply in Northern Ireland;
- (c) the independence of the legal profession has a particular significance and resonance in Northern Ireland. Despite the ending of the “Troubles” and the welcome process of normalisation, there are circumstances of legal practice in Northern Ireland which are unique. These, combined with a continued context in which manifest sensitivities exist about the accountability and independence of state bodies and Government influence over the administration of justice (for example the Public Prosecution Service, the Parades Commission, the rule of law implications of the “On the Runs” proposals), are all factors which should be taken into account;
- (d) while the independence of the legal profession is a universal principle, it can have a particular significance depending on context. The LSNI regards it as the essence of an independent profession that it is self-regulating within the meaning of the term as set out in section 1 of this response. The LSNI recognises fully the need for appropriate structures of accountability to Parliament (in other circumstances the Northern Ireland Assembly);
- (e) a particular strength of effective regulation in this jurisdiction has been the commitment of the legal profession to serve the public interest. We question whether the vesting in an external body of regulatory powers with delegation back to “front-line” regulators in the manner proposed in England and Wales is compatible with that commitment. It has the potential to result in a regrettable but understandable withdrawal by the profession of support for combining accountable self-regulation with responsible representation, and the relatively effective and efficient operation of the current arrangements in Northern Ireland;

- (f) in light of these factors, and in absence of any guarantee that the changes being introduced in England and Wales will not prejudice and undermine, rather than strengthen, the independence of the profession, the LSNI judgment is that the better balance in this jurisdiction lies in favour of seeking to maintain and improve the present structure of accountable self-regulation. The LSNI considers that it would be a negative and unwelcome consequence of the reform process if the LSNI and the solicitors it represents were to be placed in a position where, in order to fulfil its representative function, it was compelled to dilute its commitment to the public interest. This is a commitment expressed not only in regulation of the solicitors profession but also in other aspects of public participation such as contributing to law reform and the development of policy in relation to the administration of justice;
- (g) in terms of the profession in Northern Ireland, the LSNI considers also that another layer of bureaucracy without good cause is unnecessary and disproportionate in this jurisdiction. The layering on of additional cost inevitably incurred can only add to costs which are then passed on to the consumer of legal services. Before such a structure in Northern Ireland would be justified, the LSNI suggests that there would need to be clear evidence of regulatory confusion or dysfunction, sustained regulatory failure, a certainty that any new Board would not be less effective and efficient than the existing structure, and an assurance that objectives such as improved regulatory transparency and enhancement of public confidence could not be achieved in a different and proportionate way.

- 6.13 Whether some form of licensing or regulatory body for the supervision of service providers other than solicitors is required may be an issue for consideration. The LSNI recognises that this debate depends partly on market developments and also partly on policy considerations which may require the regulation of providers of services in areas of practice not reserved to solicitors who at present are unregulated, and who may not already be subject to equivalent obligations nor the relatively extensive and sophisticated system of consumer protection and regulation which applies to solicitors.
- 6.14 On the more specific issue of extending reserved areas of work to non-solicitors, key issues concern the need to guarantee professional competence, enforceable ethical and practice standards, consumer protections and safeguards which are equivalent to those presently guaranteed by solicitors. We suggest that attention would also need to be given to several other provisos or considerations concerning: the need for competition with non-solicitors to be on a level playing-field, with solicitors having equal access to opportunity in all markets on a fair and competitive basis; and a full definition and research-based understanding of the effects on consumer choice, access to justice and the network of community-based solicitors practices offering a range of legal services (see discussion below in response to Question 6.3).
- 6.15 The fact that the LSNI is opposed, for the reasons given, to the removal of its regulatory functions in order to vest these in an external Government appointed body, should not be misunderstood as a reluctance to change and improve the present structure to meet the shared reform objectives of enhancing regulation and public confidence in ways which are appropriate for the “set of issues and scale of” this jurisdiction, in particular to give enhanced recognition to the interest of consumers.

- 6.16 We emphasise again that the “consumer interest” is not a new agenda item in this jurisdiction. Solicitors work in the real world, and in a competitive environment in which client satisfaction is a key factor in maintaining reputation, securing new business and being successful in the marketplace.

***Reply to Question 6.2***

- 6.17 **Question 6.2 in the Consultation Document is posed in these terms: 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?**

- 6.18 The LSNI has recognised the particular issues arising from the handling of complaints where a grievance arises between a client and his/her solicitor, most frequently quality of service matters which have not resulted in any significant loss in financial terms to the client. Experience has shown that typically these tend to involve failure to communicate with a client, and delays in attention to or completion of client business.

- 6.19 The Consultation Document correctly identifies one aspect of consumer redress (the absence of a power for the LSNI to award compensation for inadequate service) as an issue. It does not identify the range of remedies already available to the client by way of complaint to the LSNI. Where a client complaint is investigated and upheld, the statutory powers available to the LSNI enable remedial actions to be directed of the solicitor by the LSNI (or by the Tribunal in more serious cases) at the expense of the solicitor, and to reflect the inadequacy of service by reduction or disallowance of the solicitors costs. These operate in addition to punitive sanctions which go to the imposition of financial penalties, practice restrictions or removal of entitlement to practice which may be imposed by the Disciplinary Tribunal. All these options are available as a matter of consumer protection and redress, not the interests of solicitors.

- 6.20 The LSNI also deals with circumstances which give rise to more serious allegations and considerations of professional misconduct. These can arise out of a client complaint, a third-party report or allegation, or through the proactive monitoring by the LSNI of solicitors practices. A significant amount of “intelligence” arises from information received from the profession which is one illustration, related to the scale of the jurisdiction, of the value of the collegiate commitment of the profession to self-regulation. This integration of regulatory functions and the extent to which it works is a distinctive enhancement of public protection in this jurisdiction and should not be undervalued.

- 6.21 Complaints and reports to the LSNI giving rise to an investigation of conduct and service issues are distinguished as elsewhere in the British Isles from claims for financial compensation sustained by a client as a consequence of a negligent error made by the solicitor. In Northern Ireland the Master Policy arrangement (similar to that applicable in Scotland but not in England and Wales) has to date proved to have consumer advantages, analysed in more detail in Appendix B to this response.

- 6.22 The extent to which claims for compensation arising from negligence should, as a matter of principle or practice, be kept separate from inconsequential (in financial terms) service failures and conduct issues which go to disciplinary sanctions is we

suggest a matter for consideration. The interface between professional negligence and consumer financial redress is a complex issue which requires further analysis, but for present purposes it may be noted that particular difficulties around this interface were recognised by Sir David Clementi.

- 6.23 The Consultation Document (Paragraph 5.22) is not wholly accurate in suggesting that the question of a new structure for the handling of client complaints and redress in this jurisdiction has not been subject of review previously. In fact as recently as 2004 the Government commissioned the former Lay Observer (Professor Vincent Mageean) to consider these issues and set out his views.
- 6.24 This is of particular significance to Question 6.2 because Professor Mageean, although taking full account of the position in other jurisdictions and based on his considerable experience of the strengths and weaknesses of the Northern Ireland system, continued to favour retention within the LSNI of the first-instance complaints handling function.
- 6.25 This view and these factors tend to suggest that the establishment of a separate Office which is, in the terms of the Consultation Document, “fully independent” of the professions may not be the best option in this jurisdiction. The LSNI recognises that it may be that political or other considerations mean that the conclusion may be reached that the creation of a separate mechanism to deal with client complaints is required. The LSNI would suggest that experience in the other parts of the UK to date would indicate that there is no universal model which can be guaranteed to achieve and optimise public confidence.
- 6.26 Because of this, and the significantly different context set out above, the LSNI considers that the present review exercise presents a valuable opportunity to design a distinctive solution for this jurisdiction. We make clear that we recognise fully the need for reform in this area which will include:
- (a) an enhanced role and oversight functions for the Lay Observer, including enhanced financial/staffing support;
  - (b) revised arrangements for client complaints handling to place this under a Committee with a lay majority and a lay chairman, with confirmed and formalised separation from the LSNI Council ;
  - (c) a range of additional investigative, punitive and redress powers available to the Committee/LSNI/Disciplinary Tribunal, including a ‘polluter pays’ provision.
- 6.27 The LSNI recommends that this is an issue which merits assessment by the Review Group on the basis of a much more informed understanding of the complaints system than presented in the Consultation Document with the aim of arriving at the right structure for this jurisdiction.

### ***Reply to Question 6.3***

- 6.28 **Question 6.3 in the Consultation Document is posed in these terms: At present in Northern Ireland we do not have licensed conveyancers. Is there any good reason 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?**

- 6.29 We have already made clear that our in-principle position is that if a particular restriction of practice, properly understood, can be demonstrated to be anti-competitive and not otherwise justified it need not be retained. In the case of certain aspects of the conveyancing process, again as explained earlier in this response, there remains a statutory reservation to solicitors of certain matters put in place by Parliament (not by the LSNI).
- 6.30 In respect of the conveyancing process and the public interest, the LSNI suggests that it can demonstrate a clear commitment to the consumer interest by facilitating a residential conveyancing process which is efficient, consumer-focused and designed to deliver within a competitive environment a high-quality value-for-money professional service (see fuller description of the Home Charter Scheme earlier in this response).
- 6.31 In relation to competition and regulatory considerations effecting consideration of the issue is to whether this statutory limitation should be changed, the LSNI considers that the following factors should be taken into account:
- (a) All of the indicators available to the LSNI, both anecdotally from within the profession and through the monitoring work of the Home Charter Committee suggest that conveyancing services are provided by solicitors within a highly competitive environment, specifically competition as to costs. The Consultation Document refers to the increase in the number of solicitors in private practice, the majority of which continue to work in practices providing conveyancing services. The LSNI sets no minimum fees or guidelines for conveyancing (or other) costs;
  - (b) Ultimately the level of solicitors costs is determined by the market and constrained by rights to independent taxation in accordance with principles of assessment established by law. Increases in property prices have not been reflected directly or automatically in professional charges being made by solicitors;
  - (c) As part of a general review exercise by the LSNI over the last 18 months to ensure competition-compliance (insofar as practice restrictions are a function of regulations made by the LSNI) regulatory prohibitions on fees advertising and comparative fees advertising have been removed from 1<sup>st</sup> January 2006;
  - (d) According to the available information from England and Wales, licensed conveyancers account for only some 5% of the conveyancing market, with the majority of licensed conveyancers in fact working within the structures of a solicitors practice. This is significant in a number of respects;
  - (e) First it suggests that the impact of a licensed conveyancing system would be of peripheral impact in an already competitive market;
  - (f) Secondly such read-across experience from a smaller jurisdiction as is available (particularly in Scotland) suggests that the option of licensing subject to the necessary "level playing field" requirements is unlikely to produce a sufficient critical mass of demand to justify the set-up and running costs of a licensing regime;

- (g) Any opening-up of the market for these services should enable solicitors to compete on a fair basis. The extent of regulation of any licensed system would need to extend, therefore, not only to professional indemnity and compensation arrangements but also to standards of legal knowledge and technical competence, protection against conflicts of interests, guarantees as to freedom of choice of supplier, and regulation and control of costs;
- (h) A key consideration on this issue is an understanding of the nature of the conveyancing process in Northern Ireland, and the significance of the role played by the solicitor and in particular the system of undertakings. For the assistance of the Review Group we have prepared some Notes on this which are included at Appendix C.

#### ***Reply to Question 6.4***

**6.32 Question 6.4 in the Consultation Document is posed in these terms: 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?**

6.33 This question derives from a Clementi proposal in favour of what were termed “Legal Disciplinary Partnerships”. At present in Northern Ireland a practice involving lawyers from different professional bodies would involve combinations of solicitors and barristers.

6.34 The reason why Clementi limited his recommendation to LDPs, potentially as a first step towards Multi Disciplinary Partnerships, was because he was alive to and cautious about the public interest issues, particularly about protecting genuine independence and confidentiality within a structure of practice not controlled by lawyers. Despite the limited nature of the Clementi recommendation, the Government for England and Wales proposes to permit not only external investment in lawyers practices, but for other non-legal business entities to be licensed to provide legal services to the general public through the use of in-house solicitors.

6.35 As regards LDPs the key issue for LSNI is the fundamental proviso that a barrister who wishes to become a partner in a solicitor’s practice would be required by the LSNI to meet certain requirements. These are in essence that he or she would need to attain and assume the status of a solicitor by admission to the roll. This process is relatively straightforward, and in summary consists in a requirement that a barrister undertake:

- (a) A course and examination in both solicitors accounts and professional conduct;
- (b) A course in practice management (post-admission).

6.36 The point of this transfer process and requirement is obviously justified by the interests of the consumer. The requirements reflect the fact that as a partner the barrister/solicitor will assume a joint liability for the affairs and liabilities of the firm. Obviously this would mean also that where he opts to practice as a solicitor, the transferring barrister becomes subject to the full regulatory requirements of the LSNI

- under the Solicitors Order (e.g. practising certificate requirements, professional indemnity insurance arrangements etc).
- 6.37 Insofar as the question gives rise to wider issues concerning external ownership of solicitors practices and the provision of services to the public by in-house solicitors, the LSNI proposes to respond to this question by setting out considered concerns:
- (a) About the concept of external ownership;
  - (b) About the experimental and untested nature of this concept, including particular concerns about consumer choice and access to justice.
- 6.38 As a preliminary point it may be worth noting again that the Consultation Document (at paragraph 5.26) characterises the current restrictions on partnership with other lawyers, partnership with non-lawyers and solicitors in the employment of other businesses from providing services to third-parties as restrictions “contained within the rules of the professional bodies”. In fact this is wrong. In Northern Ireland these restrictions are not a function of regulations made by the LSNI; they are a function of primary legislation approved by Parliament.
- 6.39 The debate as to external non-lawyer ownership and control of legal practice has been “live” in various manifestations for some considerable time. Throughout that period the LSNI has consistently sought to articulate a principled position directed to ensuring that commercial interests do not prejudice the core values of the legal profession which serve to protect the interests of the public. We stress that this is approached first as a matter of principle because it is conceivable that the effect of external ownership would serve the financial interests of some individual solicitors or partnerships.
- 6.40 We highlight again that what is at issue and at stake here are the core values which define the identity of lawyers i.e. guaranteed independence, avoidance of conflict of interest, and client confidentiality (including the principles of legal professional privilege). We believe that a failure to understand fully and protect these values will result in irreversible damage to the interests of individual consumers of solicitors services and the public interest in this jurisdiction.
- 6.41 We refer also to the significance of the judgement delivered by the European Court of Justice in the Wouters case. Whatever the scope for various interpretations and applications of that judgement, it seems clear that the views of the ECJ serve to signal that issues of structure and control are critical at the interface between commercial market forces and the effective real-world protection of the core values of the legal profession. The judgment confirms also that effective and proportionate self-regulation which guarantees and protects the core values (and thereby the interests of consumers) is not only permissible but essential.
- 6.42 The public protection issues to which the concept of external ownership and control gives rise are extensive, and in our view formidable in this jurisdiction. From a regulatory point of view these give rise to issues concerning independence of ownership, independence of control, lines of accountability and structure of practice.
- 6.43 Everything about the real world, and in particular the regulatory experience in the circumstance of Northern Ireland suggests that extreme caution needs to be

exercised in diluting the present degrees of regulatory control. We suggest that the onus lies on those who, for commercial reasons, advocate removal of these protections to demonstrate conclusively both that this will be guaranteed to work in the interests of consumers and that the objectives can be achieved without compromising the core values. In this connection we think it is healthy to be sceptical as to whether this objective can in fact be achieved effectively.

- 6.44 The LSNI has real and justifiable concerns about outside control and ownership of legal practices by what may be termed “undesirable” elements.
- 6.45 There seem also to be some indications (see report on Competition in the Profession by the European Commission) which indicate the particular justifiability of business structure regulations where there is a strong need to protect practitioners independence. The Competition Authority in the Republic of Ireland has acknowledged that it is entirely possible that the provision of legal services to the public through organisations not owned by lawyers will not guarantee protection of consumer interests, and also potentially could lead to monopoly positions detrimental to consumers.
- 6.46 In determining what type of business structures should be permitted in Northern Ireland it is vital that careful attention should be given to regulatory experience here, and also to the working of the current structures. As with other proposals under review the LSNI consider that change should not be implemented for purely ideological or hypothetical reasons.
- 6.47 As a corollary, the proposals set out in the Consultation Document for review are derived from an analysis and experience of the legal services market in England and Wales. In the debate since an initial review of the market by the Office of Fair Trading in that jurisdiction, there has been a regular acknowledgement that the proposed removal of restrictions in the legal services market may have a significant detrimental effect on small solicitors firms and those in practice in rural areas.
- 6.48 In respect of risk assessment and access to justice concerns, we draw attention to the widely acknowledged positive features of solicitors practice as it has developed and operates in this jurisdiction. Most typically a practice in Northern Ireland is characterised by:
- personal service and established relationships of trust and confidence, related in part to the relative absence of significant cross-selling and layering on of additional cost
  - a broad range of legal services offered through a range of accessible small professional services firms offering consumer choice in accordance with the needs of the market
  - a high percentage of solicitors undertaking low-margin or no-margin publicly funded legal services, together with an established culture of informal “pro bono” assistance
  - high quality services provided through a well-trained set of professionals adhering to the high professional standards recognised by the Lay Observer (and not disputed in the Consultation Document)
  - a network of general practices which are established, capitalised, and with an increasing emphasis on good business practice, client care, and innovation

- 6.49 We believe that these factors, taken together, represent a strong basis on which to develop rather than undermine the future provision of legal services and serve the genuine interests of the consumer in this jurisdiction.
- 6.50 As, we have noted, the proposed changes in England and Wales relating to the regulatory framework and business structures have come about to solve or address the particular problems in that legal services market. Debate has been characterised by support and lobbying from powerful commercial interests from within and without the legal profession. This is so notwithstanding that it has been recognised in the course of the debate in England and Wales that the proposed reforms may have a devastating effect on smaller businesses. A key point is that these reforms have been based on economic theory as to what should happen or may happen as a result of the changes. Accordingly, even in the context of England and Wales, the proposed changes are experimental in content and speculative in outcome.
- 6.51 We suggest that, apart from the issues of principle involved, there is an undoubted risk that imposing changes which will permit new and untried business structures to provide legal services will have a detrimental effect on the current system. This may well not be an intended consequence, but nonetheless the damage which may be done will be irreversible. Once the existing infrastructure has disintegrated, the consumer will have far less choice than at present, both in terms of choice of providers and in terms of access to the range of services presently being provided on a widespread and generally effective basis. The prospect of the creation of “deserts” of the provision of certain legal services is a real one.
- 6.52 We also consider that in the absence of established demand or proven regulatory experience, in a small jurisdiction there are particularly relevant cost issues. In order to monitor different business structures, additional layers of bureaucracy and thus increased regulatory costs are inevitable without evidence that there will be actual benefit to the consumer.
- 6.53 Because of these factors, bearing in mind the paucity of research and evidence-based argument within the Consultation Document, and in particular because of the potentially irreversible damage to legal services provision through the network of small or “general practice” units in Northern Ireland, the LSNI suggests that any proposed changes must be proportionate.
- 6.54 It is the view of the LSNI that the risks involved in adopting in this jurisdiction an experimental and untested model of de-regulation developed to meet the circumstances of another jurisdiction, and without any guarantee or certainty of the full implications and effects are considerable. Because of the potentially detrimental effects in terms of access to justice and consumer choice these models should not be adopted in Northern Ireland at this time. In particular these risks should not be taken in reliance on economic theory relating to what should happen in any market rather than what will with sufficient predictability happen within the legal services market in Northern Ireland.

## **APPENDIX A**

### **Summary of LSNI Regulatory Framework**

1. In this Appendix we summarise the main elements of regulation of the solicitors branch of the legal profession in Northern Ireland:
2.
  - (a) Regulation of solicitors in Northern Ireland is a statutory and delegated function conferred on the LSNI (principally) by the Solicitors' (NI) Order 1976, as amended by the Solicitors' (NI) (Amendment) Order 1989;
  - (b) By virtue of this primary legislation, and secondary regulations made thereunder, the LSNI through its governing Council is responsible for regulating professional standards, the propriety of solicitors' professional conduct in general and the handling of client's funds in particular, professional indemnity insurance and client compensation requirements, as well as the handling of complaints about solicitors made by their clients;
  - (c) The regulatory, disciplinary and compliance context within which the LSNI operates is not self-determined. The main principles and parameters are in fact laid down by Parliament, and further reinforces that in Northern Ireland the public interest has informed and continues to be reflected in the governing primary legislation;
  - (d) In the exercise of its functions the LSNI is subject in various ways to the oversight and supervision of the Lord Chief Justice of Northern Ireland. For example, the LCJ acts in an appellate capacity for certain purposes, in the admission of solicitors to practice, and generally his concurrence is required before any Regulations approved by the Council can be implemented. This structure of accountability reflects the position of solicitors as officers of the court and members of an independent profession within the justice system;
  - (e) Apart from the supervisory jurisdiction of the Lord Chief Justice, the LSNI is subject to a number of other "checks and balances". As a matter of policy and statute, provision is made for independent lay members to participate in the consideration of clients' complaints. In the more serious cases of professional misconduct, including breaches of the regulatory requirements prescribed by the LSNI, and of inadequate professional services to clients, the LSNI itself does not adjudicate but refers the matter to the Solicitors Disciplinary Tribunal. This body again established by statute, is independent of the LSNI. It is comprised from a panel of senior solicitors and lay persons appointed by the Lord Chief Justice. Where the question of referral on to the Tribunal arises out of a client complaint, both the individual client and the independent Lay Observer have a free-standing right to complain direct to the Tribunal;
  - (f) As an additional client protection measure, all solicitors in private practice are required to maintain Professional Indemnity Insurance at a level and to a specification prescribed by the LSNI. This cover is a pre-condition to the ability to practice. As in Scotland (but not in England and Wales) the LSNI has operated successfully for many years a form of Professional Indemnity Insurance (through a corporate Master Policy) which provides a guarantee of recovery to clients where loss has been suffered through the actions of

solicitors. This reflects positively the willingness of the profession in Northern Ireland to assume a collegiate approach to, and responsibility for, client protection;

- (g) On the same principle, the LSNI maintains by statutory authority a Compensation Fund. This Fund is uncapped, is maintained entirely by contributions from practising solicitors, and again is a prerequisite to the right to practice. The Fund provides an additional guarantee to clients of recovery of losses incurred as a result of a solicitor's default (for example, because of insolvency) or otherwise than in circumstances covered by the Professional Indemnity Insurance arrangements;
- (h) In part because of the collegiate burden borne by the profession the LSNI has always attached a high priority to pro-active monitoring of solicitors' practices. Thus, for example, solicitors' accounts are actively monitored by professional staff employed by the LSNI on a regular and precautionary basis, as well as in response to specific concerns identified by the LSNI in respect of particular practices. That is, action by the LSNI is not dependent exclusively on a system of self-certified or audited accounts, but by detailed bookkeeping inspections and rigorous enforcement of the relevant regulations;
- (i) In respect of complaints-handling the performance of the LSNI is subject to review and comment by the independent Lay Observer. Apart from the casework function of reviewing the handling of particular cases by the LSNI, the Lay Observer makes recommendations periodically for improvement to procedures and other matters. In terms of the effectiveness of the current regulation model, a series of Lay Observers have commended consistently the efficiency with which complaints are handled by the LSNI, and the degree of seriousness with which the regulatory functions exercised by the LSNI are taken by the profession;
- (j) More generally, in both the framing of regulations within its delegated authority and the discharge of all these regulatory functions, the overriding principle applied by the LSNI is to regulate in the public interest. LSNI regulation carries with it a formidable and extensive range of client protections and practice requirements for which solicitors have taken corporate as well as individual responsibility, despite the fact that solicitors compete in an increasingly demanding professional environment;
- (k) Without prejudice to these important protective mechanisms, and within the context of the effective enforcement of rigorous regulatory and ethical standards, the LSNI seeks to promote positively both best commercial practice and management standards.

## **APPENDIX B**

### **Summary of Master Policy (Professional Indemnity Insurance) and Compensation Fund**

#### **Master Policy**

The LSNI Professional Indemnity Insurance arrangements are operated pursuant to Article 63 of the Solicitors (NI) Order 1976, which permits the LSNI to “make provision for indemnity against claims in respect of any description of civil liability incurred” in relation to a solicitors’ practice.

This legislation and such regulations as are made thereunder authorise or require the LSNI to do so within a number of options, i.e. setting up an insurance fund; the LSNI arranging taking out and maintaining Professional Indemnity Insurance or requiring solicitors to do so.

The LSNI, with effect from 1<sup>st</sup> November 1977, chose to operate the second option by means of establishing Master Policy arrangements. These arrangements are outlined in and are subject to the Solicitors’ Indemnity Regulations 1976. They apply to every solicitor who is or is held out to the public as a principal in private practice in Northern Ireland.

In addition, Regulation 24 of the Solicitors Practice Regulations 1987 provides for sanctions against solicitors who fail to co-operate with the managers of the Scheme and permits the managers of such scheme to breach the confidentiality of claims handling in circumstances where the conduct of the insured solicitor or firm so warrants. These circumstances are set out in the Regulation and include, in the case of sole practitioner, more than two claims paid in any insurance year, or in the case of a partnership more than 3 claims paid in the same period; failure to co-operate by the insured; undue delay on the part of the insurer or where there is prima facie evidence of professional misconduct on the insured’s part, or where the solicitor has failed to exercise reasonable diligence in the conduct of his practice.

Subject to the above exception, claims are handled between the insured’s solicitors/claims handlers/underwriters on a total confidentiality basis. The LSNI is not involved in any way in the handling of individual claims.

The LSNI, through the Professional Indemnity Insurance/Risk Management Committee, oversees the maintenance and administration of the Master Policy. As such the Committee meets regularly with representatives of the Brokers for the Master Policy, to be advised of market developments and to direct the principles, terms and conditions on which indemnity is to be made available.

The Brokers, who are recognised by Lloyds for operation in the London insurance market, present the terms of the Master Policy to the insurance market, along with other information such as the claims experience in a profile of the profession and the LSNI’s risk management arrangements. No one Insurer is permitted to write the entire policy, which is spread across a “slip” of Insurers (both commercial insurance companies and Lloyds Brokers) who write smaller percentages of cover. The “lead” Underwriter is the Insurer writing the greatest part of the cover. That Insurer sets the premium which is “followed” by the other Insurers who chose to write the business. They are also responsible for the claims handling, which is carried out independently of the Brokers. The Insurers also appoint the panel solicitors who handle claims on behalf of insured solicitors. The LSNI has no part in the appointment of

such solicitors. The Brokers ensure the reputation and status of any Underwriter involved in the “slip” arrangements to be of the highest standards.

In turn, the Underwriters require the LSNI to be pro-active in promoting risk management amongst our insured membership. For this reason, the LSNI has access to the overall claims experience under the Master Policy – to statistics and to trends in relation to claims. It should be stressed that the LSNI does not have access to information relating to individual claims, nor does it become involved in the handling of such claims (subject to Regulation 24 set out above).

The Brokers present the policy requirements to the market and the overall premium negotiated is with the lead Insurer. Calculations to divide the overall premium amongst Insured practices is carried out, subject to discount and loading ratios. Contributions are calculated on a per capita basis relative to the number of principals in any practice unit, with an additional flat premium for each qualified assistance or consultant in that unit.

The Master Policy provides levels of cover for £2m on a full civil liability basis (i.e. beyond negligence) for each and every claim in any given insured year. The terms of cover under the Master Policy are extensive and go beyond those which would be available to an individual solicitor seeking Professional Indemnity Insurance on the open market and to the terms of cover available to other professions. These features include most notably “run-off” cover, which provides full cover for any claims arising against a solicitor or his estate for all time, and a clause rendering it virtually impossible for the Underwriter (except in fraud cases) to repudiate liability e.g. for delay in notification or for technical breach of policy terms.

Solicitors’ clients in Northern Ireland may therefore be assured that should a claim arise against their solicitor, even after that solicitor may have retired or gone out of business, they will have access to insurance cover. They may also be assured that the terms of the Master Policy render it difficult or impossible for an Insurer to refute or repudiate a claim.

Overall the Master Policy arrangements provide certainty for clients who are assured continuity of cover and assured consistency of claims handling. Where a solicitor is insolvent or fails to meet excess payments under the Master Policy within a reasonable period, the LSNI is committed itself to making such payments, subject to ultimate recovery from the solicitor, where appropriate.

Premium arrangements under the Master Policy and the economy of scale moderate for the impact of hard insurance markets and rising premiums, resulting in fair premiums available to all solicitors in Northern Ireland, irrespective of their practice profile or geographical location. Individual firms may start up, certain that they will be able to obtain professional indemnity insurance cover. Higher premiums across the board would have an adverse impact on the network of solicitors, resulting in reduced availability of legal services. They would also increase practice overheads and result in increased client charges.

The Master Policy arrangements is also efficient in administrative terms (saving time and costs of not having to review individual insurance arrangements). We can also be assured that all firms are carrying Professional Indemnity Insurance, evidence of which is provided with Practising Certificate applications on an annual basis in the form of a simple certificate issued by the LSNI’s Brokers. The claims handling arrangements remove the LSNI from any involvement with claims abrogating any allegation of conflict of interest or the perception of loss of independence. On the other hand were insurance arrangements undertaken individually by each practice, the LSNI would not have the benefit for risk management

purposes of the claims experience information, and would have additional administration costs in reviewing individual firm' arrangements.

In summary we consider the consumer benefits of the Master Policy to be as follows:

- Certainty that their solicitor has insurance
- Consistency in claims handling
- The availability of solicitors with access to high levels of good quality cover
- The cover provided for run-off
- The anti-repudiation clauses
- Full civil liability
- Expert and consistent claims handling
- Low administration costs
- Minimal administration, with time and costs implications
- The advantage of generic claims experience data for risk management purposes

### Compensation Fund

#### *Purpose of the Fund*

The LSNI recognizes that despite the high standard of ethical conduct required of and generally maintained by its members, a very small number of solicitors are unworthy of their clients' trust. Where despite our rigorous regulation and monitoring that trust has been betrayed by defalcation of client funds, the Compensation Fund is operated to relieve or mitigate loss. Solicitors depend upon the trust of their clients. The Fund is an effort by all LSNI Members to compensate for the misdeeds of fortunately very few.

The Compensation Fund is established pursuant to Part IV, Articles 55-59, and Schedule 2 of the Solicitors (NI) Order 1976. Articles 56 and 57 set out the criteria, which applicants for grants from the fund must satisfy, i.e. respectively, loss in consequence of the dishonesty of a solicitor or hardship in consequence of a solicitor's failure to account for monies which have come into his hands. Both criteria operate only on a discretionary basis (qv) and grants may be in full or in mitigation or to relieve hardship. The Fund does not address civil liability incurred by a solicitor. This is addressed by Professional Indemnity Insurance arrangements. The other provisions set out procedures for the making of grants. Article 58(1)(c) provides that the LSNI shall be, to the extent of any grant, subrogated to the rights and remedies of any recipient of a grant, i.e. the LSNI is entitled to be reimbursed the grant in full before the grantee receives any further payment. Grantees are required to sign a Statutory Receipt to this effect before a grant is paid. Schedule 2 sets out arrangements for the maintenance and administration of the Fund.

The LSNI Solicitors Compensation Fund Regulations 1976 set out the requirements to be followed in applying for a grant. In particular, Regulation 7 provides that Notice of Application for Grant must be made within 6 months of the applicant becoming aware of his loss - there is no requirement to finalise the claim at this stage; Regulation 9 requires an application to be grounded by a Statutory Declaration with supporting proofs - applicants are advised to seek the services of an independent solicitor in preparing this and an ex gratia fee is paid by LSNI to the solicitor for this work; Regulation 10 reflects that the Fund is one of last resort and allows LSNI to require applicants to pursue civil or criminal proceedings. Where the solicitor has already been reported to the Police, applicants would be expected to assist in any enquiry.

## APPENDIX C

### Notes on NI Conveyancing Process

1. It would perhaps be helpful to outline briefly the main aspects of a typical conveyancing transaction and to comment, as appropriate, where practice in Northern Ireland differs from current practice in England and Wales.
2. There is more to the necessary conveyancing process than simplifying and speeding up access to title matters in the Land Registry and public register searches in a centralised computer system. A typical conveyancing transaction includes preparing, varying and agreeing terms of contract which require to be tailored to the circumstances of the particular case, all aspects of financing and the transfer of funds, drafting deeds, which will require technical skills based on a sound knowledge of the law (if there are special requirements in any given transaction to be taken into account) all aspects of state intervention (including planning, building control, sewage and drainage matters) and finally, arranging for the stamping and registration of relevant deeds.
3. The process involves a knowledge of the law of property, and must take into account the factors which can complicate a transaction, such as matrimonial difficulties between parties, death, bankruptcy etc. The process must also accommodate joint ownership, terms of ownership, rights of way and other easements.
4. In our view the interests of the consumer require that the person with an undivided responsibility to safe guard his or her interests is able to operate through the process in a manner free from lateral pressure and conflicting interests.
5. We would highlight some other relevant factors:

**Land Registry.** There are two classes of record that are basic to any Land Registry system; first, ownership and any restriction on ownership; and secondly the physical extent of ownership. Experience and skill is required in dealing with matters of restriction on ownership, and in correlating the map on record with the situation on the ground. It would be unwise to assume that speedy access to matters on records at the Registry would, in itself, speed up and simplify the process.

**The Sellers Information Pack.** Most matters covered by the sellers pack have already been introduced in Northern Ireland under the LSNI Home Charter Scheme. The Home Charter Scheme does not require the vendor to provide a survey, this is a matter which is outside the context of these Notes. All of these welcome processing improvements, and the impact of new technologies, do not diminish the professional skills and competence required to secure the interest and protection in law of the client, vendor or purchaser.

**Stamp Duty Land Tax.** Under the present system, solicitors are largely responsible for ensuring that all stamp duty is properly assessed and paid. If other bodies were permitted to engage in conveyancing work, we would suggest that the tax collection and enforcement implications would need to be fully assessed before any de-regulation.

**Solicitors' Undertakings.** The process of conveyancing is underpinned by the fact that solicitors, as officers of the court, enter into and exchange undertakings in the course of property transactions, breach of which can lead to serious disciplinary consequences.

6. Of these factors we suggest particular attention is required to undertakings. Apart from disciplinary consequences, an undertaking given by a solicitor as an officer of the court is enforceable against that solicitor personally and is not time limited. In practice this means that conveyancing transactions in NI complete (i.e. the purchaser is enabled to take possession in accordance with the contract and the vendor can release possession) in reliance on the binding undertaking given by a solicitor in circumstances where the completion would otherwise be delayed. The terms of standard undertakings are part of the detailed processes within the Home Charter Scheme, and represent a means by which solicitors guarantee and underwrite the completion process.

## **APPENDIX D**

### **Occam's Razor**

Principle attributed to or derived from 14<sup>th</sup> C. philosopher, William of Occam.

The principle states that one should not make more assumptions than the minimum needed. Choose from a set of otherwise equivalent models the simplest one. Pluralities should not be supposed without necessity.

When you hear hoof-beats, think horse not zebra.