

# **Response from the Legal Services Ombudsman and Legal Services Complaints Commissioner (England and Wales) to the Northern Ireland Department of Finance and Personnel's Consultation Paper "Regulation of Legal Services in Northern Ireland".**

## **Introduction**

In November 2005 I published my response to the radical way in which legal services are delivered and regulated in England and Wales as proposed by the government in its White Paper "The Future of Legal Services: Putting Consumers First" (the White Paper)<sup>1</sup>. As Legal Services Ombudsman and Legal Services Complaints Commissioner, I welcome the Government's proposals and I was delighted to see that the recommendations made by Sir David Clementi being taken forward.

I now very much welcome the opportunity to respond to the Consultation Paper "Regulation of Legal Services in Northern Ireland". In doing so I will address my comments to those questions posed in the Consultation Paper. There are parallels between the proposals in the White Paper and the Northern Ireland Consultation Paper and many of the comments I have made in response to the White Paper are relevant and therefore repeated here.

I have for many years been an advocate of reforming the regulation of the legal profession in the interest of the consumer. In outlining the challenges facing me as Legal Services Ombudsman in July 2003<sup>2</sup>, I commented "... it is clear that we must embark upon such a course of action (to deliver step change solutions) if we are to ensure that legal services better meet the needs of consumers and that the associated complaints-handling systems deliver a fair, transparent and impartial service, one that inspires confidence rather than apprehension and distrust among consumers".

I acknowledge that there are lower levels of complaints against legal service providers in Northern Ireland than in England and Wales and that may well be because there is less to complain about, at first sight. However, I fully support the view expressed by the Minister of State, Jeff Rooker, that consumers of legal services in Northern Ireland should have access to complaints procedures that are as consumer oriented as those available elsewhere in the United Kingdom. I also fully support the Minister's view that the wider regulatory framework in Northern Ireland should be reviewed to ensure that the market operates to provide value-for-money, quality, legal services with only necessary and appropriate restrictions placed on those wishing to provide such services.

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<sup>1</sup> The Future of Legal Services: Putting Consumers First - October 2005

<sup>2</sup> "Taking up the challenge" The Office of the Legal Services Ombudsman - Annual Report 2002/2003

**Question 2.1** *Have you any comments on any issues raised in relation to designing a regulatory regime appropriate to the legal services market in Northern Ireland?*

In addition to the regulatory regime as set out by Clementi I advocate the setting out some additional principles by which the success of a new regulatory framework and ways of delivering legal services could be judged by consumers:

1. Adequate protection and safeguards

There needs to be strong on safeguards for consumers in terms of a hierarchy of controls and sanctions from the Legal Services Board (LSB) to the Front Line Regulators (FLRs) in the event of non-compliance or failure. Similar safeguards in relation to the ownership of the new Alternative Business Structure (ABS) firms are in my view necessary, sensible and in the consumer's interest.

I feel it is important that any new regulatory regime places as much emphasis on the proactive activity such as setting standards for the FLRs as on the provision of sanctions if things go wrong. I would also suggest that any legislation should give the LSB **a duty of consumer protection**.

2. Empowerment and Education

It is essential that all consumers are clearly informed about the changes to the regulatory regime and the LSB should have **a duty to inform and educate consumers**. Those consumers who are confident and competent should be enabled within the new legal services market to undertake more self-help legal work where appropriate. Those who require expertise or support should be clearly sign-posted where to go for help.

I suggest that information about how the market works must come from the authority of the LSB, which needs to have the structure and resources to enable it to communicate effectively with consumers and the general public as well as members of the professional bodies.

Consumers will seek out information and the LSB needs to control the key messages. In the absence of consumer information from the LSB there is a danger that the private sector could fill this vacuum. I suggest that legislation ought to give the LSB the power to monitor and set guidelines for how the FLRs and firms (including the new ABS firms) communicate and undertake marketing activity. As a parallel, the Financial Services Authority (FSA) already sets guidelines monitors marketing literature on financial products.

**Question 3.1** *Have you any comments on how the current regulatory system operates or on the other points made about the comparability of the legal services market (in Northern Ireland)?*

I am concerned that, under the current arrangements, the Law Society of Northern Ireland alone decides whether a concern received from a consumer constitutes a complaint. From a consumer prospective, it is difficult to see how such an arrangement can meet the principles of accountability, in terms of being subject to public scrutiny, and transparency, in terms of openness.

I am also concerned that in Northern Ireland only clients can make complaints about solicitors. In contrast, in England and Wales, anyone can make a complaint provided it relates to professional misconduct as opposed to purely service issues. In the year 2004-2005 over 27% of complaints in England and Wales related to professional misconduct.

I note with concern that the statistical research carried out in Northern Ireland in October 2004 revealed that the level of dissatisfaction with the service provided by solicitors was measured at over 11% with just 25% of those dissatisfied lodging a complaint. Of those who pursued a complaint I note that 60% were not satisfied with the way their complaint was handled (the comparable figure for England and Wales in 2004 was very similar, 62%). 75% of those not pursuing complaints gave their reasons as being no point in pursuing, they had been through enough stress already and they did not know how to complain. I agree that these statistics may very well hide a degree of overall dissatisfaction with the current regulatory system particularly as there is no provision to pay compensation.

In England and Wales in 2004-2005 as Legal Services Ombudsman I awarded 35% of complainants financial compensation, 10% of cases were referred back to the Law Society of England and Wales for reconsideration and 5% of cases received my formal criticism. Should a similar profile to this exist in Northern Ireland then I think it would be safe to assume that a number of justifiable complaints remain unresolved and uncompensated.

I am also concerned that, under the current arrangements, there is no statutory framework for the regulation of barristers by the Bar Council. Viewed from a consumer prospective, it is difficult to see how such a lack of regulation can meet the principles of accountability, in terms of being subject to public scrutiny, and transparency, in terms of openness. In the case of the Bar Council I note with disappointment that there is no evidence at all of any independent research on customer satisfaction. By comparison, as Legal Services Ombudsman, I have carried out customer satisfaction ratings on the Bar Council in England and Wales. In the year 2001-2002, 92.9% of complainants were satisfied with the Bar Council's handling of complaints. However, this has declined so that in 2004-2005 only 78.7% registered satisfaction. Similar levels of satisfaction may or may not exist in Northern Ireland.

**Question 4.1** *What are your views on the relevance of the matters discussed in this chapter (Regulation in Other Jurisdictions) for the regulation of the legal professions in Northern Ireland?*

I have noted that in his annual reports and review of 6 years' experience the Northern Ireland Lay Observer, Professor Vincent Mageean, considered that the post of lay observer is perceived as having "no teeth" and in his opinion the post cannot attain full consumer confidence because of (a) the limits of the remit and (b) the title "Lay Observer". I fully support those views. In my role as Legal Services Ombudsman I have the power to award individual complainants up to £5000 compensation (in the case of the Law Society £15000 from 01 January 2006). As already stated, in the year 2004-2005 I awarded 35% of complainants financial compensation.

In my role as Legal Services Complaints Commissioner I have the power to levy very substantial financial penalties (up to £1million) if the Law Society of England and Wales fails to provide adequate plans or deliver improvements in accordance with those plans in its complaints-handling function.

I see no good reason why the system of legal services regulation in Northern Ireland should not, as a minimum, be afforded a similar set of "teeth" to that which currently exists in England and Wales.

**Question 6.1** *Clementi recommended a fully independent Legal Services Board (LSB) to deal with the regulation of legal service providers on matters other than complaints with powers to delegate the functions to front line bodies, such as the Law Society, where the LSB is satisfied that satisfactory arrangements on the split between regulatory and representative functions have been made. Given the different scale of the Northern Ireland market, what do you think would be appropriate arrangements (in Northern Ireland)?*

I fully support the Clementi recommendation of a fully independent Legal Services Board (LSB) with its range of powers to enable it to have effective oversight of the FLRs and the Office for Legal Complaints.

My experience as Legal Services Complaints Commissioner has shown that it is necessary for a regulator to have a range of control powers backed up by a range of sanctions, which can build in severity proportionate to the degree of failure.

Based on this experience, and in considering the range of powers proposed for the LSB, I have identified some potential gaps, which the Government may wish to address in drafting the legislation. These are in relation to the LSB powers to carry out regulation:

## 1. Controls over FLRs:

I would suggest additional powers as follows:

- To set minimum standards of service that consumers should expect to receive from the FLRs and their members

The establishment of a Consumer Panel would be well placed to advise the LSB on this matter. This would be an important step in achieving consistency of service for consumers.

- To set and ensure consistency of standards across all FLRs, such as setting minimum standards for education and training of providers of legal services.

Individual FLRs may wish to set standards higher than those set by the LSB, although the LSB needs to be satisfied that these standards do not become unreasonably restrictive or a barrier to entry.

I would also recommend that as with the medical profession, there should be a requirement for all legal professionals to be regularly re-accredited, perhaps every five years and particularly in client care.

- To investigate/audit FLRs (including the power of entry to the FLR).

This is particularly important, as the LSB will need (as an effective and fair oversight regulator) to gather evidence of failure to comply or weakness in regulation in order to work with the FLR to improve, or in the case of continued failure, in order to use sanctions and/or remove authorisation to regulate.

The LSB may also wish to satisfy itself (through investigation and audits of the FLRs) that the governance arrangements it accepts as initial evidence of the representation/regulation split continue to work in practice and are carried through in the day-to-day operations of the FLRs.

I would also suggest an enhancement to the following control power over FLRs as expressed in the White Paper:

- To require FLRs to provide the LSB with information (subject to privacy/confidentiality) to carry out its duties.

My suggestion is that any legislation should be drafted so that the LSB has the power to insist on the information being provided, rather than reliance on enforcement via a civil injunction. This would need to be supported by an appropriate sanction.

## 2. Sanctions over FLRs:

The general point that I would raise with regard to the sanctions is that for each control power there should be one or more sanctions which it is clear would be specifically employed in the event of failure to comply by a FLR. The sanctions and controls should be drafted in order to more obviously complement each other.

In addition, the proposed sanction “to set regulatory targets for FLRs and to monitor compliance” might be expressed more positively and appropriately in the legislation as a control power rather than a sanction.

I would suggest two additional sanctions:

- To enforce an individual FLR's compliance with LSB or OLC recommendations.
- To apply a sanction directly on a firm in the event of its non-compliance with LSB or OLC recommendations.

**Question 6.2** *Clementi recommended a single complaints body – the Office for Legal Complaints- for all legal services customer complaints. What arrangements do you think would be appropriate in Northern Ireland?*

As both Legal Services Ombudsman and Legal Services Complaints Commissioner, I welcome the proposals in relation to creating an independent Office for Legal Complaints (OLC) as “the single complaints – handling authority”. The White Paper accurately portrays the difficulties and erosion of consumer confidence that have characterised the handling of complaints by the professions, particularly those against solicitors. It is for this reason that I support the view that the FLRs must not be allowed to retain the ability to handle complaints about their members’ service under any new arrangements.

The powers and sanctions described for the new OLC are largely those that I would expect to see in an independent complaints-handling service. However, there are some aspects of the OLC’s powers as described in the White Paper that may need further consideration making or clarification in the legislation.

My specific comments are as follows:

- It is fundamental that the OLC is given powers in legislation to define the boundaries of consumer complaints and misconduct.

This is essential for consumer understanding and for the FLRs to act consistently, particularly as the boundaries (between minor conduct issues and misconduct) are not neatly drawn or indeed obvious to the consumer. I have consistently raised this point, including in my response as LSO to the Clementi consultation paper.

- It should be clear in the legislation that the OLC, using these definitions will make the assessment of what constitutes misconduct.

The White Paper stated that misconduct issues will continue to be handled by the FLRs and I am in agreement with this principle, but consider it to be in cases of serious misconduct only. Any legislation needs to make it clear that accountability rests with the OLC, all complaints go there and any redress awarded by the OLC can take into account any conduct issues found.

- Legislation should give the OLC the power to decide when it concludes a case and when it deems it appropriate to make a referral to the FLR.

Any breach of conduct rules would be referred to the FLR at an appropriate point in its investigation of the case, if the OLC deems it necessary.

The White Paper makes the case for quick and fair redress for the consumer. I endorse this view and agree with the principle of not having a separate, external appeals process. There should be increased confidence in the OLC's decisions as it will be independent of the professions about which the consumer is complaining. Consumers will need to be told clearly at the outset that the OLC's decision is final.

However, I do think there is a danger in the Government's proposals to remove the external appeal body and allow for Judicial Review (JR), without considering whether there might be practical and financial benefits to the provision of an effective internal review mechanism.

- Legislation should allow within the OLC, a mechanism that allows the parties to have a review of the final decision, which must then be binding.

This may well offer scope for speedier resolution than recourse to JR alone. In addition, the costs of JR could be very significant for the OLC, if as with the present legislation covering the Legal Services Ombudsman, all non-recoverable costs of the JR would have to be absorbed by the OLC.

The legislation needs to be clear which party will carry the cost of JR, and if it were the OLC, the new body would need to be funded accordingly.

- Sharing information with consumers about the complaints records of providers.

The White Paper is clear that the OLC will decide how best to do this. I believe that availability of information on the complaints records of providers will be an important factor in creating true consumer choice. It would assist the OLC in moving forward on this matter soon after its creation, if there could be clarity over whether there are Human Rights Act and Data Protection Act implications of publishing this information.

- Legislation will provide for an upper limit of £20,000 for awards by the OLC.

I welcome the proposed increase in the compensation limit, but I am not clear from the White Paper on what basis the figure of £20,000 was reached. Considering that the variety of types of Alternative Business Structures (ABS) are not yet known, but anticipating that they could relate to legal matters involving property and/or investments, this upper limit may not be sufficient and could drive more consumers towards the courts in order to seek redress. As the Estates Agency Ombudsman is already able to award £25,000 and the Financial Ombudsman Service (FOS) limit is £100,000, research may show that a limit somewhere between the two may be more appropriate. The LSB should also be provided with the power to undertake periodic review of the maximum level and recommend increases where appropriate.

The OLC will have the option to include in its guidelines on enforcement, the power “to order a payment for poor service, loss or distress. Such an award will be enforceable as a debt”.

I endorse the option of the OLC having the power as expressed above. However, the legislation also needs to ensure that in the event of the provider failing to comply with the OLC’s order, the system of regulation works effectively to enforce further appropriate sanction at the level of the firm.

As currently described, it would seem that the OLC could make a report to the LSB if the firm fails to pay. However, it would be more appropriate for the LSB to have clearly defined powers in relation to the firm itself, rather than only relying on its sanctions and powers in relation to the FLR.

Performance of the OLC:

I support the proposal in the White Paper that the OLC will be required “to monitor and prepare reports on trends in complaints handling and outcomes”. This will help to ensure that information on complaints can be used to improve the whole system of legal services delivery for consumers. It is also appropriate for the OLC to report on its own performance in an Annual Report.

It is my view that the Government’s proposals for the LSB’s powers in relation to the OLC seem appropriate to support the organisation in its objectives. The LSB’s power “to set and monitor targets for the OLC” is welcomed. A brand new OLC should be assumed to be an organisation that will aspire to and achieve excellence. However, if the new organisation fails to deliver an

efficient and effective service, there should be appropriate and graded sanctions available to the LSB.

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

In establishing the Council for Licensed Conveyancers (CLC), the Administration of Justice Act 1985 (England and Wales), lays upon it the duty: "to ensure that the standards of competence and professional conduct among persons who practice as Licensed Conveyancers are sufficient to secure adequate protection for consumers and that the conveyancing services provided by such persons are provided both economically and efficiently".

Under the legislation in England and Wales, it is now possible for individuals to become Licensed Conveyancers. Banks, lenders, property developers and some firms of solicitors employ Licensed Conveyancers. Many Licensed Conveyancers practise on their own or in partnership and to that extent they can be said to be in competition with solicitors in providing conveyancing services. Once the CLC examinations have been successfully completed and the practical training requirements undertaken, an applicant may apply for a licence which would permit them to offer conveyancing services as an employed person. Once they have held an employed licence for a period of three years, they may then apply for a full licence, which would permit them to offer conveyancing services directly to the public as the sole principal, as a partner in a firm of Licensed Conveyancers or a director of a recognised body, i.e. limited company.

The CLC deals with complaints against their members and I have the same statutory duty to review the way in which the CLC handles complaints as I have for the other professional bodies. Provided there are adequate standards of competence and professional conduct among persons who practice as Licensed Conveyancers and there is sufficient and adequate protection for consumers I can see no reason why conveyancing services should not be opened up in Northern Ireland.

In England and Wales some solicitors have rights of audience in the higher courts which was once the preserve of the Bar. Once again provided there are adequate standards of competence and professional conduct and sufficient and adequate protection for consumers I can see no reason why such arrangements could not be implemented in Northern Ireland.

Probate Services and Will Drafting could be opened up with adequate standards and safeguards as described above.

**Question 6.4** *Clementi recommended that lawyers from different professional bodies should be allowed to practice together as equals and that outside ownership of such practices should be permitted. Should such practices be allowed in Northern Ireland and why or why not?*

The White Paper sets out a range of safeguards to protect the public in relation to the new structures. I endorse these safeguards and feel that they are particularly important as the Government's proposals for ABS go beyond Sir David Clementi's recommendations that would have extended innovation in structures as far as "Legal Disciplinary Practices", bringing together lawyers from different professional bodies.

The proposed ABS model is an attractive one from the point of view of increasing the consumer's choice of provider, allowing legal services to be accessed alongside other goods and services and giving the potential for "one-stop services".

Any concerns I would have about the introduction of ABS would be largely theoretical with regard to the potential for providers to move into the legal services market and unbalance it by "cherry-picking" those types of work which are favourable to their business model, while leaving less attractive work to be picked up by traditional providers. This could have the effect of actually reducing consumer choice and access and has the potential to put a strain on providers (for example those in the not-for-profit sector) who act as a safety net for consumers.

My other concern would be that the true burden on the entire system of regulating ABS is unlikely to be known at this stage, but it is important that the powers of the LSB and OLC are made sufficiently flexible in legislation in order to adapt to the complexity the new ABS structures may bring.

On paper, the potential benefits to consumers and professionals alike would seem to be considerable and the safeguards in the White Paper, if reflected carefully and flexibly in the legislation, should allow for appropriate regulation of ABS.

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