

Regulation of Legal Services in Northern Ireland A Consultation Paper

Response from the Office of Fair Trading

Introduction and background

1. The current Review of the Regulation of Legal Services in Northern Ireland provides an important opportunity for radical consideration of how arrangements for the regulation and provision of legal services can be improved. The Consultation Paper, issued in September 2005, asks for responses to fundamental questions both about the future regulatory structure of the profession and about new business structures that would allow greater choice, for both consumers and professionals, in the provision of services. We welcome the opportunity to contribute to this review. The legal professions in Northern Ireland need reform to improve competition and choice for their customers and to enhance consumer confidence and protection.
2. The promotion of competition and innovation is central to the identification of a regulatory framework and business structures that will best serve the public and consumer interest. This has been a key theme in recent work by the Office of Fair Trading (OFT) in the area of professional services. Since January 2000 the OFT has been conducting an ongoing review of competition in professions¹.
3. A significant part of our work in this area has involved a focus upon restrictions on competition in the provision of legal services in England and Wales. The independent review of the regulatory framework for legal services in England and Wales led by Sir David Clementi took forward a number of the important outstanding issues in England and Wales identified in the OFT's work on competition in the legal professions. In particular, the review addressed regulatory barriers to change. In our report, *Competition in professions*², in 2001, we noted in the report our intention that the lessons of the report would inform work across the whole range of professions and throughout the UK. The OFT has recently been involved in work in both Scotland and Northern Ireland to identify and address certain restrictions on competition in the provision of legal services.
4. An important theme in the OFT's work on competition in professions relates to competition scrutiny of professional rules. With regard to Northern Ireland, current arrangements for competition scrutiny of rules of the legal professional bodies involve the OFT in an enforcement capacity under the both Competition Act 1998 and, since May 1 2004, under similar provisions in EC law³. These provisions

¹ See OFT 328 *Competition in professions*, published March 2001, and OFT 385 *Competition in professions* Progress Statement, published April 2002, both available at www.offt.gov.uk

² See footnote 1.

³ These changes are introduced by EC Council Regulation 1/2003, the 'Modernisation' Regulation. Modernisation provides a new framework for the enforcement of European competition law by decentralising the application of European law: national competition authorities and the courts of the Member States will apply Articles 81 and 82 of the EC Treaty alongside the European Commission. A European Competition Network has been established to co-ordinate enforcement by the various national authorities. Further, Modernisation

apply throughout the UK. In England and Wales OFT has statutory advisory functions in relation to the rules of the legal professions that relate to litigation and advocacy. Similar advisory responsibilities exist in relation to certain rules of the legal professions in Scotland. There is currently no equivalent of these provisions in Northern Ireland.

5. Unnecessary restrictions will deny freedom of choice both to suppliers and consumers, and will harm competition. Where the freedom of choice of suppliers is inhibited, the development of forms of service provision that are innovative may be impeded. But unnecessary restriction also harms the interests of those who use the services of professionals. Rules that restrict consumer choice and that limit without justification new forms of service provision damage the consumer interest. It is right, therefore, that OFT should make full use of its available powers, and where necessary should act in concert with government departments, in order to ensure that both practitioners and consumers benefit from fully competitive markets in professional services.
6. In our work on regulatory reform in the legal professions in England and Wales and Scotland, we have also been involved in commenting on reform of arrangements for complaint handling. In this regard, we have consistently supported the proposed establishment of a fully independent complaints handling body as the only option that is likely to adequately address concerns about consumer confidence. In England and Wales, we welcome the proposal in the White Paper to establish an Office of Legal Complaints (OLC) to act as a gateway for all complaints and to deal with service complaints (a new compensation maximum of £20,000 is proposed and we welcome this). In Scotland, we have similarly supported the establishment of an independent body to handle consumer complaints. We welcome the Scottish Executive's recent announcement that an Independent Scottish Legal Complaints Commission, with a non-lawyer chair and a non-lawyer majority, will be created to deal with complaints against lawyers in Scotland.

Questions in the consultation Document

Question 2.1

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

7. The choice of regulatory regime will clearly have a significant impact on the key objective of ensuring that future regulation facilitates and promotes competition, innovation and the public and consumer interest. The performance of core regulatory functions, such as the setting of entry standards and training requirements and the making of conduct rules, will frequently require that a balance be struck between the interests of the members of the profession and those of its clients or potential clients. With regard to the legal profession, it is also important to ensure that principles of the profession, which are undoubtedly important, are not used to justify unnecessary restrictive practices that may operate to the detriment of users of legal services. A central issue in designing a regulatory regime is how best to ensure that this balance is properly struck. Self-

abolishes the system of notifying agreements for exemption under Article 81(3) and the exclusive competence of the European Commission to apply Article 81(3).

regulation without effective external oversight is unlikely to ensure that the balance is struck in a manner that best serves the public interest. Consumers in Northern Ireland will also benefit from a regime that makes effective provision for competition scrutiny. Further, it will be important to ensure that arrangements for complaints handling and discipline are effective and inspire consumer confidence.

8. In this regard there are four key reforms that underlie the new regulatory regime for England and Wales proposed in the White Paper. The OFT supports each of these and considers that the principles which underlie them are equally important and relevant to Northern Ireland as they are to England and Wales. The first is to introduce effective external oversight. This is addressed by the proposed establishment of a Legal Services Board (LSB), with a lay Chair and lay majority, to oversee the whole legal services industry and with ultimate responsibility for its regulation. This reform is considered necessary to strengthen public confidence in the legal profession by ensuring that regulation serves the public interest. Professional bodies that currently have responsibility for significant areas of rule making will retain that role but under the oversight of the LSB, which will have a range of powers to intervene where self-regulation fails.
9. The second key reform that underpins the new regime is that professional bodies should only have regulatory responsibility where they can demonstrate that this will not conflict with their representational responsibilities. To this end, it is to be a pre-condition of the continuing regulatory involvement of the professional bodies that they separate their regulatory and representative functions and do so to the satisfaction of the LSB. We consider both reforms to be critical to ensuring that regulation is in the public interest. In our view, the principles that underlie these reforms are equally applicable in the context of the legal professions in Northern Ireland.
10. A third key area of reform relates to competition scrutiny of rules. Any change in the regulatory model will have implications for the way in which competition scrutiny is achieved. In the proposed England and Wales reforms, the establishment of an oversight regulator would have the effect of substantially removing the professional rules governing the legal profession from the scope of both the UK and EC competition enforcement provisions outlined at paragraph 4 above. Alternative scrutiny arrangements were therefore necessary. The White Paper addresses the need for competition scrutiny in a number of ways⁴. In the context of Northern Ireland, where changes are proposed to the regulatory regime, it will be important to fully appreciate implications of such changes for competition scrutiny and to ensure that competition scrutiny remains effective.
11. Finally, with regard to the other core regulatory functions of complaints handling and discipline, consumer satisfaction will depend upon swift and effective

⁴ Firstly, it is proposed that decisions of the LSB and of all the professional bodies will be governed by a competition objective, one of a number of statutory objectives that will govern the exercise of the new powers (section 4.1). It is proposed that the composition of the Board should ensure that it can offer experience of competition issues. (Section 5.4). In addition, current proposals would place a duty on the LSB to consult OFT formally in relation to certain significant regulatory decisions (Section 5.7, 7.4, 7.6). Most significant, with regard to effective competition scrutiny, however, is the proposal (Section 5.10) that OFT have an ongoing duty to scrutinise regulatory provisions and report to the LSB and a corollary duty on the LSB to respond to competition concerns raised by OFT. In the event of a disagreement between OFT and the LSB, the Secretary of State will have power to resolve the issue, following advice from the Competition Commission.

redress, including financial compensation. Recourse to a responsible authority that is external to the profession complained about is also likely to be a key feature of any regime that will command the confidence of consumers. In England and Wales, the OFT supported the proposed establishment of a fully independent complaints handling body (OLC) as the only option that is likely to adequately address concerns about consumer confidence. The OLC will act as a gateway for all complaints. It will deal itself with service complaints (a new compensation maximum of £20,000 is proposed). Complaints relating to professional misconduct and discipline will be passed back to the professional bodies who will deal with these under the oversight of the OLC. In the context of Northern Ireland, it may be necessary to do a cost/benefit analysis to consider whether the undoubted benefits of a fully independent complaints handling body can be achieved without disproportionate expense. If the outcome suggests that they cannot, a number of other steps may be taken towards improving the current system, although none are as likely in our view to command the confidence of consumers as independent handling of complaints. Further steps are discussed at paragraph 18 below.

Question 3.1

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

12. Measured against principles discussed above such as effective external oversight of regulatory functions, the avoidance of conflict between regulatory and representative functions and the availability of swift, effective redress offering compensation and with recourse to a responsible authority that is external to the profession complained about, a number of aspects of the current framework clearly give rise to concern.
13. With regard to the question of effective external oversight, it is clear that this does not exist in relation to the regulatory functions of the Northern Ireland Bar (NIB). With regard to the Law Society of Northern Ireland (LSNI), there is some provision for oversight of certain regulatory functions. Adequate oversight, in line with best practice, would require that there was an effective oversight mechanism by which proposed rules and amendments could be considered to ensure that they served the public interest including ensuring that they did not restrict competition unnecessarily. It is not apparent whether such a mechanism or resources to achieve this oversight exists within the current arrangements.
14. With regard to the avoidance of conflict between regulatory and representative functions, it is clear that neither the NIB nor LSNI have taken steps to address this. The regulatory function if it is to be properly exercised must serve the wider public interest. The public interest requires the balancing of a number of sometimes conflicting objectives such as justice, independence, competition and innovation. There are, in our view, numerous instances of the tension between members' interests and the wider public interest leading to rules that may not best serve the public interest either because they unnecessarily restrict lawyers from adapting their services to meet the needs of clients or because, in some other regard, they do not strike an appropriate balance between the objectives.
15. Similarly, the representational function of the profession may be less effective where the professional body wishes to act as lobbyist on behalf of members' interests but is constrained in doing so by a duty to reflect other wider interests. Both functions are likely to be more effectively exercised when separated.

16. Finally, with regard to the availability of swift and effective redress and external recourse, the following aspects of current arrangements are of concern:
- at both NIB and LSNI, complaints, including those about service are defined and dealt with by the profession complained about;
 - while, in relation to the LSNI, the role of the Lay Observer (LO) offers a form of external recourse, it is clear, and highlighted by the LO himself, that there are significant weaknesses with this as a form of external recourse and the remit does not in any event operate in relation to complaints to the NIB;
 - the LSNI has no power to order compensation following either a service complaint or a disciplinary hearing; while the NIB has the power to order compensation following a disciplinary hearing it is unclear whether the scope of disciplinary hearing is defined to encompass both service and disciplinary complaints and, if not, whether there is provision to deal with complaints about behaviour that, while not amounting to a disciplinary matter, nonetheless damages a consumer's interests;
 - at both LSNI and NIB, the in-house bodies that investigate complaints have a practitioner majority.
17. As indicated above, we consider that a fully independent complaints handling body has undoubted benefits in terms of consumer satisfaction and confidence. In addition, this model would be best suited to ensuring that there was simplicity from a consumer perspective and consistency across the profession. Such a body, in addition to acting as a gateway, handling service complaints and passing conduct and discipline issues to the professional bodies, should have powers to order redress in respect of all kinds of complaints including those that raise conduct and discipline issues. It should also have powers to monitor and set targets for the handling by the professional bodies of conduct and discipline complaints and may also benefit from a capacity to prosecute such complaints before the professional bodies where important public interest issues are at stake. The most important features of the body's composition would be a lay chair and majority which, along with other members, would be appointed on merit by the Minister of State or the Executive.
18. However, if following a cost/benefit analysis, it was considered that the cost of this approach would, for the time being, be disproportionate, there are clearly a number of interim steps that might be taken to improve the current arrangements:
- the complaints handling bodies of both the LSNI and the NIB should have the power to award substantial compensation;
 - in each case, the complaints handling bodies should be functionally separate from the representational body following a split of regulatory and representative functions;
 - in each case the complaints handling body should have a lay majority and chair;
 - the role of the LO (probably under a new title e.g. Complaints Commissioner) might be significantly expanded to provide in addition to existing powers for
 - oversight of both NIB and LSNI complaints
 - a single gateway for complaints
 - powers to monitor and set targets for the handling by the professional bodies of conduct and discipline complaints
 - power to rehear complaints against practitioners
 - power to order compensation.

Question 4.1

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

19. OFT views on these matters will be apparent from the answers to previous questions in particular with regard to the position in England and Wales.
20. With respect to other jurisdictions, it is interesting to note that, notwithstanding the different scale of the Republic of Ireland, the recent report by the Irish Competition Authority reached conclusions very similar to those reached in the review in England and Wales regarding key principles of effective external oversight of regulatory functions, the avoidance of conflict between regulatory and representative functions and the availability of swift, effective redress offering compensation and external recourse.
21. With regard to the review work that is currently ongoing in Scotland on complaints handling and on the separation of regulatory and representative functions by the Law Society of Scotland, it is also interesting to note that the recently published responses to the Scottish Executive's consultation on these issues showed a very large majority in favour both of an independent complaints handling body for legal services in Scotland and of a requirement to split regulatory and representation functions. Following that review, as noted earlier, the Scottish Executive has recently announced that an Independent Scottish Legal Complaints Commission, with a non-lawyer chair and a non-lawyer majority, will be created to deal with complaints against lawyers in Scotland.
22. More generally with regard to competition, it will be important to note the European Commission's Recommendation, set out at paragraph 93 of the Commission's Report on Competition in Professional Services published on 9 February 2004 (Com (2004) 83 Final). This calls on all those who have regulatory responsibility for professional services to ensure that where, in pursuit of a legitimate objective, rules or regulations are introduced that restrict competition, such rules are subject to scrutiny to ensure that the restriction does not go beyond what is strictly necessary to achieve that objective.

Question 6.1

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

23. It will be clear from what is said above (see paragraphs 13-15 in particular), that OFT considers that significant public interest benefits will result from both a fully independent legal services board and the separation of regulatory and representation functions. We therefore think that high priority should be given to achieving this.
24. However, with regard to the establishing a fully independent board, if following a cost/benefit analysis, it was considered that the cost of this approach would, for

the time being, be disproportionate, there are a number of interim steps that might be taken. Steps that would be particularly important to help secure benefits that would otherwise be secured by an independent board include:

- to place a responsibility on an authority, external to the professions (possibly the relevant Minister of State), to ensure that professional rules and in particular, entry (including training requirements) and conduct rules (including rules about what services may be provided) are subject to external oversight to ensure that they are in the public interest;
- to ensure that the authority for the oversight and approval of professional rules is informed by appropriate consultation, in particular with the OFT on competition issues;
- to provide for a mechanism whereby the OFT would be able to bring competition issues that may from time to time arise in relation to the regulation of legal services to the attention of the responsible oversight authority, and to provide, as a corollary an obligation on that authority to respond to competition issues raised;
- to review the current statutory framework for the regulation of legal services to identify any unnecessary restrictions on competition - an example that recently came to our attention is the rule at Article 28 of the Solicitors (NI) Order 1976, which appears to prohibit fee sharing between a solicitor and an unqualified person and which is currently interpreted by the LSNI as prohibiting referral fees. The OFT considers this to be unnecessarily restrictive.

25. With regard to the separation of regulatory and representation functions, it is worth noting that in England and Wales, legal professional bodies of all sizes have been required to achieve the separation. In the absence of an independent board to oversee this separation, government should consider taking responsibility for ensuring that this requirement is met.

Question 6.2

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

26. See Paragraphs 16-18 above.

Question 6.3

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

27. We strongly support the introduction in Northern Ireland of provisions that would allow for the recognition of professional bodies whose members could supply certain legal services in competition to solicitors and barristers. Such provisions exist in both England and Wales (where four additional bodies have been recognized) and in Scotland where the Scottish Executive is working towards commencement. In our view, there is a significant potential benefit to users of legal services in Northern Ireland in allowing appropriately regulated alternatives to the existing suppliers.

28. Conveyancing is one example of where the introduction of an additional professional body whose members can compete with existing suppliers has proved an important means of ensuring better value for consumers⁵. Probate is another area where there is potential to achieve this. There are likely to be others. In terms of legal services generally, the Institute of Legal Executives is an example of a legal professional body whose members, while holding qualifications alternative to those of a solicitor or barrister, provide a range of legal services often alongside solicitors in solicitors firms. It is not of course possible to predict all of the areas in which an alternative regulator may benefit consumers. Establishing a framework for the recognition of bodies who may wish to operate in this way will allow those who feel they have identified a consumer need to meet this.

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?

29. Yes. The question of how services are supplied is generally best determined by unfettered competition between suppliers for the custom of consumers. Regulators at whatever level should therefore avoid prescribing how professional services should be supplied. It follows that where, as currently, restrictions are placed on the freedom of patterns of supply to evolve and improve, those restrictions should be removed unless they can be justified. Restrictions identified include:

- rules that prohibit partnerships between barristers and between barristers and other professionals (both lawyers and non lawyers);
- rules that prohibit solicitors from entering partnerships with members of other professions (both lawyers and non-lawyers); and
- rules that prevent solicitors in employment to non-solicitors from providing services to third parties.

Such restrictions may exist either in statute or in professional rules or both.

30. OFT considers that the removal of restrictions in professional rules and in statute which prevent lawyers from different professional bodies practicing together as equals, and of restrictions that prevent outside ownership of such practices is

⁵ We are aware that an attempt in Scotland to set up a regulatory body for conveyancing and executory practitioners was unsuccessful. The causes for this are unclear. In particular it is worth noting that through solicitors' property centres, solicitors in Scotland play an estate agency role as well as a conveyancing role. As a result, solicitors in Scotland enjoy a position in relation to conveyancing services that is unique to Scotland. It is also likely that, notwithstanding the withdrawal of the alternative regulator, consumers in Scotland will have benefited where solicitors adapted price and service to take account of potential competition from licensed conveyancers. This was clearly the case in England and Wales where, the impending arrival of licensed conveyancers on the market was seen to bring about a marked change in solicitors' pricing and where licensed conveyancers, though relatively small in number, continue to exercise significant competitive pressure on solicitors to the benefit of consumers.

likely to have a positive effect on competition in the supply of legal services in Northern Ireland as it is throughout the UK.

31. With regard specifically to partnerships between lawyers from different professional bodies, in our view, prohibiting these restricts choice: the lawyers' choice to adapt their business structures in the way that best met their needs and those of their clients. That choice should be open, for example, to the barrister as a barrister, and without the need to requalify and to market himself as a solicitor. Similarly, the client's choice to seek the benefits of an integrated service is restricted where partnerships with non-barrister professionals are prohibited. While it is often argued that partnerships involving barristers will reduce the availability of barristers, in our view, permitting partnerships between barristers and others has the potential, on the contrary, to expand the availability of barristers, where new forms of practice attract new practitioners to the profession.
32. But partnerships between lawyers and other professionals, often known as multi-disciplinary practices (MDP), may also benefit consumers in Northern Ireland, as they would consumers throughout the UK. It has long been the position of the OFT that it is desirable in principle to permit the formation of such partnerships⁶. In the Professions report *Competition in professions*, in 2001, we noted that restrictions on MDP may both inhibit new entry and prevent the exploitation possible economies of scale and scope. It was and remains our view that the opportunities to provide combinations, in particular, of high-street professional services under one roof should unlock potential cost efficiencies and enhance customer choice and convenience at this level of the market. Potential benefits might accrue also from combinations at other levels of the market⁷. For a fuller account of OFT's views on the issues surrounding the introduction of MDPs see OFT 722⁸.
33. We recognise that there are a number of issues that are specific to the MDP models and that would need to be resolved, in some cases in partnership with other professions; the time-frame for introduction of MDPs might therefore be longer than that for practices involving lawyers from different professional bodies. Resolution of issues specific to MDPs should not be allowed to cause delay to an early introduction of alternative business structures that allow lawyers from different professional bodies to practice together and which allow for external ownership of such practices. But these structures should be seen as a step towards MDPs rather than an alternative. Creating a framework in which lawyers who are members of different regulatory bodies can offer services in partnership is likely to be a significant step toward establishing a framework where lawyers can practice with other professionals.

Other Issues

The QC System

⁶ See the *Entities Report*, OFT, 1986

⁷ See OFT 328 *Competition in professions* at paragraphs 29-32 available at www.of.gov.uk

⁸ OFT 722 *Consultation on the Future Regulatory Framework for Legal Services in England and Wales: Response from the Office of Fair Trading*, June 2004. See in particular paragraphs 3.24 -3.28, available at www.of.gov.uk

34. In our report *Competition in Professions*⁹, OFT considered the position of the title of Queen's Counsel in England and Wales. The report questioned both the involvement of government in conferring a title that had a marked impact on fee level, and the information value to consumers of a title where the title offered no information about the advocate's specialism and, in the absence of any system of revalidation, offered no guarantee that an barrister's level of competence was sustained over time.
35. Further conferral of QC title was suspended in England and Wales in spring 2003, pending a process of consultation and review. The OFT response to the government consultation, issued in autumn 2003, suggested that the criterion on which to judge whether the title was in the public interest or not should be whether it was a useful kite mark by which buyers of advocacy services could better choose barristers.
36. In general, the OFT considered that to function effectively, a kite mark should meet the following criteria :
- appointments were made on an objective basis;
 - the appointment process was fair and transparent;
 - entry was subject only to candidates meeting a standard without influence of any kind of quota; and
 - awards had to be revalidated from time to time, and were capable of being withdrawn.
37. OFT found that the QC system in England and Wales did not meet these criteria in a number of respects. In particular, the appointment system was not sufficiently transparent to allow an assessment of the objectivity of the criteria applied or the fairness of the appointment process. Moreover, the persistence over time of the proportion of barristers who held the title suggested that some form of quota might have been in place and there was no provision to revalidate and where necessary withdraw awards. OFT was also concerned that the QC qualification did not offer sufficient information, for example on specialisms.
38. The possible anti-competitive effects of the Queen's Counsel system, which restricted the badge of excellence and the higher fee rates associated with it to those who succeeded in the appointment process, were addressed by a consultation paper issued by the Department of Constitutional Affairs in July 2003¹⁰. The consultation was aimed at users of legal services and members of the legal profession, including all holders of the title of Queen's Counsel in England, Wales and Northern Ireland. In November 2004 the Bar Council and the Law Society announced an agreement on a new scheme for appointing Queen's Counsel in England and Wales which was based on an agreed competency framework and aimed at providing a more transparent, open, and fairer way to make such appointments. This interim scheme invited applications from summer 2005.
39. We understand that a competency framework similar to that which underpins the interim scheme in England and Wales has been agreed in relation to Northern

⁹ See footnote 1.

¹⁰ Available at www.dca.gov.uk/consult/qcfuture

Ireland. The LSNI and the NIB are working towards a selection process similar to that recently introduced in England and Wales (allowing for relevant differences, in particular, to ensure that costs are proportionate).

40. The Department for Constitutional Affairs (DCA) is currently carrying out a market study to consider how to improve information for users of legal services more generally. When the market study is complete, the interim scheme will be reviewed to ensure that it is compatible with any principles the Government highlights as a result of the study.
41. If the title is to be retained in Northern Ireland (retention of the title remains an open question in England and Wales), it will be important that the new arrangements in Northern Ireland are reviewed to ensure that they are compatible with the OFT criteria set out above. It is also likely to benefit consumers if, following completion of the DCA market study, arrangements in Northern Ireland are reviewed to ensure that they are compatible with any other consumer-oriented criteria highlighted by government in the study.