



Department of
Justice

An Roinn Dlí agus Cirt
Máinnystrie O tha Laa

**Introduction of a Statutory Registration Scheme
for all suppliers of Publicly Funded Legal
Services in Northern Ireland
Report of the 2017 Targeted Consultation**

April 2021

1. INTRODUCTION

- 1.1. The purpose of this document is to report on the most recent consultation carried out by the Department of Justice ('the Department') on a statutory registration scheme for suppliers of publicly funded legal services. This report provides a summary of the responses received from stakeholders and sets out the Department's proposed way forward for the statutory registration scheme project.
- 1.2. The consultation ran between 15 February and 7 April 2017 and was aimed at those in the legal profession providing services to legally aided clients, and their regulatory bodies. The consultation focused on the draft enabling legislation required to provide a statutory basis for the scheme, as well as the draft Codes of Practice for each branch of the legal profession (solicitors and barristers) to set minimum standards and compliance arrangements.
- 1.3. This report provides:
 - the background to the statutory registration scheme and overview of responses to the 2017 consultation;
 - an overview of developments since the end of the consultation period;
 - the Department's proposed way forward to finalise the policy proposals and take forward the subordinate legislation required to underpin the scheme; and
 - a detailed summary of the views expressed by respondents during consultation along with the Department's response to the issues raised.
- 1.4. A copy of this report will be placed on the Department's website at [Department of Justice Publications](#)

- 1.5. You may make additional copies of this report without seeking permission. If you require any assistance in accessing the document in an alternative format, or have any other queries in relation to the content of the document, please contact Enabling Access to Justice Division using the details below and we will do our best to assist you.

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2. BACKGROUND AND OVERVIEW OF RESPONSES

Background to statutory registration scheme

- 2.1. Section 36 of the Access to Justice (Northern Ireland) Order 2003 provides power for the Department to introduce a registration scheme for all legal aid practitioners, in respect of civil legal services and criminal appeals to the Court of Appeal. Article 36B of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 provides a similar power in respect of criminal legal aid services.
- 2.2. The purpose of a statutory registration scheme is to provide a system to assess the quality and value for money of legally aided services funded from the public purse in a proportionate, risk based way, targeting those areas that matter the most while not adding disproportionately to the costs and administration of the scheme. The scheme would put in place arrangements to ensure that those who receive public funding for the delivery of legal services provide the appropriate level and quality of service to their clients, by requiring that all those registered to provide legal services commit to and comply with minimum quality standards.
- 2.3. A statutory registration scheme has been recommended by the Public Accounts Committee (PAC)¹ and the Northern Ireland Audit Office (NIAO)² in order to demonstrate value for money in legally aided services and to provide a comprehensive quality assurance system for all those providing legally aided services.
- 2.4. The Department has responsibility for the policy and legislation to introduce the scheme. The Legal Services Agency (LSA) has

¹ See [Northern Ireland Assembly Public Accounts Committee Report on Managing Criminal Legal Aid 2011](#) and [Northern Ireland Assembly Public Accounts Committee Report on Managing Legal Aid 2016](#)

² See [Northern Ireland Audit Office Managing Criminal Legal Aid Report dated 29 June 2011](#) and [Northern Ireland Audit Office Managing Legal Aid Report dated 21 June 2016](#)

responsibility for the practical implementation and operational delivery of the scheme, and was fully involved in the policy development process.

2.5. An earlier public consultation on a statutory registration scheme took place in 2014. That consultation focused on the overall policy and included initial proposals on the audit framework, codes of practice, education, and the registration fee. The consultation documentation and post consultation report are available on the Department's website.³

2.6. The policy intent of a statutory registration scheme as set out in the 2014 consultation provides a summary of the key elements of the scheme. These can be summarised as:

- all solicitors and barristers, whether in private practice or working in the voluntary sector, will be required to register in order to continue to provide publicly funded legal services;
- the requirements for registration will be set out in Codes of Practice and Audit & Compliance Frameworks for solicitors or barristers as applicable;
- compliance with minimum quality standards may be evidenced by self-certification, audit and compliance visits, administrative desktop reviews, customer surveys, complaints reviews, peer reviews or other suitable quality assurance tools;
- quality assurance mechanisms will be developed to include advocacy, and may include peer reviews in due course;
- the Scheme will provide the Legal Services Agency with the power to exclude providers who fail to meet or maintain requisite standards;
- the Department may make provision in regulations to impose charges i.e. fee(s) payable by legal aid service providers for membership of the statutory Scheme;

³ See consultation documents at [Department of Justice, Introduction of a Statutory Registration Scheme Consultation 2014](#) and post consultation report at [Department of Justice, Post consultation report on the Statutory Registration Scheme published March 2015](#)

- the Scheme should be self-financing in terms of staff costs incurred in administering the Scheme;
- an education and support programme relevant to legal aid should be an integral part of the Scheme; the development of which, with the Law Society and Bar Council, will be a key factor in the successful delivery; and
- the data provided may also be used to ensure the Legal Services Agency meets its monitoring obligations under section 75 of the Northern Ireland Act 1998.

Targeted consultation in 2017

2.7. The 2017 consultation, on which this report is based, developed more detailed proposals focused on:

- the draft Rules and Regulations to implement the Scheme;
- the Code of Practice;
- the Audit and Compliance Framework;
- the fee charging methodology;
- the Review Panel membership;
- the Equality Impact Assessment and the Equality Screening documents; and
- the Regulatory Impact Assessment (RIA).

2.8. A copy of the consultation and associated documents, including impact assessments, is available on the Department's website.⁴

2.9. The consultation ran between 15 February and 7 April 2017, the initial deadline having been extended at the request of the professional bodies. Substantive responses to the consultation were received from the following organisations:

- Bar Council of Northern Ireland

⁴ See consultation documents at [Department of Justice, Introduction of a Statutory Registration Scheme Consultation 2017](#)

- Law Society of Northern Ireland
- Ards & Down Solicitors Association
- Children’s Law Centre
- Housing Rights
- Law Centre (NI)
- Association of Personal Injury Lawyers
- Gibson Solicitors
- Falls & Hanna Solicitors
- KRW Law
- Michael Flanigan Solicitors
- The Office of the Attorney General.

2.10. In addition, the Office of the Lord Chief Justice, the County Court Rules Committee and Magistrates’ Courts Rules Committee acknowledged receipt but made no comment on the proposals.

2.11. The Department is very grateful to those who took the time to provide considered responses to the consultation.

Overview of responses to 2017 consultation

2.12. Overall, there was broad support for the overarching policy intent of ensuring that those who receive public funding for the delivery of legal services provide the appropriate quality of service to clients and the public purse, although some stakeholders did question the need and purpose for a registration scheme. While some stakeholders, notably those in the voluntary sector, broadly supported the proposals, the professional bodies and solicitor firms who responded to the consultation indicated significant concerns in relation to a number of fundamental aspects of the proposed scheme.

In brief, the main concerns expressed relate to:

- A lack of detail on various aspects of the proposals, particularly in relation to the audit and compliance framework, the development of an education and support programme for those registering and the future development of quality assurance mechanisms, which led to some stakeholders feeling that they were not given adequate information on which to provide considered comments and a view that the scheme was not yet ready to proceed to implementation;
- A perception that the proposed scheme was more expansive than previously envisaged and in particular that there had been a shift in emphasis from the 2014 proposals (which had a more balanced focus on both the quality and value for money aspects of the scheme) towards a scheme that was much more focused on audit and compliance and lacked detail on quality;
- Too much duplication and overlap between the proposed purpose and requirements of the registration scheme and the regulatory responsibilities of the professional bodies. Stakeholders felt that this was inappropriate, unnecessary and placed an excessive administrative burden on those wishing to register;
- Fundamental opposition to the proposal that the operation of the scheme should be self-funding i.e. that the costs of administering the scheme would be recouped from fees charged for those registering. Stakeholders were also concerned that the costs of the scheme as set out in the consultation were not transparent and did not represent value for money;
- The timescales proposed for implementation of the scheme were rushed and unrealistic.

2.13. A detailed summary of the responses to the consultation, including the Department's proposed response to those issues, is provided at Section 5 below.

3. POST CONSULTATION DEVELOPMENTS

3.1. The Department recognises that a period of time has passed since the consultation and that the responses provided by stakeholders reflect their position on the proposals at that point in time. Before setting out the Department's proposed approach, it is important to consider developments since the formal consultation process ended in April 2017, both on the statutory registration scheme project and more widely across the legal aid and justice system.

Developments relating to the statutory registration scheme and legal aid

3.2. Further engagement with stakeholders on the statutory registration scheme continued into 2018 through a series of meetings with representatives of the profession's regulatory bodies to further refine the Codes of Practice and the draft legislation and address some of the specific identified issues. Further documentation including draft registration arrangements and compliance checklists were shared with stakeholders.

3.3. Work on the statutory registration scheme was paused in 2018 as it was not possible to proceed with the legislative instruments required to give effect to the scheme in the absence of the Assembly. It was also clear from the stakeholder responses to the consultation that there remained a number of issues still to be resolved in order to deliver a workable and acceptable scheme.

3.4. It was originally intended that the delivery of the statutory registration scheme would be taken forward alongside the introduction of the Legal Aid Management System (LAMS), the new digital case management system used to process all legal aid applications and payments. The two streams of work were separated in 2018 when it became apparent that the legislation required for the registration scheme could not be

progressed. The new case management system LAMS was introduced in July 2019.

- 3.5. In 2018, the Department commissioned a scoping study on the potential to introduce a system of contracting for legal aid services in Northern Ireland. In other jurisdictions, contracting regimes for publicly funded legal services focus on ensuring the availability of good quality services and such a system would provide an alternative way of achieving the intended benefits of a statutory registration scheme. A copy of the report is available on the Department's website.⁵
- 3.6. The report concluded that introducing contracting for most legally aided services in Northern Ireland would not be viable or cost effective. Instead, a blend of three elements was recommended as a more cost effective means of ensuring value for money in legally aided services. These are:
- a statutory registration scheme to ensure quality;
 - a desired outcome statement for legal aid to ensure quality and an effective pattern of service provision; and
 - continued remuneration reform.

The Justice Minister has accepted the recommendations of the report and the Department is progressing work on each of the three elements.

Wider developments

- 3.7. Since the 2017 consultation, there have also been a number of developments and changes in relation to the regulatory framework for each branch of the profession, such as revisions to the codes of conduct, changes and additions to Continuing Professional Development (CPD) requirements and new statutory obligations such as those relating to General Data Protection Regulation (GDPR). Given the links between

⁵ See report at [Department of Justice, Scoping study: Contracting for the provision of Legal Aid in Northern Ireland](#)

the regulatory responsibilities of the professional bodies and the statutory registration scheme, it will be important that these are considered and taken into account in the further development of the minimum standards and compliance framework.

- 3.8. The Covid-19 pandemic has had a significant impact on the justice system and providers of legal services (both publicly and privately funded), resulting in changes to the ways in which legal services are delivered to the public. It will be important that the impact of the pandemic, and the landscape of the legal system as we move into the post-pandemic recovery, are taken into account as the proposals for the registration scheme are further developed and refined.

4. DEPARTMENT'S PROPOSED APPROACH TO PROGRESS A STATUTORY REGISTRATION SCHEME

- 4.1. The Department remains of the view that a statutory registration scheme is essential in providing assurance in relation to the quality and value for money in legally-aided services. The Department is clear that the scheme should complement, rather than duplicate, professional regulation and that its aim should be to ensure both quality and value for money in publicly funded services. However, quality of advocacy and representation is difficult to measure and it will take time to perfect the design and implementation of that part of the quality framework and so that element will not be included within the initial phase of the scheme.
- 4.2. The Department is conscious of previous delays in the project, the need to progress a scheme in order to meet outstanding PAC and NIAO recommendations and the need to address the concerns expressed by stakeholders, particularly around the perceived change in emphasis away from quality to a much stronger focus on audit and compliance, the speed and approach of implementation, the potential overlaps with the regulatory responsibilities of the professional bodies, and the value for money and costs of the scheme.
- 4.3. Balancing these factors, the Department has taken the decision to re-initiate the project on a slightly different basis from what was envisaged in the 2017 consultation. The intention now is to focus on implementing an effective minimum viable model for registration that can be introduced relatively quickly, that takes a more proportionate approach to the audit and compliance aspects of the scheme, that builds in more focus on quality from the outset and that provides scope to develop the scheme more fully in the future.
- 4.4. In setting this approach, the Department has carefully considered the views and concerns expressed by stakeholders in response to the 2017

consultation, as well as the more recent developments impacting on a scheme as set out in the previous section. The Department's intention is to address those concerns and developments, where possible, and to engage with stakeholders to work through the more detailed and technical aspects of the scheme and seek to resolve and clarify any outstanding issues.

4.5. This re-initiated project is focused on delivering the four pieces of subordinate legislation required to give effect to the scheme and make the necessary consequential amendments to existing legal aid rules. These statutory instruments are all subject to the draft affirmative procedure in the Assembly.

4.6. In addition, the project will also deliver the key elements of the scheme including:

- Effective Codes of Practice for both solicitors and barristers;
- A proportionate and cost effective compliance framework to ensure compliance with minimum standards;
- A fee-charging methodology for those registering;
- An implementation plan; and
- The development of options and an outline plan for further development of the scheme, including consideration of further quality assurance mechanisms.

4.7. The Department's intention is to bring forward revised proposals on each of these elements of the scheme for further public consultation in September 2021, alongside revised draft impact assessments. The project will also seek to establish information sharing agreements with the professional bodies to ensure the smooth administration of the scheme and reduce the duplication of requirements on those registering.

4.8. Subject to the outcome of that consultation process, the Department intends to bring forward the subordinate legislation required for the

scheme within the current Assembly mandate which ends in May 2022. The Justice Committee has responsibility for scrutiny of these proposals and will be consulted before the legislation is considered by the wider Assembly.

4.9. The Department's intention is that the scheme would be implemented from late 2022. The implementation phase of the scheme will be led by the Legal Services Agency. This will be driven by the implementation plan and will include the development of guidance and support for the legal profession on the registration process.

4.10. The Department recognises the importance of constructive and open engagement with stakeholders throughout the project, in order to implement a statutory registration scheme that is workable, balanced and proportionate, and which delivers benefits outlined to all those with an interest in legally aided services. The Department has established a dedicated forum for engagement with the professional bodies (the Law Society and Bar Council) and we are happy to meet with any other interested parties to discuss our proposed approach and any key issues of concern. Please get in touch using the contact details at paragraph 1.5 above if your organisation is interested in meeting with the project team.

5. DETAILED SUMMARY OF CONSULTATION RESPONSES

5.1. This section provides a summary of the responses received from stakeholders in relation to the various aspects and elements of the scheme, along with the Department's response to those views. The responses of stakeholders are grouped under the following themes:

- Codes of practice and registration requirements
- Quality
- Registration fees and costs of the scheme
- Audit, compliance, sanctions and review
- Implementation
- Draft subordinate legislation
- Data protection and handling
- Impact assessments

Codes of Practice and registration requirements

Stakeholder views

5.2. The consultation document set out the basic requirements and supporting evidence that all suppliers, including individual solicitors, solicitors firms, voluntary organisations and barristers, must satisfy in order to register and comply with the relevant Code of Practice.

5.3. In general, stakeholders considered that the requirements in the codes of practice unnecessarily duplicated the requirements of the professional bodies in their roles as regulators of the profession and placed an unnecessary administrative burden on suppliers. Stakeholders pointed to the existing requirements, including statutory obligations, and commented that any additional regulation could be done by way of a much more limited scheme. Some commented that the Legal Services Agency should have a mechanism through which some requirements could be checked with the professional bodies (such as Continuing Professional Development

(CPD) training requirements) rather than relying on information provided by individual suppliers.

- 5.4. Stakeholders commented that the codes of practice must not contravene the regulatory requirements and that any future amendments to the codes should be agreed with the profession in advance. Some thought that any new demands placed on practitioners should be based on evidence and be cost effective. It was suggested that the Department should review the improved practices and protocols in place for the profession with a view to reducing any duplication in requirements. Some stakeholders thought that issues arising in the scheme which relate purely to the professional conduct of practitioners must remain within the remit of the professional bodies.
- 5.5. Some stakeholders felt that there was insufficient clarity on what would constitute compliance and the criteria which would be used to assess evidence of compliance. They thought that more clarity was required on the right of LSA to refuse any application to register and indicated that those seeking to register would require more details and guidance on completing the self-assessment. Stakeholders commented that either the LSA or the professional bodies should provide CPD training on the code of practice, establishing and evidencing compliance with the quality standards, and to provide updates on policy development. This should be subsumed within current CPD requirements (i.e. CPD should not increase).
- 5.6. There were some concerns that some specific provisions in the codes of practice could potentially interfere with access to justice or with client relationships. Stakeholders also had concerns that the proposed duty to report fraudulent or other criminal behaviour was too broad and overlapped with professional regulations. Other, more detailed comments were provided highlighting some specific provisions in the Codes of

Practice which were considered too vague, unclear, impractical or unworkable.

- 5.7. Stakeholders noted that there are difficulties in measuring quality in legal services. Client satisfaction is subjective and this must be taken into account when using it as an assessment tool. Measuring outcomes on a qualitative basis is problematic due to case variation and differing definitions of 'success'.
- 5.8. Some stakeholders felt that the requirements of the Code of Practice will not achieve the aim of appropriate level and quality of service. The focus should be on competence in the chosen specialist area(s) and the scheme should recognise the value of accreditation schemes. Stakeholders noted recent developments in client care and relatively few complaints since the Legal Complaints and Regulation Act (Northern Ireland) 2016 came into operation and thought that the scheme should therefore focus on quality assurance through case handling and file management as key aspects of service quality.
- 5.9. In relation to peer review, some stakeholders commented that this could be overly expensive and labour intensive and could have a disproportionate impact on smaller providers. There is a need to draw on the experience of practitioners in a peer review mechanism and consider how this could be implemented in a small jurisdiction. The Department should carry out full consultation on any proposal to introduce a peer review or other quality element including how it could be sustainably, adequately and fairly resourced.
- 5.10. The consultation document proposed that the scheme would have a retrospective effect, meaning that it would include cases where representation (under a legal aid certificate) was granted prior to the introduction of the scheme. This would mean that, in the event that a supplier with ongoing legally aided cases chose not to register with the

scheme, those cases would need to be transferred to a different representative who was registered.

5.11. Some stakeholders commented that this was not subject to previous consultation and that they objected to this on the grounds that it would amount to direct or indirect interference in the legal representation for ongoing cases. Others commented that, if this remained the policy intention, the Legal Services Agency and the professional bodies would need to take steps to ensure that suppliers and clients are fully aware of those implications.

Department's response

5.12. The Department is clear that the scheme should complement, rather than duplicate, professional regulation and acknowledges that the scheme will inevitably place some additional administrative requirements on suppliers applying to register. The Department intends to seek ways to minimise any duplication of effort as far as possible.

5.13. The Department recognises that there are a number of registration requirements (for example, on the validity of practicing certificates and training courses attended) where it would be more efficient for evidence to be provided by the regulatory bodies rather than individual practitioners. The Department will therefore seek to put in place information sharing agreements with the Law Society and Bar Council to agree the protocols and ensure that data handling and sharing is undertaken in compliance with GDPR and other obligations. While the supplier seeking to register will remain ultimately responsible for ensuring that their application for registration and supporting evidence is complete, accurate and timely, it is hoped that these information sharing agreements will help to reduce the administrative burden on suppliers, and minimise any duplication with the requirements of the regulatory bodies.

- 5.14. Following the formal consultation period, the Department had further engagement with the professional bodies to refine the draft Codes of Practice and address the concerns and objections to some specific provisions in the codes of practice. During the next phase of the project, the Department will continue to work with stakeholders to further refine and update the draft Codes of Practice, taking account of the detailed stakeholder comments on specific provisions as well as developments since 2017. The project will also include the development of an implementation plan which will set out plans for training and guidance for those registering. These will be subject to further consultation later in 2021.
- 5.15. The Department agrees that measuring quality in legal services can be difficult and problematic, particularly in terms of the quality of legal advice and representation. The Department also recognises that the proposals set out in 2017 lacked sufficient detail and focus on the quality aspect of a registration scheme.
- 5.16. In seeking to rebalance the quality and value for money aspects of a registration scheme, the Department's proposed approach is to build in more quality assurance from the outset and provide scope to develop the scheme further in the future. Initially, the focus will be on the quality of service to the client and case management with an intention to building towards standards on the quality of legal advice and representation in the future.
- 5.17. The Department intends to give consideration to further quality assurance mechanisms that could be used in this jurisdiction and will include an outline plan for future development of the scheme in the planned consultation later in 2021.
- 5.18. The Department has sought further legal advice in order to clarify the intention of the scheme in relation to the carriage of legally aided cases in

circumstances where suppliers choose not to register to the scheme, or choose not to re-register in subsequent years.

5.19. The Department is now of the view that the scheme cannot apply retrospectively to certificates granted before the Scheme was introduced. In these circumstances suppliers who choose not to register with the scheme can continue to represent legally aided clients and claim remuneration in respect of legal aid certificates granted prior to the scheme commencement until work authorised under those certificates concludes.

5.20. The Department intends to give further consideration to the implications in circumstances where a supplier had initially registered for the scheme but subsequently chooses not to register the following year, or is de-registered. Proposals in relation to these issues will be included in the consultation planned for later in 2021.

Registration fees and costs of the scheme

Stakeholder views

5.21. The consultation document set out the principle of cost recovery for the scheme derived from Managing Public Money Northern Ireland (MPMNI)⁶. In accordance with MPMNI, the consultation document proposed that the registration scheme would be self-financing through a fee charged to those registering. The consultation document further detailed proposals for the fee charging methodology which would introduce fees across a number of bands based on the legal aid income for suppliers in the preceding year.

⁶ MPMNI provides guidance on a wide range of issues, relating mainly to the proper handling and reporting of public money. It sets out the main principles for dealing with resources used by public sector organisations in Northern Ireland (NI). See [Department of Finance, Managing Public Money Northern Ireland](#)

5.22. Overall, respondents strongly objected to the principle of cost recovery and considered that both Article 36(4) of the Access to Justice (Northern Ireland) Order 2003 and MPMNI could both be interpreted as giving the Department a choice as to whether costs must be recovered. Some commented that similar schemes in other jurisdictions do not charge fees and that charging for registration would effectively amount to "a tax on legal aid". It was further commented that if suppliers have to pay for the scheme then there is no incentive for the Department to keep costs down and run the scheme efficiently.

5.23. Stakeholders considered that requiring the profession to pay the cost of its own regulation would need to be factored into operational costs at a time of economic uncertainty, which in turn could lead to erosion of quality of service. They stated that there are worrying cost implications particularly for small firms and younger members of the Bar, as well as presenting cash flow difficulties for those with VAT registration. Ultimately, it was argued, there is a risk that charging a fee will result in smaller firms pulling out of legal aid and the creation of legal aid 'deserts' as has happened in England and Wales.

5.24. Stakeholders also argued that the cost of first year registration should not fall to suppliers as they have the burden of setting up the scheme (through input of registration details) and the actual costs of administering the scheme, and therefore the registration fee, can only be determined after the first year of operation.

5.25. In relation to the proposed costs themselves, stakeholders commented that the proposed costs of administering the scheme were greatly in excess of what was previously indicated and unjustifiable given cuts to the legal aid budget. Stakeholders thought that the costing model didn't provide sufficient breakdown to assess value for money and didn't provide the appropriate comparisons with similar schemes elsewhere, or with audit and quality assurance processes for other public bodies overseeing

expenditure and large private sector companies, or with the costs of using an outsourced private provider to administer the scheme. The costs also did not include offset costs from replacing existing audit and compliance work in LSA and required further adjustment to take account of efficiencies (e.g. digitalisation of legal aid).

5.26. Some stakeholders thought that fees should be weighted or apportioned by legal aid income, otherwise smaller firms (doing less legal aid work) will end up subsidising bigger firms who are in a better position to pay. It was also suggested that a *de minimis* level with zero fee should be included where legal aid income is very small. Some thought that, if the focus of the scheme was practice management rather than professional competence, then those with accreditation should qualify for a discount on registration fees.

5.27. Stakeholders were concerned at the proposal to charge a fee for voluntary organisations and considered that this may amount to a barrier for some charities pursuing legally aided work, which could in turn impact on important test cases for social justice. They were concerned that some funding bodies may not agree to cover the fee and it may not be viable to refer a case to private practice (such as in cases of vulnerable individuals) and this could amount to a barrier to access to justice. Stakeholders thought that the Department should consider exempting voluntary organisations from a registration/membership fee due to charitable status, lower 'not for profit' hourly rate for professional services, restrictions of practice as per Law Society waiver and nominal costs received annually from legal aid fund, or apply a fixed nominal charge in line with lowest band as an exceptional measure. Any concession should be included in the legislation underpinning the scheme and the relatively small costs of doing so could be funded through any surplus money generated through the scheme. Stakeholders also commented that voluntary organisations should be exempt from paying fees for routine, extended or special audits, with only a nominal fixed charge levied in respect of a final audit.

5.28. Stakeholders noted difficulties in advance payment of fees based on historic earning patterns given delays in payments, significant fluctuations in volumes of work and rates of payment, and ongoing reform. They also thought that the potential fluctuation of costs of the scheme in any given year is not acceptable as was the potential for further increases in fees (as further quality assurance methods are introduced) given the already significant running costs, particularly considering that the service providers are not receiving a service for these fees.

5.29. Stakeholders also highlighted that there was no information provided on how additional fees (where routine audits are failed) will be calculated or the basis on which such a charge will be made.

Department's response

5.30. In relation to the principle of cost recovery the Department is content that MPMNI makes clear the requirement for the Scheme to be self-financing through recovery of costs charged to those registering.

5.31. The Department recognises that stakeholders have concerns in relation to the costs of the scheme and that these could have a significant impact on some suppliers. In setting out our revised proposals, we will seek to demonstrate value for money and ensure that the costs of administering the scheme are proportionate and necessary. The impact of the scheme on suppliers will be considered as part of the Regulatory and Equality Impact Assessment processes.

5.32. Through the next phase of the project, the Department intends to review the fee charging methodology to take on board the concerns raised by the profession. In particular, we will carefully consider the staffing structures required to deliver the scheme, set out how the proposed fees are calculated, and consider how the initial registration fees should reflect the operational limitations in the first three years as the scheme beds in.

5.33. The Department will also consider stakeholder comments on the banding fee structure that was proposed in the 2017 consultation with any required adjustments. The Department considers that this method remains the most equitable approach to setting the fee as it does not adversely differentiate between the different branches of the profession and each supplier pays against their legal aid payments level.

5.34. The Department would also plan regular review of the fees to take account of further developments of the scheme and adjust for changes in the resource requirements in line with the proportionate and risk based approach to compliance monitoring.

Audit, compliance, sanctions and review

Stakeholder views

5.35. The consultation document set out a proposed Audit and Compliance Framework for the scheme, including support to assist suppliers in achieving the necessary standards, details on audit processes and assurance ratings, and the sanctions that may be imposed if identified issues are not rectified, including de-registration.

5.36. In general, stakeholders did not support the proposals in relation to the audit and compliance framework. Stakeholders opposed the change in focus from a proportionate framework of compliance checks to demonstrate minimum quality standards to an increasing regulatory and audit apparatus. Stakeholders also felt that the proposals lacked detail in relation to the risk based approach to inspection (rather than a three year cycle), the audit intensity and frequency, how the assurance rating scheme would operate, how thematic and cross cutting audits would be triggered, what compliance visits and audits will consist of and what additional resources will be required to facilitate and conduct audits. Stakeholders had particular concerns in relation to requesting files for

inspection including the need to minimise the administrative burden on suppliers (solicitor firms in particular), the need to ensure that this power is exercised appropriately, a view that the costs of producing files for inspection should be met by LSA, and data protection issues.

5.37. Stakeholders were opposed to the proposal to publish the audit schedule as this could cause reputational issues amongst the public (who may think that being included on an audit schedule is an indication that a firm or individual has done something wrong), particularly if a risk-based approach to audit is adopted. The Bar Council noted that barristers would require notice that their work is likely to be included in a solicitor's audit.

5.38. Voluntary sector respondents indicated that less regular audit would be required for their organisations given the very small number of cases they are involved in and membership of accreditation schemes, although they agreed that dates for proposed audit should be published in advance.

5.39. Stakeholder also commented that suppliers should not face sanctions during the initial phases of an untested scheme, particularly without sufficient information and guidance provided in relation to audits. It was considered crucial that the minimum quality standards and the audit framework were agreed in advance of the scheme launch.

5.40. A number of stakeholders felt that the proposals in relation to the Review Panel were inadequate and that there should be professional representation on the review panel and a right to review of the decision of the panel before a judge. It was also suggested that the panel should include someone with a quality standards background.

Department's response

5.41. The development of a proportionate and risk-based compliance framework has been identified as one of the key products to be delivered under the re-initiated project. The Department intends to fully review the

2017 proposals, taking account of the comments provided by stakeholders, and develop a revised framework which will be brought forward for further consultation later in 2021.

5.42. The Department agrees that decisions taken by the Review Panel could have severe implications for suppliers and that there is a clear need for transparency and accountability in the decision making process. The Department agrees that the panel should include a designated Law Society or Bar Council representative (depending on whether the case being dealt with relates to a solicitor or barrister) and will consider whether there is merit in making provision for other experts (such as government officials with specific expertise of the issues in a particular case) to provide advice to the Panel as necessary.

5.43. The Department also agrees that there should be a right of appeal from the decision of the review panel other than Judicial Review, which, although not satisfactory, would be available if needed. The creation of a right of appeal to the High Court for decisions of the Review Panel would require an amendment to primary legislation, which would not be possible within the time remaining in the current Assembly mandate (which will end in May 2022). The Department therefore proposes to proceed without the creation of a right to appeal at this stage, with the intention of bringing forward such an amendment in the next mandate once a suitable legislative vehicle is identified.

Implementation

Stakeholder views

5.44. The consultation document proposed early full implementation of the registration scheme, originally intended alongside the introduction of LAMS.

- 5.45. Stakeholders commented that the timescales set out in the consultation document were unrealistic, particularly in light of the lack of detail, further development required and issues still to be resolved in relation to other aspects of the scheme. Stakeholders also felt that it was illogical to implement the scheme fully in advance of the rollout and testing of the digitisation programme, which needed to be fully integrated with the registration scheme.
- 5.46. Some stakeholders commented that the Department should consider operating a phased introduction of the scheme (as per the 2014 consultation) possibly with a pilot scheme in different regional locations (to measure impact on urban/rural communities), which would allow for ongoing review of scheme's proportionality and cost effectiveness. Alternatively, the Department should consider introducing a more limited scheme starting with registration and self-certification, with additional processes added over time if necessary.
- 5.47. Specifically, some stakeholders commented that a registration period occurring over summer recess would be unsuitable for the legal profession. They also felt that the initial registration period of eight weeks should be extended to provide sufficient time for suppliers to upload information and for this to be verified by LSA, as any error could result in a firm losing entitlement to funding for legal services and this could have a disproportionate impact on smaller providers. It was also noted that there were likely to be initial administrative and technical issues, particularly given that the consultation proposed rolling out an education and support programme after the scheme launch.
- 5.48. Stakeholders also commented that the scheme should be subject to regular and formal review. Stakeholders commented that any further reforms and material changes to the scheme such as peer review and a support programme must be subject to further consultation, especially if costs of this are to be borne by the profession. Some commented that the

scheme should provide opportunities to streamline the legal aid process, review the LSA procedural requirements and provide a mechanism for practitioners to suggest improvements. The scheme should include specific service standards that suppliers can expect from LSA, for example in relation to processing times.

5.49. The Attorney General noted the lack of sanction available in the event of market failure or withdrawal of services at least in the initial phase of the scheme, along with the constraints around the current case-by-case funding model, and urged consideration of a potential contracting model in the alternative.

Department's response

5.50. The timescales originally envisaged in the consultation document have now passed and many of the concerns expressed are linked to the digitalisation of legal aid, particularly the introduction of LAMS. The Department considers that some of these concerns are now mitigated following the successful launch of LAMS in July 2019.

5.51. Through the next phase of the project, the Department will develop an implementation plan setting out more detailed plans for the phased implementation of the scheme which is planned from late 2022. The implementation plan will be subject to consultation later in 2021.

5.52. The Department accepts the suggestion that the Scheme should be subject to a formal review period, similar to other legal aid legislative instruments. This will provide an opportunity to formally evaluate the workings of, and further refine, the Scheme on an ongoing basis. The Department also agrees that further development of the scheme including the introduction of additional quality assurance mechanisms and changes to the code of practice will require further consultation with suppliers.

5.53. As set out at paragraphs 3.5-3.6 above, the Department has concluded that an alternative contracting model would not be viable or cost effective in this jurisdiction at this time.

Draft subordinate legislation

Stakeholder views

5.54. The consultation included four pieces of draft subordinate legislation, namely:

- Draft Access to Justice (Registration) Regulations (Northern Ireland) 2017 to enable introduction of a scheme for civil legal services and criminal appeals in the Court of Appeal;
- Draft Criminal Legal Aid (Registration) Rules (Northern Ireland) 2017 to enable introduction of a scheme for criminal legal aid;
- Draft Civil Legal Services (Disclosure of Information) (Amendment) Regulations (Northern Ireland) 2017 to ensure that information retained in relation to the scheme is governed in the same manner as other legal aid information; and
- Draft Criminal Legal Aid (Disclosure of Information) (Amendment) Rules (Northern Ireland) 2017, also to ensure that information retained in relation to the scheme is governed in the same manner as other legal aid information.

5.55. No specific comments were received in relation to the latter two pieces of draft legislation (comments in relation to data handling are considered separately at paragraphs 5.59-5.60 below). Detailed, technical comments were provided and further clarification sought by respondents in relation to various aspects of the proposed statutory framework. Many of these comments relate to the policy proposals as discussed in earlier sections above and how these matters should be reflected in the draft legislation. These include comments and requests for clarification in the following areas:

- The register of barristers, solicitors and solicitor firms eligible to provide legally aided services;
- The period for registration after commencement of the legislation and cut-off periods required for the verification of information;
- The requirement to impose a fee for the registration scheme and the wide discretion of the Department to decide what level of fee is 'reasonable';
- The need for early sight of the forms to be completed and the information and supporting evidence that will be required at registration;
- Clarification regarding fees for newly established businesses and in-year registration;
- Further clarification in relation to provisions relating to non-compliance, refusal, warnings, suspension and deregistration;
- Further consultation on the compliance arrangements;
- Concerns that some provisions duplicate the regulatory role of the professional bodies;
- Lack of detail in relation to the contempt of court process and referral to the High Court;
- Requirement for external oversight and a right of appeal to the High Court;
- Notice periods; and
- Statutory review periods.

5.56. The Attorney General liaised separately in relation to technical points and the Bar noted that the draft Regulations and Rules should accommodate phased implementation.

Department's response

5.57. Since the end of the formal consultation period, the Department engaged further with both the Bar Council and the Law Society in relation to the draft legislation and these discussions assisted in further refining the proposed legislation in a number of areas.

5.58. The draft legislation that was consulted on in 2017 and subsequently refined will require further review and amendment to give effect to the final policy proposals and address the issues identified by respondents. The Department will carry out a full review of the draft legislation to take account of stakeholder comments and intends to engage with stakeholders to address any outstanding concerns. Revised draft legislation will be published for formal consultation later in 2021.

Data collection and handling

Stakeholder views

5.59. Stakeholders expressed some concerns in relation to how data collected through the registration scheme will be used and shared, including the need for assurances that the data being collected is required for the registration scheme and a clear articulation of how data collected will be used in relation to policy development and the legal aid reform agenda. Stakeholders also had concerns in relation to the sharing of confidential client information and concerns about the scheme being used to interfere with cases. Stakeholders thought that proposals in relation to data handling are required to mitigate these risks and the information sharing protocols between LSA and the professional bodies should be transparent. One stakeholder also commented that the data gathered at registration will help the Department address a lack of equality data and inform future targeted consultations on the delivery of publicly funded legal services.

Department's response

5.60. The Department accepts that data collected, used and shared in connection with the registration scheme needs to be handled in accordance with statutory obligations and the intended information sharing agreements with the professional bodies. The Department also recognises the need for transparency on how this data is handled. Details

on the proposed approach to data collection and handling will be included in the consultation planned for later in 2021.

Impact assessments

Stakeholder views

5.61. The consultation included draft Equality Impact Screening (EIS) and Partial Regulatory Impact Assessment (RIA) documents. Stakeholders commented that further analysis and evidence was required particularly in relation to the impact of the proposals on newly qualified members of the Bar, rural practitioners providing legal aid and the voluntary sector. It was also noted that it was important to further consider the impact of apportioning fees for registration on the importance of preserving access to justice for vulnerable clients.

Department's response

5.62. Following the consultation, the Department sought additional information to assist in ascertaining any adverse impact of the proposals and encouraged the representative bodies to collate and forward any relevant information for consideration and analysis so that the proposals could be tailored to take account of all available evidence. At that stage, no further information was provided.

5.63. In tandem with developing revised policy proposals, the Department will revise and update the draft Regulatory Impact Assessment and draft Equality Impact Screening and these will be subject to further consultation. These documents will assess whether or not, or to what extent, the proposals would have an unfair or negative impact on any section of the community or particular business model. The Department would welcome any information and evidence held by stakeholders that would inform the screening and impact assessment processes.