

## Introduction

The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.

## Background

The Bar Council welcomes the opportunity to contribute to the Department of Justice's targeted consultation on the introduction of a Statutory Registration Scheme. Following detailed engagement with officials, the Bar responded to the previous consultation in 2014, offering broad support for the proposed scheme.

We appreciate the extension granted in submitting this final response. A number of factors led to the conclusion that the original six week timeframe for the submission of responses was not appropriate or achievable. The consultation includes a significant amount of legislation requiring scrutiny, represents the first opportunity to properly scrutinise the proposed audit procedures for barristers and the proposed costings. Furthermore, we note a number of significant changes in the policy from the proposals previously consulted upon in 2014. A number of meetings with the Legal Services Agency and the Department have taken place in the intervening period to seek clarity and further information regarding the conduct of audits and the cost structures.

This response provides commentary on the consultation in accordance with the sections contained therein.

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Section 1.1 indicates that the Department believes it is currently '*in the final steps*' of introducing the registration scheme. However, rather than build on the previous consultation, the Bar of Northern Ireland believes that this consultation includes significant alterations to the scheme, many of which lack detail and have not been the subject of prior engagement, and would therefore challenge both the adequacy of a shortened targeted consultation and the expressed ambition of implementing the scheme in September 2017. This is illustrated by the fact that

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the 2014 consultation did not provide details in relation to the barrister audit framework with the intention that *“this framework will be developed further to apply to barristers through further engagement during the consultation period.”* The necessary engagement to develop the framework was not pursued.

The Bar welcomes the assistance provided by the Department and Agency in recent meetings which have provided an opportunity to discuss the proposed approach to be adopted with this registration scheme. This has reinforced our view that the scheme is only at an initial design stage without the necessary detail and evidence base to provide confidence and clarity and without due cognizance being given to the recent developments undertaken by practitioners and the professional bodies with regards to automation, data protection and regulation. In our view the scheme still requires a preparatory phase before full implementation as too much remains unknown and untested at this stage.

Section 1.1 states that *“the underlying purpose of the Scheme is to 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 and the public purse.”* The Bar supports this rationale and any genuine effort to ensure quality assurance. We see benefits for all concerned if there can be a proportionate means of achieving consistently high standards of quality and providing evidence to demonstrate how these are achieved. However, the Bar observes that, based on the proposed approach to data capture and auditing, the purpose of the scheme seems to have expanded and changed from its original scope. It is now attempting to serve multiple purposes with less reliance on the professional bodies’ regulatory measures, duplication of data entry arising out of the requirements of the parallel digitisation project and a much greater weighting on audit than had been anticipated. This consultation and the lack of clarity on key aspects such as the costs and audit framework has greatly eroded the confidence of our members in the stated purpose and the value of the overall scheme. A significant number of whom continue to have concerns that the purpose is to adjudicate on the conduct, advice, direction or outcome of a given case, which would be highly inappropriate.

Section 1.2 references *“the Department’s [original] intention to introduce the Scheme in a phased manner”*. Whilst recognising the position of the Department in wishing to introduce the scheme as soon as possible, the Department has not sufficiently substantiated the reasons for removing the phased introduction previously agreed. The Legal Services Agency requires time to inform itself afresh of the developments taking place within the professional bodies in relation to regulation, automation and quality assurance and to develop primarily the audit framework for both solicitors and barristers. In 2014, it was envisaged that

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the initial stage of testing would be without charge. As stated in our previous response, “*we would therefore suggest that the matter of a registration fee can only be determined following the first year of operation when it will be evident what costs are associated with the scheme.*”

It must be stressed that the Bar remains unconvinced that the scheme should result in any costs being borne by the profession and would point to the quality assurance schemes operated in all neighbouring jurisdictions which do not have such a feature. We comment on the proposed costs in a later section of this response. In light of the cost structure now proposed, the Bar cannot accept that the profession must bear the burden of costs associated with this scheme. Practitioners should not face potential sanction while an untested scheme is initiated and operated in the absence of development, information and guidance, particularly in relation to audits.

Section 1.3-4 refers to the recent publication of the Northern Ireland Audit Office report into Managing Legal Aid. We acknowledge the fact that both the Audit Office and Public Accounts Committee were highly critical of the Department for not implementing the scheme as yet. The Bar shares the view that such a scheme can deliver significant value in evidencing the quality of services delivered by the profession. However, we do not believe that the scheme can be burdened with the responsibility alone for addressing the range of criticisms made by the Audit Office and the public Accounts Committee and to do so, alters the original purpose of the scheme.

Section 1.5 states the aim “*to enable the introduction of the Scheme during the 2017/18 financial year*”. The Bar would strongly question the viability of this date, given the consultation deadline and the current lack of a functioning legislature to scrutinise and approve the secondary legislation. Furthermore, we would contend that additional work is required to ensure the scheme could be operational. As stated previously, the profession will not tolerate being subject to either costs or sanctions during a run-in period to develop aspects of the scheme which should be clear and in place from commencement.

## **Policy Intent**

Section 2 reiterates the Policy Intent of the Registration Scheme and we note that this reflects the previous consultation and post consultation report. In its previous response, the Bar welcomed and endorsed the policy intent underpinning the scheme, specifically in light of our regulatory functions. Our primary concern is that the value of the policy intent is now being challenged and compromised in the absence of the supporting operational and practical details.

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We note the intent to include voluntary sector organisations within the scheme. It is likely that the additional financial and administrative burden will be a considerable concern and may undermine the ability of such organisations to deliver their current services, which does not appear consistent with the Access to Justice Review.

Section 2 indicates that *“the requirements for registration will be set out in a Code of Practice”*. The Department and Agency must recognise that the Bar Code of Conduct is the principal governing document for practice in Northern Ireland and the LSA Code of Practice must not contravene any aspect. Any subsequent amendments to the LSA Code of Practice must be agreed in advance with the Professional Conduct Committee and the Bar Council.

Section 2 states *“compliance with minimum quality standards, as detailed in the Audit & Compliance Framework section of the Code of Practice, must be evidenced by self-certification, audit and compliance visits, administrative desktop reviews, customer surveys and complaints reviews”*. With our initial support for the proposed registration scheme, the Bar accepted the issue of compliance. However, the stated minimum quality standards and audit framework have not been advanced to enable practitioners to benchmark their current practice with what may be required as part of an audit. In the interests of fairness, this must be completed in advance of the scheme, prior to any consideration of charging or sanctions.

Section 2 states that *“the Scheme must be fully self-financing in terms of costs incurred in administering the Scheme, and ensuring compliance, which will be recouped through fees charged to those registering.”* The Bar has serious reservations in relation to the assumptions and approach adopted in relation to costs and operational structure which will be detailed further in this submission. The issue of self-financing was not fully outlined in the previous consultation and raises significant matters of equivalence, value for money and cost control mechanisms. The professions do not accept the argument that the costs of the scheme should be met by the profession. Furthermore from the perspective of safeguarding public funds, it is noted that in proposing the costing model, the consultation document does not provide the necessary assurance of stringent cost controls and a mechanism to challenge expenditure and development in the future.

Section 2 states that *“the data provided at registration may also be used to help the Agency meet its monitoring obligations under section 75 of the Northern*

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*Ireland Act 1998*". The Bar acknowledges that the collection of such data would be in the mutual interest of the Agency and the profession. However, the Agency must provide the necessary assurance that the data collected is required and that the stated purpose(s) is made known to the profession from the outset, both as a professional body and as an individual practitioner.

The Bar acknowledges that part of the function of the Agency is to contribute to the wider legal aid reform agenda. With responsibility for policy development being vested in the Department and the Agency focusing on operational business, the Bar requires a clear articulation of how any data collected through the registration scheme will be deployed in relation to policy development and the wider legal aid reform agenda.

Section 2.2 outlines that *"the scheme will be developed further with a second phase"*. The Bar would reiterate our previous response that *"any inclusion of additional elements such as advocacy services and peer reviews will require further targeted consultation with the profession."* The Agency must be aware that the implementation of first phase will be heavily scrutinised by the professional bodies and individual practitioners. The willingness of the Bar to engage in any subsequent development of the scheme will largely depend on the experience and success or otherwise of the first phase. We are increasingly concerned about the current and envisioned scope of the scheme. If there is a suggestion of the scheme having any other application or by products, this must be articulated. Whilst unacceptable notionally, it is even more so with the present contention of being funded by the profession.

## **Purpose of the Consultation**

Section 3.1 states that the consultation *"provides consultees with the opportunity to identify any practical issues which the Department should consider in finalising the arrangements to introduce the Scheme."* Through this consultation response and engagement with Department and Agency officials, the Bar has highlighted significant practical issues. We welcome the willingness of both the Department and Agency to address these. However, the support of the Bar Council and the membership of the Bar to engage with the scheme is predicated on these matters being resolved, ahead of implementation, charging and sanctions.

Section 3.4 states the legislative process envisaged by the Department. Given the current political issues and absence of a functioning Executive and Assembly, it is likely to impact the ambitious timeframe proposed by the Department. The Bar requests the Department to outline their proposed procedure in the event

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of a return to Direct Rule and seeks assurances that the proposals will receive similar scrutiny and no aspect of consultation with the Lord Chief Justice, Attorney General and Rules Committees will be compromised.

## **Implementation Proposals - Overview of the Scheme**

Section 5.1.1 states that “*the Scheme will be implemented once the legislation is commenced*”. The Bar restates its position that the practical details and clarity must be provided in advance of any legislative scrutiny or implementation.

Section 5.1.2 states that “*the scheme will help provide the necessary assurance*”. The Bar would restate our position that “*There can be no assertion that the absence of such a scheme equates to an absence of quality in the representation provided by the legal professionals who practice in publicly funded cases.*” Additionally, as presently constructed, we do not believe the scheme will secure the support of the professional bodies and the wider profession. Substantial work on the practical details is necessary to achieve the necessary assurance that the scheme will be of value and not merely serve as a ‘box-ticking’ exercise, incapable of achieving the desired outcome.

Section 5.1.3 outlines the Agency’s first phase of the digitisation process, which will involve suppliers submitting information on-line. The investment in technology to support the work of the Agency is to be welcomed. The profession looks forward to improved services available to suppliers and the introduction of direct payments as a matter of priority. However, it would have been useful for the Agency to have provided more details on the digitisation project while in development, given the likely impact on the Bar corporately and individual practitioners. More information is required on the wider application and future development of the case management system.

The Bar notes that the process outlined is not as per the engagement or consultation conducted in 2014, where the current practising certificate application process conducted by the Bar would be expanded to accommodate the required information, which would be centrally authenticated by the Bar and submitted to the Agency in a data transfer. This was the preferred option both for the Bar and the Department, aiming to reduce the administrative burden on the membership to complete duplicate processes and to reduce the workload of the Agency in verifying the details. This was also aimed to reduce the overall costs of the scheme.

The Bar invests considerable time and resources in processing applications and validating information submitted by members of the Bar to ensure their fitness

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to practice. Since the first consultation, the Bar has added further rigour and innovation to its processes and is planning further changes to comply with the European GDPR Regulation. The scheme as now proposed represents a major duplication in processes and with the Agency proposing to conduct validation, will ultimately create unacceptable additional costs for the Bar corporately. Information pertaining to the registration fields has highlighted that this is already achievable without altering the current annual application for a practicing certificate.

The Agency and Department have advised the Bar about certain protocols that must be observed by the Agency in relation to data collection. These have included NIDA but the Bar cannot see how the NIDA process adds any value to the profession and in fact introduces further duplication and delay. The Bar believes that any duplication of data in this manner should be avoided and it should not result in any costs being borne by the profession.

Section 5.1.4 states that *“the legislation has been drafted to allow a short interim period to facilitate the input of pre-registration details”*. We would restate our position that any implementation is subject to clarity on operational matters. Given the planned operational timeframe of the IT system from September 2017, this interim period would be occurring over summer recess and therefore, unsuitable for the legal profession.

Section 5.1.5 states that *no remuneration will be paid for any publicly funded work undertaken from the date the Scheme is implemented if the supplier is not registered*. This equates to the scheme having a retrospective effect which was not subject to previous consultation. Given the proposed charging, it is likely that not all barristers currently engaged in public funded work will continue to do so. They should not be effectively punished for choosing not to register, nor should they be forced to register. Moreover, clients should not be adversely impacted by the introduction of the scheme. For example, in a long running family case, both solicitor and counsel may be presently engaged in resolving the case, a requirement to withdraw from the case will have detrimental impact on the service offered to the client, the outcome of the case and the efficient conduct of the court system. The Bar strongly objects to any direct or indirect interference in the representation of clients in current cases.

Section 5.1.6 states that *“the full costs of the Scheme must be recovered and therefore those registering will be required to pay a fee at the point of registration”*. This represents a significant departure from the previous proposals and therefore has not previously been subject to consultation. The Bar restates

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our contention that *“the matter of a registration fee can only be determined following the first year of operation when it will be evident what costs are associated with the scheme”*.

However the profession wishes to make clear that it does not accept the argument presented in the consultation document that the costs of the scheme will be met by the profession.

The consultation makes reference to Chapter 6 of Managing Public Money Northern Ireland (MPMNI) when describing the requirements for full cost recovery. However, there are variations on the statutory registration scheme in operation in each of Scotland, Republic of Ireland and England and Wales. None of those schemes are structured for fee charging in the manner proposed by the Department and the Bar requires an explanation for the scheme in Northern Ireland being subject to a unique fee recovery model.

From the perspective of safeguarding public funds, the costs associated with the scheme should be proven to be justifiable, controlled and represent value for money. This has not been demonstrated in the costs presented within the consultation document. There is an unsatisfactory lack of detail on how costs will be controlled and how efficiency and value for money will be assessed and proven. The Bar has questioned how the costs were derived and how they compare to other benchmarks. The Bar understands that a comparison could not yet be made against outsourcing of the function to an external audit function because the scope of the services and the performance criteria remain to be fully defined. However, this merely proves the point that the arrangements described are not ready to be implemented in full and are subject to an initial experimental or testing phase.

Section 5.1.7 states that the second phase of the scheme will be subject to targeted consultation in advance of later implementation. Any development of the scheme must be subject to a full formal consultation and direct, detailed engagement with the professions. The Department and Agency should not hold the expectation that a second phase is inevitable or can be introduced over the objections of the professional bodies and practitioners. As previously stated, it will be dependent on the success or otherwise of the first phase and evidence that the desired performance and purpose are being achieved.

## Legislation

Section 5 outlines the process in relation to the governing legislation. The Bar would contend that significant work remains in clarifying the underpinning policy



and the associated costs. Draft legislation prepared to date may require amendment to give legislative effect to the further details requested. At a minimum, the draft rules must accommodate the phased implementation as previously consulted and agreed upon.

## Registration Fees

Section 5.3 details information in relation to registration fees with s5.3.2 providing the first available indication of likely costs. As stated previously the costs proposed represent a significant departure from the previous proposal and therefore has not previously been subject to consultation. Our response in 2014 detailed that *“the present consultation paper comments only on the principle of the proposed methodologies, not on the individual amounts of the proposed fees or whether the overall level of cost being proposed is reasonable. We presently have too little information to make an informed assessment of those matters.”*

The present costs and structures now outlined are greatly in excess of what was previously indicated and the consultation does not provide a detailed breakdown of the costs, in particular the salary costs and the model for determining the staffing structures.

It should be recognised that in other jurisdictions, similar schemes are not charged to the profession and to date, we have not been persuaded that this should not be the case in Northern Ireland. The costs of the scheme should therefore not be funded by the professional bodies and the proposals contained within the consultation document in this regard are not accepted.

Furthermore the professional bodies believe that the scheme in general will be discredited and challenged on the grounds of delivering value for money and safeguarding public funds if the currently proposed costs were to be incurred by the Agency in running the scheme.

However, from the point of view of a stakeholder rather than a sponsor of the scheme, the Bar consider that the costs proposed are excessive and cannot be accepted as:

- It remains unknown what the resources will be tasked with delivering and as a consequence what value will be derived from this level of resources;
- The costs do not include any offsetting cost savings to be derived as this scheme replaces existing internal audit and compliance activity within the Agency;

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- They do not compare favourably to the costs of similar schemes operated by the peer organisations to the Agency in other jurisdictions. For example, Scottish Legal Aid Board incurred quality assurance costs of £198,000 in 2014/15 and £235,000 in 2015/16 in relation to a Legal Aid Fund expenditure of £138million in each year. As stated elsewhere, other jurisdictions do not recoup fees from the profession in the manner proposed in this consultation;
- They do not compare favourably with internal audit and quality assurance costs incurred by other Northern Ireland public bodies tasked with overseeing effective and appropriate use of public money. For example, Invest Northern Ireland had a notional Internal Audit cost of £267,000 in the year ending 31 March 2016 in relation to Grants and Programme Related Costs of £138million;
- They do not compare favourably with the internal audit or quality assurance costs of private sector companies in Northern Ireland with turnover of c. £100million;
- They have not been compared to the costs of providing the anticipated service by using outsourced private sector providers which affords full flexibility in terms of fluctuating demand.

Section 5.3.3 notes that “*the annual costs in any given year may fluctuate*”. Whilst conceivable, this is unacceptable and inadequate given the lack of any oversight and ability to scrutinise or control costs.

Section 5.3.4-5 details the compliance stage in a strategic context. However, the consultation does not provide the necessary supporting practical information. Without knowing the details of what a compliance visit or audit consists of, it is highly unlikely that the proposed number of days, duration of audits or resources required is accurate. The Bar would require this level of detail prior to any agreement to proceed to implementation in order to prepare our members to undergo such compliance checks.

Section 5.3.6 outlines the duration and schedule for registration. The Bar’s position is that the scheme should not be funded by the practitioners and as further practical evidence in support of this position we would highlight that the concept of seeking an advance payment from practitioners based on historic earning patterns at a time when practitioners experience significant delays in receiving payment and when volumes of work and rates of payment are undergoing significant fluctuations and reform is deeply flawed. In addition this model would represent a considerable financial burden to younger members of

the profession and would also create a cash flow difficulty for VAT registered practitioners to pay a further lump sum three months after the tax deadline.

## **Registration, Compliance, Audit and Review Panel**

Section 5.4 covers the registration, compliance, audit and review panel. Section 5.4.1 details that “suppliers must provide required evidence that they comply to the Code of Practice”. However, the consultation does not address what the required evidence is. Whilst the Bar can accept that there may be a need to develop such detail through a period of testing and trialling, it is of grave concern that the scheme proposes an implementation date of September 2017, a staffing complement and cost recovery model and proposes the existence of sanctions for the profession for non-compliance for operating a system when there is a fundamental lack of clarity about what will constitute compliance.

We strongly urge the Department to review and recognise the various practices and protocols that exist within the profession. Many of which have been subject to improved rigour and testing, agreed protocols, increased automation and innovation in the face of factors such as external quality assurance schemes, European GDPR and the incoming Legal Complaints and Regulation Act.

Section 5.4.3 outlines “the Agency’s right to refuse any future application”. The Bar would request examples of when such a right would be envisaged and requests that an appropriate appeal mechanism is included, given the potential detrimental impact to a practitioner’s practice.

Section 5.4.4 lists the various policies and procedures which must be in place and evidence of compliance will be required. The Bar would highlight that this was not included in the Barrister Code of Practice in the previous consultation and represents a significant addition. With reference to section 5.4.6, we would reiterate our contention that the Agency must provide the criteria against which evidence will be assessed in each of these policies and procedures, prior to implementation. The Bar would welcome the opportunity to work with the Department and the Agency to develop such detail.

Section 5.4.9 raises the issue of publication of the audit schedule in advance. Given the negative connotation associated with audits, the Bar would propose that the audit schedule should not be in the public domain. However, we do agree that barristers require notice of the likelihood of their work being included in the audit. The distribution of such information can be facilitated with the Bar Library and in internal communications with the membership.

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Section 5.4.11 refers to the minimum standards in respect of legally aided cases. To date, the Department and Agency have not been able to state or provide information on the minimum standards.

Section 5.4.12-24 provides a summary of the audit and compliance framework. The Bar does not believe the appeals mechanisms as presently constructed are sufficient. We note that the constitution of the Review Panel has widened the panel but to ensure the confidence of the profession, requires a professional member. Furthermore, section 5.4.22 makes provision for the Agency to bring in other government officials with specific expertise to the issue at hand, yet does not recognise the need for a professional representative with legal practice expertise.

## **Information Sharing protocols with Regulatory Bodies**

Section 5.5 outlines information sharing protocols with regulatory bodies. Subject to resolution of other issues with the scheme and phased implementation, the Bar will engage with the Agency to develop information sharing protocols. It is imperative that this is fully transparent and our members are aware of such arrangements.

Section 5.5.2 recognises the increased practicality and efficiency of the professional and regulatory bodies supplying and validating information. This is not reflected in the Agency's proposed duplicated registration process.

## **Impact Assessments**

Section 6.1 The Bar would reiterate the view that the Agency should consider the impact on newly qualified members of the Bar.

## **Annex B: Code of Practice**

Section 2.1.1 states an obligation to comply with the format determined by the Agency. We would refer to our earlier comments in relation to the duplication in the currently proposed registration process.

Section 2.1.2 states the obligation to pay any prescribed fee. The issue of costs, charging and necessary controls remains to be resolved.

Section 2.2.1 requires a barrister to "*forward a copy of his current Practising Certificate to the Agency*". Members of the Bar are no longer issued with a paper/electronic certificate and instead, are included on a registered list with an assigned number and hold a SmartCard for identification purposes. A list of

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barristers operating in Northern Ireland with a valid practicing certificate is maintained on the Bar of Northern Ireland public website.

Section 2.2.4 states that the Agency may refuse the application of any barrister if not satisfied that they are capable of discharging their responsibilities. As presently drafted, this provision is too broad and requires the Agency to stipulate the circumstances of such a refusal. It should also make reference to the means by which a barrister could appeal this determination.

Section 2.3.2 requires “*the completion of a self-assessment*”. The Bar would request further details of what is involved in the self-assessment and the criteria to which a barrister would assess his/her current practices.

Section 2.4.2 relates to the completion of CPD courses relevant to legally aided cases. The Bar would suggest that once per term, Agency or Department officials may wish to hold a CPD session, updating practitioners on policy developments, new guidance and circulars.

Section 2.5.1 requires the submission of a copy of the barrister’s CPD record. At present, this record is submitted manually and kept on record by the Bar Council, who validates the attendance and points, in accordance with the practicing certificate application process and schedule. Under the previously proposed registration process, the Agency would have no requirement for a copy. The CPD system is currently under development and it is expected to be a fully digitised process before the end of 2017.

Section 4.6.3 includes a provision that “*barristers shall give assisted parties copies of any questionnaire issued by the Agency for the purpose of measuring assisted party satisfaction*”. This is objectionable to our members as an undue interference in the client/barrister relationship. Any request for feedback or questionnaires must be issued and managed directly by the Agency.

Section 4.1 outlines the standards of professional service. With a number of exceptions, the standards are open to wide subjective interpretation and does not provide sufficient detail for the purposes of self-assessment or auditing.