



Northern Ireland
Assembly

Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

Legal Complaints and Regulation Bill:
Departmental Briefing

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Mr M Foster: There are a number of strands to that. First, the starting points in those jurisdictions were significantly different from the starting point that this jurisdiction faced. Your researcher set out quite clearly the fact that there will be a fairly radical overhaul in the Republic of Ireland over the coming months and years if the Bill is passed as it stands. That Bill was catalysed by the troika agreement, as your researcher pointed out. The enactment and delivery of that Bill is subject to a country-specific recommendation under the EU semester process that followed on from troika. So, the impetus for the Bill there was a lot different from the issues facing this jurisdiction.

Again, Scotland is different, as the self-regulation model still exists there, and there are no plans to change that. The Law Society of Scotland is the regulator of the profession. The difference in that jurisdiction is that responsibility for dealing with service complaints has been taken away and given to an independent body. That was very carefully considered, first of all, by the legal services review group, under the chairmanship of Professor Sir George Bain, and subsequently when the Department consulted on the draft Bill. Again, the issues faced in this jurisdiction were different from those faced in Scotland. In Scotland — I think that your researcher mentioned this at one point — there were upwards of 3,000 to 4,000 complaints being made against solicitors at that time. In this jurisdiction, even when Bain was carrying out his work, there were approximately 350 complaints a year against solicitors.

We were dealing with a different scale and a different type of issue. You have heard over the course of the various evidence sessions — your researcher mentioned it again today — that the number of complaints against solicitors is lower now than it was eight or nine years ago. The figure of 76 complainants in 2014 was mentioned. There is an issue in relation to scale and proportionality. The model that we are putting forward in the Bill is a proportionate response. At the same time, it significantly enhances the independence, oversight and transparency of the complaints-handling system. You have to remember that, at this point, any complaint made to the Law Society is heard by a complaints committee that must, under the Solicitors (Northern Ireland) Order, contain a minimum of two thirds majority solicitor representation. That, of course, has led to the perception that solicitors look after themselves in such cases. That is a perception that this Bill will move away from. Not only will we have complaints committees that are chaired by a layperson — at the moment, they are chaired by a solicitor — they will also contain a lay majority, so laypeople will be in charge of the process.

We also will have a move away from a Lay Observer — at the moment, they can really only pressurise the Law Society to look again at how it has handled a complaint — to a person who will have significantly enhanced powers, including target-setting and the power to penalise the professional bodies, which the Lay Observer does not have at the moment. There has been considerable debate about this. The Department has looked at the other models over the course of the last number of years. We still go back to the Bain principles. Bain did not come to his conclusions on the back of a postage stamp; he looked at this very carefully over the course of a year and took evidence from a lot of people.

The Chairperson (Mr McKay): You mention moving away from the status quo. The question for me is this: does it move far enough away?

Bain was a good report that was, rightly, lauded by all sides in the argument. However, it was nearly 10 years ago now. Things are changing here and in other jurisdictions. Perhaps we need to be mindful about other aspects of this, too.

Mr M Foster: I fully accept, Chair, that the Bain report will be nine years ago in November of this year. The Department was conscious of that when the draft Bill was ready to go. It would not necessarily be a usual process for the Department to consult on a draft Bill before it goes to the Assembly, but we took the view that, because Bain was, at that point, seven or eight years in the past, it was important to go out again to consultation to see whether Bain's recommendations still carried the force that they had back then. The consultation gave a very clear signal that the Bain recommendations were still valid. That consultation took place last year.

There was not an overwhelming view from anybody during that consultation that the model that we have based this on, which is based on the Bain recommendations, is not proportionate or correct or does not go far enough. The Department's evidence to date has pointed very much in the direction that the Bain reforms are still valid.

The Chairperson (Mr McKay): You made the point about proportionality in regard to Scotland, but that could apply in reverse. We have a very small community here of solicitors, barristers and those of a legal background. That being the case, where everybody knows everybody, perhaps there is more of an argument for independence here than in Scotland.

Mr M Foster: I understand that point of view, Chair. At the same time, though, we have to remember that, if we have a fully independent body, significant extra costs will be attached to it. That body might have only a small number of complaints with which to deal in any given year. This model keeps the proportionality and keeps the costs to a reasonable level but also affords a level of independence. It is not the case now that the Law Society will be able to, for example, hand-pick its laypeople or committees. That will all have to be done under the Nolan principles under the very clear and direct oversight of a Legal Services Oversight Commissioner with significant powers to set targets and make sure that targets are met. Ultimately, if things do not go to plan, he has the power to hit the professional bodies in the pocket.

The Chairperson (Mr McKay): What degree of bureaucracy is in the system that you propose? There are different committees, such as the Bar complaints committee. You might argue, "Why not go the whole hog with an independent set-up?". Why would that cost any more to the public purse?

Mr M Foster: There is an economy of scale at present, Chair. For example, the Law Society has accommodation, just to give one strand to it. A fully independent body would need, as a starting point, to find accommodation. When you are dealing with the number of complaints that go through the system at the moment, an independent body would probably need a staffing structure to support it. The Law Society has that staffing structure in place, so there would be no additional cost. So, there are a number of different factors, which suggests that the cost, as one aspect, will be significantly higher under a fully independent body than under this model.

The second aspect is one that the Lay Observer has alluded to on a number of occasions, — he is the person who has the most direct knowledge and experience of the system and, at times, can be critical of it — that it is his firm view that to take responsibility away from a professional body almost lets him off the hook, and there might not be the same incentive for standards to be raised and maintained. There has been clear evidence that, over the last seven or eight years after Bain reported and with the very strong possibility that legislation would follow, the Law Society has taken active steps to improve the complaints-handling experience. That is reflected in the modest downturn in the number of complaints. The Lay Observer is firmly of the view that to remove that entirely to an independent body is not the way forward.

The Chairperson (Mr McKay): It is worth noting that the Bill going through the Dáil includes provision on the definition of complaints: is that something that we can add to this Bill?

Mr M Foster: We have had discussions about that on a number of occasions, Chair. It is still my view that it is difficult to define what a complaint is.

The Chairperson (Mr McKay): But they are doing it in Dublin.

Mr M Foster: Yes. I am not going to say that I am not going to look at that; I am happy to be involved in a conversation about that to see whether it would add anything to the Bill. In the context of the Bill, though, given the scope and nature of it, I am not sure that it would necessarily take us much further. The bottom line is that, if you have a complaint, you tend to know whether you have a complaint. I would not want to see a situation where we define a complaint and those who operate a system relying on that to exclude other things that may not be as tightly covered in the definition. Ultimately, there is provision in the Bill for complaints committees to make rules, and there is nothing to stop them defining what a complaint is and what they consider to be a complaint.

Mr McCallister: I have a couple of points. Following on from the Chair, complaints are down and you have said that they have fallen over recent years. Is there any hard evidence for the reasoning for that? Is there anything to suggest that there may be frustration from the public that it is barely worth complaining? Has any work been done on that?

Mr M Foster: The reason for the number of complaints slightly tapering off, according to the Lay Observer's work, is that the Law Society has taken steps to improve the complaints-handling process. When Bain reported in 2006, there was no onus on a solicitors' firm to have, for example, an in-house

complaints system. In 2008, following the Bain report and the recommendations that that group made, the Law Society brought forward regulations that placed an onus on each firm of solicitors to have an in-house complaints-handling system. Of course, that could be a factor in why complaints have fallen off a bit. Some of those complaints may well have gone to the Law Society for formal investigation and may well have been resolved internally in the in-house complaints-handling systems.

That is not to say that the vast majority of firms did not have their own in-house complaints systems in 2006, but the 2008 regulations of the society made it compulsory. That may be part of the explanation. The other aspect is that the Lay Observer had noted a trend over the last number of years of the Law Society making greater efforts to train its members in these matters. There is greater awareness that complaints need to be dealt with properly and that standards need to rise. I think that there is a combination of factors. I do not think that we have any particular piece of hard evidence to explain why there has been a slight decrease in the number of complaints over the past decade or so.

Mr McCallister: Are you confident that, at least, it was not because people thought that it was not worthwhile?

Mr M Foster: The work of Bain, and that of the Lay Observer in the years since, point to the fact that, back in 2006, that explanation could well have been valid; that complainants may well have thought that there was not much point in complaining. In fact, during the Bain work, we carried out an omnibus survey that threw up that a percentage of people did feel that there was not a great deal of point in complaining. The percentage involved in that omnibus survey was not so much that we were led to the dramatic conclusion that there were vast swathes of people who were not using the system to make a complaint, although, certainly, it was a factor.

It is our view that that factor should be greatly minimised in the Bill because they are not going to be dealing with the Law Society complaints committee, led by a professional and with a two thirds minimum majority of professional members. They will be in a system that will be very much more in the public focus with the work of the Legal Services Oversight Commissioner because one of the responsibilities in the Bill is to ensure that there is access to the complaints committees and to ensure that the public are aware of their rights and the way forward for them when they have a complaint.

Mr McCallister: In your earlier answer to the Chair you talked about the Law Society having office accommodation and staff. You will have heard me — you were in the room when Ray was in — talking about the firewall between the professional body and the regulator. I sometimes get slightly nervous when we do something just because they are in the building and have the staff and that we do not have a clear division between the two: the professional body does this and represents solicitors, and the regulatory arm does professional development, regulations, complaints and all that. Those are two very distinct roles and should not overlap.

Mr M Foster: I understand that. That perception will be a key challenge for both the Law Society and the Legal Services Oversight Commissioner. However, the Law Society is aware of that and has already taken steps in its planning process, as I understand it, to separate out completely the complaints-handling department from the rest of the organisation. One has to remember that the Bill contains specific provision that anybody who is involved on the regulatory side or the representative side of the Law Society, such as a council member, is not allowed to serve on a complaints committee. That is not the case at the moment.

Mr McCallister: The constant argument that we get about this is that we do not have the scale of, say, the Republic's, the Scottish or even the English model. A counterargument is that the broad principles of good regulation should not change dramatically whether you are a huge organisation or a very small one. The Chair made the point that, in November, it will be nine years since this was published. There is almost a feeling that the world has moved on and we are barely doing enough in the Bill to bring us up to where we are. Do you think the Bill goes far enough to meet the broad principles of good regulations for whatever professions are involved, whether medical or legal?

Mr M Foster: Again, there are two aspects to that. As I mentioned to the Chair, the Department went out last year and consulted on this again to see the response to the exact question that you raised, which was that Bain is eight or nine years old. The responses that we got were, by and large, the same as the Bain recommendation. Not all those responses were from Law Society or Bar Council members. In fact, some of the strongest supporters of the model that we put forward were organisations such as the General Consumer Council, the Federation of Small Businesses and other consumer groups that, on behalf of their members, have a clear interest in legal complaints.

I accept that there is still that perception and a question mark over whether the Bill goes far enough, but the Department has always made it clear and the Minister made it clear at Second Stage that this model does not work well and does not meet the aims that the Department expects it to. However, it is not the end of the process as far as we are concerned. We will certainly monitor how the Bill works over the next number of years. If we are at the stage, three or four years down the line, where it has not realised the benefits that we expected it to, we can reflect on that and perhaps look at putting forward a stronger model.

Mr McCallister: The only thing that I will say briefly in reply is that the fact that DFP has had Bain's report since November 2007 and we have the Bill before the Committee only in 2015 does not exactly give me great confidence that we could act quickly if you thought that there were gaping holes in it. We probably have to get this nailed down. Was it 1976 that solicitors regulations —

Mr M Foster: It was amended in 1989.

Mr McCallister: There were 13 years from 1976 to 1989, then a report was done in 2007, which was 18 years later, and nine years after that we are getting to the Bill stage. Realistically, Michael, the chances of us amending anything about this in four or five years would probably be quite slim.

Mr M Foster: I would not want to get into any discussions about why it has taken so long to reach this stage, but, as we move forward, I am hopeful that it might not take quite as long.

Mr McQuillan: Michael, you mentioned in answer to the Chair that cost was also a big factor in the Bill. I do not think that cost should come in to making legislation; it should be all about making the best legislation that we can. On reading the Bill and listening to what has been said, I think that the success or failure of the Bill will depend on how the commissioner reacts to the whole thing. He is the important guy in the whole lot of it. How will he be appointed? More importantly, maybe, how can we get rid of him if he is not doing what he should be under the Bill?

Mr M Foster: The simple answer is that the commissioner will be appointed by the Department. That will take place under the normal process for making public appointments, with the various safeguards and checks. The Department can hire and fire, I suppose. That is the stark answer to that. Going forward, the Department will obviously want to monitor how the Legal Services Oversight Commissioner performs their role.

Mr McQuillan: That is wild important to the success of the whole Bill. If we get that wrong, the Bill and what we are trying to do in it will fail as well, and I honestly do not think that the cost should come into it when we legislate.

Mr D Bradley: Good morning, Michael. What you said sounds a bit like, "These are our principles, and if you do not like them, we will get you a new set in the future". You do not sound as though you are very confident in the Bill. You are saying, "We will try it for a while, and if it does not work, we will get you something else". Why not get it right now?

Mr M Foster: I was maybe slightly inelegant in the way I put forward that comment. The Department is confident that the Bill strikes the right balance. It strikes the right balance on proportionality and on the issues that have been uncovered during a fairly lengthy and involved series of events getting us to where we are. The point I was trying to convey is that it is normal for there to be a post-legislative analysis of any legislation. The Department, in its overall policy responsibility, has a role to make sure that any legislation it brings forward works in the way that was intended and that the benefits that we anticipated are realised.

I was not trying to strike a cautionary or even a pessimistic note about our expectations of how this will play out in practice. As far as we are concerned, we have considerable buy-in from both professional bodies. Both are very keen to make this work. They know that, if it does not work, the Department can, in the future, bring forward change in a more radical or a stronger way. However, at this point in time and given what has gone before, the Department is of the view that this is the correct balance and that this model should and most likely will work. In my experience, you can never say with 100% confidence that that will be the case for any legislation, but we think that this strikes the right balance at this stage.

Mr D Bradley: Are any other professional bodies governed by similar legislation?

Mr M Foster: The medical profession has a self-regulatory structure, as do a number of other professions. The legal profession is a bit different from those just by the very nature of its work. This model, where we have a great deal of laicity and a greater involvement of laypersons and other professional bodies, is slightly different. However, that is the model that has been pointed to as the correct way forward by those who have worked closest with the existing model. The Lay Observer, for example, is very supportive of this as a model, and he is the postholder who has had the most direct experience of how the existing system works.

Mr D Bradley: What about the Bill makes you confident that the person seeking redress against a solicitor or barrister will be well supported?

Mr M Foster: Well supported in what sense?

Mr D Bradley: By the provisions of the Bill.

Mr M Foster: For a start, the mechanisms for redress are significantly enhanced from those in the existing model. Under the existing model, if you have a complaint against your solicitor, there is absolutely no provision for compensation to be paid, for example. That is specifically catered for in the Bill, so that is one move forward. The second is the fact that we have a Legal Services Oversight Commissioner to act as a guardian of this model. As has been noted and as the Lay Observer would say himself, the Lay Observer's powers are very limited. This person, the Legal Services Oversight Commissioner, will have much stronger powers and, to coin a phrase, will have teeth. That person will be almost the custodian of the new system. They will be there to ensure that there is openness and transparency and that anybody with a complaint has a clear pathway for that complaint. They will have a very strong power in relation to both professional bodies to make sure that they operate the system effectively and efficiently.

The Chairperson (Mr McKay): In correspondence with us, the Bar Council indicated that it believes that it and the Law Society should have some sort of role in appointing the Oversight Commissioner. What is the Department's view on that?

Mr M Foster: The Department does not share that view. We feel that it is important that any appointment of the Legal Services Oversight Commissioner is removed from the professional bodies so that there is no perception that they have had an influence on whomever the postholder is. We considered their views during the consultation, and the professional bodies suggested that there might be a role for the Lord Chief Justice from a more independent perspective. The Bill has catered for that by noting that an appointment by the Department can be made after consulting the Lord Chief Justice. The Lord Chief Justice is best placed: if either professional body has any strong concerns, the Lord Chief Justice will certainly be there as a consultative figure. Ultimately, it will be the Department that makes the appointment, but that will be based on the very strict use of the existing principles for public appointments. We will most likely see an independent appointment made by a panel in the usual way.

The Chairperson (Mr McKay): How much is the levy likely to be? I think that you previously indicated that it would be between £80 and £100. A concern was also raised about that.

Mr M Foster: Obviously, the professional bodies will be paying for this, so they have a concern about what the costs will be. Our initial views on this are that, given the nature of the work of the Legal Services Oversight Commissioner, under the legislation, it will be a single postholder probably supported by a very small staffing structure. We do not consider that the costs will be prohibitive. We have not finalised the precise nature of the levy at this stage, but if it was to be taken on the very broad, blunt instrument of per head, per practitioner in this jurisdiction, the upper figure does not look to be any more than £100 per person. We feel that, for effectively £2 per week per practitioner, it is not something that the professional bodies should get overexercised about.

Mr Cree: Following on from that, Michael, you said that the professionals bought in to the whole thing. The Law Society certainly has a concern about those costs. In fact, it reckons it could be £2,500 in practice, if you excuse the pun.

Mr M Foster: With respect, I think that that would be highly unusual. It has to be remembered that there are two aspects to the increase in costs for the professional bodies. The first is the levy itself, which is the statutory part of it to pay for the Legal Services Oversight Commissioner. The costs of that are, broadly speaking, within the control of the Department. Certainly, we do not consider that

that will be above £100. The second aspect is the increased costs involved in the Law Society appointing, maintaining and running complaints committees.

Certainly, the figure of £2,500 is new to me. In any discussions I had with the Law Society on the issue when we were looking at the model, it suggested that there could be an increase in costs to a practitioner of between £300 and £500. If you extrapolate that across a profession that contains approximately 2,500 members, you are into considerable amounts of money. I cannot see how a figure of £2,500 could possibly be arrived at.

Mr Cree: What budget figure is the Department using?

Mr M Foster: In relation to?

Mr Cree: The whole exercise.

Mr M Foster: In relation to the whole exercise, the Law Society presented figures to us in the past. The Law Society was kind enough to copy me in to its correspondence to the Committee in its call for evidence recently, and I saw that the Law Society was suggesting that it could be up to £500 per practitioner. That is certainly at the very upper end of our —

Mr Cree: A practitioner may have four assistants, for example.

Mr M Foster: Yes. If there is a bigger firm, the costs could well be £2,500 over the course of a year in the context of the whole model, but that will not be for the levy, which is the part that is statutory. I think that the Law Society will be better placed to determine those costs and will be best placed, if need be, to contain any costs to its members. The Department will be in a better place to determine what the levy will be.

Mr Cree: So you have not had the poverty bid yet from them.

Mr M Foster: It is clearly an issue. The levy regulations that will follow the Bill will be carefully consulted on. The Committee, the Law Society, the Bar Council and any other interested party will have a chance at that stage to feed in their views.

The Chairperson (Mr McKay): Clause 11, which concerns complaints procedures for barristers, states:

"relevant complaint" means a complaint which relates to professional services provided by a barrister."

What does "professional services" cover? For example, if a barrister were to refuse a service, how wide would that definition be?

Mr M Foster: I think if a barrister were to refuse a service, that would not be covered by the Bill.

The Chairperson (Mr McKay): So it is quite narrow.

Mr M Foster: It would be difficult to make a complaint against a barrister for refusing to take a case. If it were something in a brief that he or she refused to do, that would be different, because it would be covered by a professional service. You would have to look at that in its broad entirety. I do not think that it would be possible under any system anywhere to complain about somebody whose services you have not engaged.

The Chairperson (Mr McKay): Yes, but, in many other areas, if a service was refused because you had some issue with a person, if their background or section 75 categories were involved, for example, it would be entirely relevant in making a complaint.

Mr M Foster: That is something that I had not necessarily thought of, Chair. I will say that, given the nature of the work at the Bar, particularly in present times, very few barristers would refuse work in those circumstances.

The Chairperson (Mr McKay): Do other jurisdictions have the same definition in regard to this issue?

Mr M Foster: Yes. That is the case certainly in Scotland, which deals only with service complaints. The complaint must be about the professional service of the lawyer involved.

The Chairperson (Mr McKay): Is it the exact same definition in Scotland?

Mr M Foster: It may not be word for word, but it is the same effect. Obviously, I would need to check the precise wording in the Scottish legislation again, but it is a fairly standard definition.

The Chairperson (Mr McKay): Could you come back to us in writing on that point?

Mr M Foster: Certainly.

The Chairperson (Mr McKay): Clause 15 concerns complainants. It states:

"The first condition is that C is—

(a) an individual; or

(b) a person (other than an individual) or body".

What about two, three, four or more people together? Is there a need for an amendment to say "an individual" or "one or more individuals"?

Mr M Foster: That can be covered by secondary legislation, given the way it is drafted.

The Chairperson (Mr McKay): Why not put it in the primary?

Mr M Foster: The purpose of that is to give a little flexibility in who can access a complaints committee. It is not the intention of this complaints system to be used by, for example, Departments. This is designed to be a fairly swift procedure for the typical client who goes to their solicitor or barrister and receives poor service. They do not tend to be repeat or regular users of legal services. If Departments, for example, do not get good service from a particular solicitor, they have at their disposal a very easy route for their next choice of solicitor, for want of a better term. The purpose of the definition in that section means that, if other classes of complainant come along, we do not have to continually come back and change the primary legislation; we can deal with it in secondary legislation.

Mr Cree: That was a point that caught my eye, especially after the submission this morning. Clause 15(2)(a) talks about an "individual", and clause 15(2)(b) talks about a "body". Should paragraph (a) not then refer to one or more? There could be a group of individuals.

Mr M Foster: I think that, if there were two or three people, it would be within the scope of the Bill for an individual to bring it forward on their behalf.

Mr Cree: There may be a group of those individuals.

Mr M Foster: I suppose that would mean separate complaints.

Mr Cree: No; they could be making a joint complaint. The point I am making is that it could be one or more, not just individuals.

Mr M Foster: That is something that we could reflect on as we get into the clause-by-clause scrutiny. I would be happy to look at it again.

The Chairperson (Mr McKay): I have one final question. Clause 17(4) states:

"Rules under subsection (1) may (among other things) make provision—

(a) for the whole or part of a complaint to be dismissed, in such circumstances as are mentioned in subsection (5), without consideration of its merits;".

However, subsection (5) states:

"The circumstances referred to in subsection (4)(a) are the following—

(a) the Committee considers the complaint or part of the complaint to be frivolous or vexatious or totally without merit;".

That contradicts the earlier point that said "without consideration of its merits". Could that be tidied up?

Mr M Foster: That strikes me as being a drafting point. I am certainly happy to go back to the draughtsperson and raise that as a potential issue.

The Chairperson (Mr McKay): OK, Michael. We will forward you the responses from the Bar Council and the Law Society, along with the research paper, if members agree. We will also forward any other questions that come up at Committee level in the meantime. Thank you very much.