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Comparative Research on Legal Complaints and Regulation

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This paper examines the provisions in the draft Legal Complaints and Regulation Bill 2013 and provides comparative information on legal complaints systems in England and Wales, Scotland and the Republic of Ireland.

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Key Points

The Department of Finance and Personnel has consulted on a draft Bill on legal complaints and regulation.

The draft Bill gives effect to the recommendations made in the report of the Legal Services Review Group (2006). The report said that the most public aspect of regulation, complaints handling, required the most wide-ranging reform and needed to be strengthened in the public and consumer interest. The Review Group considered that the most important reform in respect of complaints handling was greater lay representation;

The report of the Review Group recommended that given the relatively few numbers of complaints, professional bodies should continue to administer complaints handling with enhanced oversight arrangements, including a Commissioner with audit powers to monitor the system and set targets;

The draft Bill provides for Complaints Committees for each of the legal professions; it also provides for the appointment of a Legal Services Oversight Commissioner. The systems in England and Wales, Scotland and as proposed in the Republic of Ireland provide for independent complaints bodies;

Direct comparisons are not always possible due to the differences in the structures, but the following points can be made which draw on issues raised in submissions on the draft Bill:

Appointment of a Commissioner- The draft Bill provides for a lay person as the Legal Services Oversight Commissioner and a lay majority on the complaints committees. Issues were raised regarding the preclusion of legal professionals from the post. The other systems provide for a lay Chairman and a majority of lay members in the structures;

Role for the Lord Chief Justice in appointments- There is no provision in the draft Bill for the role of the Lord Chief Justice in the appointment of the Legal Services Oversight Commissioner. It was suggested that a role for the Lord Chief Justice in the appointment of the Oversight Commissioner would enhance the process. Judicial figures have roles in the appointments of members of the structures in England and Wales, Scotland and as proposed in the Republic of Ireland;

The Levy-The draft Bill provides that the Department of Finance and Personnel can make regulations for a levy on the professional bodies to fund the Office of the Legal Services Oversight Commissioner. Concerns were raised by the legal professions regarding the cost implications of the proposed levy to fund the office of the Oversight Commissioner. The other systems provide for a levy to be paid by the legal professions

to fund the regulatory systems. In England and Wales, statutory provisions enable the Legal Services Board to make levy rules. In Scotland, statutory provisions enable the Scottish Legal Complaints Commission to determine the levy. The Commission consults the professional bodies and their members on the budget for the financial year. The proposed Bill in the Republic of Ireland sets out how the levy is to be apportioned in primary legislation;

Complainants- The draft Bill provides details on who can bring a complaint but also provides that the Department of Finance and Personnel might make regulations in this regard. It was suggested that the draft Bill was insufficiently clear as to who could bring a complaint. The concern was expressed that only the client of a solicitor (or the personal representative in an administration of estates) should be entitled to bring a complaint; if persons with no relationship to a legal professional were entitled to bring complaints this might increase the possibility of vexatious complaints. In relation to service complaints, the provisions in Scotland allow for designated office holders and public bodies as well the person directly affected to bring a complaint;

Compensation limits- The draft Bill specifies the maximum amount of compensation payable to a complainant is set at £3500. However, the draft Bill also enables the Department to amend the compensation limits. Compensation limits differ between the jurisdictions. In England and Wales, the compensation limits are set at a maximum level of £50,000, although most awards are less than £1,000. In Scotland, compensation limits are set at a maximum level of £20,000. In the Republic of Ireland, the maximum level of compensation is €5,000 for financial loss, however sums may be payable the Authority for costs of investigating the complaint;

Appeals against determinations-The draft Bill provides that the Department must, with the concurrence of the Lord Chief Justice, make regulations providing for appeals to the High Court against determinations of the Complaints Committees. The legislation in Scotland permits the complainant, the practitioner, the employing practitioner or the employing firm to bring an appeal against decisions of the Scottish Legal Complaints Commission to the Court of Session. The Bill in the Republic of Ireland provides for appeals to the High Court against Disciplinary Tribunal determinations;

Informal resolution- The draft Bill indicates that complaints should be dealt with informally before they go to complaints committees. The systems in each of the jurisdictions examined in this research support the informal resolution of complaints;

Research and monitoring of complaints-Questions have been asked about the capture of complaints in Northern Ireland and research undertaken to identify numbers of complaints. The legal professional bodies in Northern Ireland indicated that there were relatively low numbers of complaints. The independent complaints bodies in England and Wales and in Scotland produce detailed research on the number of complaints and complaints handling. The data is available on the bodies' websites.

Contents

- Key Points 1
- Contents..... 7
- 1 Introduction 9
- 2.1 Report of the Legal Services Review Group 2006 9
- 2.2 DFP Consultation on Draft Legal Complaints and Regulation Bill 12
- 3.0 Legal Services Oversight Commissioner 10
- 3.1 Appointment of the Commissioner 13
- 3.2 A Role for Lord Chief Justice in the Appointment of the Commissioner ? 18
- 3.3 The Levy 19
- 4 Legal Complaints..... 28
- 4.1 Statutory Scheme for Complaints..... 28
- 4.2 Complainants 29
- 4.3 Determinations by the Committees 31
- 4.4 Lay Representation..... 38
- 4.5 Powers to Remove Members of Committees..... 41
- 4.6 Informal Resolution of Complaints..... 43
- 5 Research and Monitoring Complaints..... 48

1 Introduction

The Department of Finance and Personnel has consulted on the draft Legal Complaints and Regulation (Northern Ireland) Bill 2013. The draft Bill consists of four parts. Part one of the draft Bill provides for the establishment of the Legal Services Oversight Commissioner. Part two provides for a statutory scheme dealing with complaints against barristers. Part three of the draft Bill establishes a new statutory scheme for complaints against solicitors. Part four of the draft Bill contains general clauses including interpretative clauses and minor and consequential amendments.

This paper provides comparative research on the legal complaints systems in England and Wales, Scotland and the Republic of Ireland. The sections consider the contents of the draft Bill, any issues raised in consultations or evidence and comparative experience from other jurisdictions in relation to the Legal Services Oversight Commissioner (Appointment of the Commissioner, the Levy), Legal Complaints (Statutory Scheme, Eligibility, Determinations, Lay Representation, Removal of Members, Informal Resolution of Complaints, Research and Monitoring).

2 Background to the Draft Bill

2.1 Report of the Legal Services Review Group 2006

In December 2005, the Government established the Legal Services Review Group (herein known as the Review Group) to make recommendations to the Minister for Finance and Personnel on possible reforms to the regulation of legal services in Northern Ireland. The Review Group was chaired by Professor Sir George Bain and its members were drawn from various backgrounds including legal, academic, voluntary and business sectors.

The Review Group published its report in 2006. This paper does not propose to rehearse all the recommendations of the Review Group, the full report is available at the DFP website http://www.dfpni.gov.uk/legal_services.pdf. Nevertheless, it may be valuable to give a brief summary of the report recommendations to provide some context to the background of the draft Bill.

The Review Group made recommendations in the areas of regulation, complaints handling, oversight and competition. The following sections will summarise the Review Group's recommendations.

The Review Group noted that the legal professions in Northern Ireland are largely self-regulating. Only the solicitors' profession is subject to oversight from the Lay Observer

in relation to complaints handling and from the Lord Chief Justice on some issues. The Lay Observer reports on the nature of the complaints made to the Law Society and how it deals with the complaints. The Lay Observer looks at how the complaint has been handled but does not have the power to investigate complaints.¹ The Northern Ireland Bar is not subject to any form of statutory oversight.²

The Review Group considered comparisons with other jurisdictions. In particular, the Review Group examined recommendations made in a review on the regulation of Legal Services in England and Wales by Sir David Clementi. His recommendations on regulation as summarised by Review Group included:

- Establishment of a Legal Services Board to act as a legal regulator, providing external oversight to the front line regulators such the Law Society and Bar Council;
- Allowing certain regulatory functions to be devolved back to front-line regulators on a day-to-day basis, subject to their competence and governance arrangements;
- Requiring front-line regulators to separate effectively their regulatory and representative functions.

The Review Group found that the regulatory failure that took place in England and Wales had not occurred in Northern Ireland. Nor was there a regulatory maze in Northern Ireland that was a feature of the system in England and Wales identified by Clementi. The Review Group concluded that transferring Clementi's proposals, in particular a Legal Services Board, would not be appropriate in Northern Ireland due to the absence of a regulatory maze, small size of the legal professions and good regulatory record compared with counterparts in England and Wales.³

Instead, the Review Group recommended that professions should continue to discharge regulatory responsibilities, subject to enhanced oversight arrangements. In considering the separation of regulation from representation, the Review Team reported that there was no history or current evidence of regulatory failure under the present arrangements. It was suggested that there was an opportunity in a small jurisdiction for the representative and regulatory functions of the professional bodies to inform one another. Furthermore, strict separation of representation and regulatory functions within small professional bodies and in a small jurisdiction, the Review Group argued, would create difficulties.⁴

¹ Legal Services Review Group(2006) "Legal Services in Northern Ireland: Complaints, Regulation and Competition" pg 15

² Legal Services Review Group (2006) "Legal Services in Northern Ireland: Complaints, Regulation and Competition" iv and v

³ Legal Services Review Group (2006) "Legal Services in Northern Ireland: Complaints, Regulation and Competition" pg 29

⁴ Legal Services Review Group (2006) "Legal Services in Northern Ireland: Complaints, Regulation and Competition" pg 31

The Review Group reported that the most public aspect of regulation, complaints handling, required the most wide-ranging reform. Although the professional bodies discharged their responsibilities in the area fairly the Review Group “identified a number of areas where the system required to be strengthened in the public and consumer interest.”⁵ The Review Group recommended that given the relatively few complaints, that the professional groups should continue to administer complaints handling subject to some important changes.⁶ According to the Review Group, the most important reform is greater lay participation, lay people should be the majority on complaints committees and these should be chaired by a lay person.

The Review Team recommended that oversight should be applied to both solicitors and barristers by a Legal Services Oversight Commissioner (the Commissioner), helped by advice from the Lord Chief Justice for Northern Ireland.⁷ The Legal Services Oversight Commissioner’s main powers should relate to the complaints handling process, with audit powers combined with those for monitoring the system and setting new targets. The Review Team recommended that these should be supported by enforcement powers, including the power to impose financial penalties. The Commissioner should also have an important role to play in other aspects of regulation such as ensuring targeted consultation is carried out by professional bodies in discharging those responsibilities.⁸ In addition, the Review Group suggested that the Office of the Commissioner should be funded by the professions themselves.⁹

The Review Group also recommended the following changes:¹⁰

- Complaints Committees should be functionally separate from their professional bodies;
- Eligibility to make a complaint should be considerably widened;
- A simplified process for pursuing a claim for professional negligence in lower value cases;
- Limits for compensation awards set at lower limits than proposed elsewhere; £3,500 for misconduct and poor service, and £3,500 for professional negligence.

⁵ Legal Services Review Group (2006) “Legal Services in Northern Ireland: Complaints, Regulation and Competition” iv and v

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⁷ Legal Services Review Group (2006) “Legal Services in Northern Ireland: Complaints, Regulation and Competition” v

⁸ Legal Services Review Group (2006) “Legal Services in Northern Ireland: Complaints, Regulation and Competition” vi and vii

⁹ Legal Services Review Group (2006) “Legal Services in Northern Ireland: Complaints, Regulation and Competition” vii

¹⁰ Legal Services Review Group (2006) “Legal Services in Northern Ireland: Complaints, Regulation and Competition” vi

Competition was the other major area of consideration by the Review Group, who found that it exists due to the existing model of solicitors practices providing advice throughout Northern Ireland, supported by the independent Bar. The Review Group took the opportunity during the review to examine the possibility of alternative business structures; in particular Legal Disciplinary Practices and Multi-Disciplinary Practices proposed in England and Wales. The Review Group concluded that adopting these approaches in Northern Ireland would not have the desired effect of increasing competition, but could in fact reduce competition. In addition, the Review Group recommended that the restriction on external ownership of legal firms should continue.¹¹

Other suggestions made by the Review Group to increase competition included: relaxation of the rules relating to direct access to a barrister for advice and the rights of audience to solicitors in the higher courts.¹² Recommendations relating to the rights of audience of solicitors in the Higher Courts were taken forward in the Justice (Northern Ireland) Act 2011.¹³

2.2 DFP Consultation on Draft Legal Complaints and Regulation Bill

The Department of Finance and Personnel consulted on the Draft Legal Complaints and Regulation Bill and the consultation period ended on 14 February 2014.¹⁴ The purpose of the draft Bill is to give legislative effect to the majority of the Review Group's recommendations. The Department agreed with the Review Group's overall analysis that independent and costly structures such as Legal Services Board or an independent commission are not necessary in Northern Ireland.¹⁵

The following sections deal with issues raised by stakeholders to the Committee for Finance and Personnel in written submissions and oral evidence. The sections consider the contents of the draft Bill, any issues raised in consultations or evidence and comparative experience from other jurisdictions in relation to the Legal Services Oversight Commissioner (Appointment of the Commissioner, the Levy), Legal Complaints (Statutory Scheme, Eligibility, Determinations, Lay Representation, Removal of Members, Informal Resolution of Complaints, Research and Monitoring).

3 A Legal Services Oversight Commissioner

¹¹ Legal Services Review Group (2006) "Legal Services in Northern Ireland: Complaints, Regulation and Competition" vii

¹² Legal Services Review Group (2006) "Legal Services in Northern Ireland: Complaints, Regulation and Competition" vii

¹³ DFP "Consultation by the Department of Finance and Personnel on the Draft Legal Complaints and Regulation Bill", pg 8

¹⁴ DFP "Consultation by the Department of Finance and Personnel on the Draft Legal Complaints and Regulation Bill", pg1.

¹⁵ DFP "Consultation by the Department of Finance and Personnel on the Draft Legal Complaints and Regulation Bill", pg10

3.1 Appointment of the Commissioner

Overview of the Clauses

Clause 1 of the draft Bill establishes the post of Legal Services Oversight Commissioner (LSOC) for Northern Ireland. Subsection 2 enables the Department of Finance and Personnel to make the appointment. Subsection 3 specifies that the Commissioner must not be and must never have been a solicitor or barrister. Clause 9 abolishes the office of the lay observer and repeals Article 42 of the Solicitors (Northern Ireland) Order 1976 which deals with lay observers. Subsection 3 transfers the existing powers of the lay observer to the Commissioner where the lay observer has not concluded his or her examination of an allegation before the repeal of the Article has effect.

Clause 2 sets out the general powers of the Commissioner. Subsection (1) provides that the Commissioner may require a professional body to provide information, or make reports to the Commissioner about the handling of complaints about their members. The Commissioner can investigate the manner in which complaints about the members of a professional body are handled by the body and can make recommendations in relation to training of members of the Bar Complaints Committee and the Solicitors Complaints Committee. Targets may be set in relation to the handling of complaints about the members of a professional body and professional bodies may be required to submit a plan to the Commissioner for the handling of complaints.

Subsection 2 of Clause 2 provides that the Commissioner may require the professional body to pay a penalty if it fails to submit a plan which the Commissioner considers adequate for the handling of complaints or the body submits a plan but fails to handle complaints in accordance with it. Subsection 3 of Clause 2 requires the Commissioner to consult with the relevant professional body and give professional bodies reasonable opportunities to make representations before requiring them to pay a penalty. Subsection 4 provides that the Department must specify by Order the maximum amount of penalty. Subsection 5 specified that no Order may be made unless a draft Order has been laid before and has been approved by resolution of the Assembly. Subsection 6 requires the Commissioner to have regard to all the circumstances of a case when determining the amount of penalty a professional body is required to pay including the total number of complaints about members of the body and the assets of the body and the number of its members. Subsection 7 requires that the penalty imposed on a professional body must be paid to the Commissioner who must in turn must pay the penalty to the Department of Finance and Personnel.

Clause 3 of the draft Bill relates to duties of certain bodies to consult the Commissioner. Subsection 1 specifies that professional bodies' responsible for making rules or regulations relating to barristers must consult the Commissioner before making

such rules. The various bodies are set out in subsection 2 and include the Benchers of the Honourable Society of the Inn of Court of Northern Ireland, the Executive Council of the Inn of Court of Ireland and the General Council of the Bar of Northern Ireland. Subsection 6 amends Article 75 of the Solicitors (Northern Ireland) Order 1976 by placing a requirement on the Law Society for Northern to consult with the Legal Services Oversight Commissioner before making regulations.

Clause 4 of the draft Bill requires the Commission to review and report on any matter relating to the organisations or regulation of the Law Society or Bar that may be directed to the Commissioner for consideration by the Department of Finance and Personnel.

Schedule 1 of the draft Bill contains further detailed provisions on the Legal Services Oversight Commissioner for Northern Ireland, including status, general powers and tenure of office, staffing and procedural arrangements. Schedule 1, paragraph (6) empowers the Commissioner to appoint staff, determine remuneration and conditions of service and make payments towards the provision of pensions or allowances.

The Consumer Council said that there should not be an England and Wales solution for a Northern Ireland problem and fully supported the tailored approach favoured by the Bain Review. The Consumer Council also supported the enhanced oversight function.¹⁶ The Bar Council in its written submission to the Committee for Finance and Personnel accepted the broad principles in relation to the Commissioner but had reservations in relation to the proposed powers and costs. The Bar Council believes the Commissioner could offer an important contribution in the development of future rules in relation to legal services.¹⁷

However, some stakeholders raised concerns about the preclusion of legal professionals from the post. The Bar Council has no specific objections to the appointment of a layperson as the Legal Oversight Commissioner. However the Bar Council says it does not understand the preclusion of anyone who is or has been a solicitor or barrister.¹⁸ In evidence to the Committee for Finance and Personnel, the Bar Council indicated that a retired judge with experience and who has the breadth of knowledge of the legal profession in general in Northern Ireland could be of great assistance.¹⁹

Concerning the power of the LSOC to impose a penalty on the professional bodies, the Law Society has suggested that the penalty should not be a first resort. Rather it

¹⁶ Consumer Council Correspondent to the DFP Committee Re Draft Legal Complaints and Regulation Bill, 24 January 2014

¹⁷ The Bar Council "Briefing Paper on Draft Legal Complaints and Regulation Bill", para 15

¹⁸ The Bar Council "Briefing Paper on Draft Legal Complaints and Regulation Bill", para 23

¹⁹ Committee for Finance and Personnel Official Report, Draft Legal Complaints and Regulation Bill: Bar Council, pg 2.

suggests there needs to be a stage where the professional body can take remedial action.²⁰

With respect to the provisions on the powers of the Commissioner to recruit staff and professional assistance, the Law Society suggested that this should be within an acknowledged test of reasonable expenditure and that the practicalities should be agreed with the professional bodies.²¹

The following sections provide information on the regulatory framework in England and Wales, Scotland and the Republic of Ireland. These systems differ from the proposals in Northern Ireland as they have established regulatory bodies or independent commissions rather than an oversight commissioner.

England and Wales

Legal Services Board

The Legal Services Act 2007 established a new framework for the regulation of legal services in England and Wales. The Act established the Legal Services Board to act as an independent oversight regulator to sit at the head of the new regulatory framework to replace the regulatory maze of oversight regulators.²² The Legal Services Board is under a statutory duty to observe eight regulatory objectives when exercising its functions. These include:²³

- Protecting and promoting the public interest;
- Supporting the constitutional principle of the rule of law;
- Improving access to justice;
- Protecting and promoting the interests of consumers;
- Promoting competition in the provision of services;
- Encouraging an independent, strong and diverse legal profession;
- Increasing public understanding of the citizen's legal rights and duties;
- Promoting and maintaining adherence to the professional principles.

The legal framework provides for a Legal Services Board with a lay person appointed by the Lord Chancellor as Chair.

²⁰ Response of the Law Society of Northern Ireland to the draft Legal Complaints and Regulation Bill 2013, p 1 para 2.3..

²¹ Response of the Law Society of Northern Ireland to the Consultation of the Department of Finance and Personnel to the Draft Legal Complaints and Regulation Bill (Northern Ireland) 2013, para 8.2

²² Explanatory Memorandum to the Legal Services Act 2007

²³ Section 1 of the Legal Services Act 2007

The Legal Services Act 2007 allows the Legal Services Board to appoint a person as Chief Executive and staff as it considers appropriate in the performance of its functions. The Chief Executive and staff are to be appointed on terms and conditions as determined by the Board.²⁴

The Office for Legal Complaints

The 2007 Act also created an Office for Legal Complaints (OLC) to administer an Ombudsman Scheme to deal with complaints about legal services. The OLC also has a duty to act compatibly with the statutory regulatory objectives and to have regard to the principles of best practice in relation to the administration of the Ombudsman's schemes.

The OLC is comprised of eight members. Schedule 15 of the 2007 Act provides that the OLC is to consist of a Chairman appointed by the Board and at least 6 other members appointed by the Board in consultation with the Chairman.²⁵ The Board are required to ensure that the majority of members of the OLC are lay members and the Chairman must be a lay person.

Section 122 of the 2007 Act requires the OLC to appoint a person to act as a Chief Ombudsman for the purposes of the Ombudsman Scheme and to appoint one or more other persons to act as assistant ombudsmen. Schedule 15 of the 2007 Act provides that the OLC is to consist of a Chairman appointed by the Board and the Chairman must be a lay person. The OLC must appoint a lay person as Chief Ombudsman.²⁶

The 2007 Act also provides that the OLC may appoint staff it considers appropriate in the performance of its functions. Staff appointed are subject to terms and conditions determined by the OLC.²⁷

Scotland

The Legal Profession and Legal Aid (Scotland) Act 2007 created the Scottish Legal Complaints Commission (SLCC). The SLCC acts as a gateway and a point of contact for all complaints against legal practitioners in Scotland, including complaints about the services or conduct of a legal practitioner, where it has not been possible for the practitioner or the practitioner's firm to resolve the complaint. Legal practitioners include qualified conveyancers, solicitors, advocates and commercial attorneys. The SLCC receives complaints about the service received from a legal professional and

²⁴ Schedule 1 of the Legal Services Act 2007

²⁵ Schedule 15 of the Legal Services Act 2007

²⁶ Section 122 of the Legal Services Act 2007

²⁷ Schedule 15 of the Legal Services Act 2007

decides whether or not to investigate those complaints. The SLCC also has an additional responsibility to share best practice, monitor trends and highlight areas of concern. The Law Society of Scotland, Faculty of Advocates and Association of Commercial Attorneys still deals with matters of professional misconduct or unsatisfactory conduct and the SLCC oversees how those complaints are investigated and prosecuted.²⁸

The Scottish legal framework does not provide for a Legal Services Oversight Commissioner; however, the statutory framework provided that the Chairing member of the Scottish Legal Complaints Commission must be a non-lawyer member.²⁹

In Scotland, the Legal Profession and Legal Aid (Scotland) Act 2007 requires the Commission to appoint a Chief Executive whose terms and conditions of employment are to be approved by Scottish Ministers.³⁰ The Commission may appoint staff and Scottish Ministers may give directions such as number of appointments, terms and conditions.³¹ The Commission must comply with the directions given.³²

Republic of Ireland

The Legal Services Regulation Bill 2011 is currently passing through the Oireachtas. The origins of the Bill can be found in the Government's Programme for National Recovery in which the Government committed to "establish independent regulation of the legal professions to improve access and competition, make legal costs more transparent and ensure adequate procedures for addressing consumer complaints."³³

Clause 9 of the Bill, as initiated, provides for the establishment of a new independent Legal Services Regulatory Authority. The Authority will have responsibility for independent oversight of both branches of the legal professions and the maintenance of standards and improvement of standards in the legal professions. Currently only solicitors have a statutory governance framework.³⁴ Other functions of the Authority set out in clause 9 include:

- Keeping under review the education and training standards of the legal profession, the codes of conduct of solicitors and barristers and the organisation of the provision of legal services in Ireland;
- Specifying the nature and minimum levels of professional indemnity insurance required;

²⁸ <http://www.scottishlegalcomplaints.org.uk/about-slcc/what-we-do.aspx>

²⁹ Schedule 1, paragraph 3 of the Legal Profession and Legal Aid (Scotland) Act 2007

³⁰ Schedule 1(8) of the Legal Profession and Legal Aid(Scotland) Act 2007

³¹ Schedule 1(8) (4) Legal Profession and Legal Aid(Scotland) Act 2007

³² Schedule 1(8) (5) Legal Profession and Legal Aid(Scotland) Act 2007

³³ <http://www.justice.ie/en/JELR/Pages/SP12000102>

³⁴ See the Explanatory Memorandum to the Legal Services Regulation Bill 2011, pg 2

- Establishing and administering a system of inspection of legal practitioners;
- Dealing with complaints against legal practitioners;
- Promoting public awareness and dissemination of information to the public in respect of legal services;
- Keeping the Minister informed of developments in respect of the provision of legal services by legal practitioners; and
- Undertaking, commissioning or assisting in, research projects and other activities in respect of the provision of legal services.

The Bill provides for an independent complaints structure to deal with complaints received by the Authority. Clause 49 of the 2011 Bill provides for the establishment of a Complaints Committee to deal with complaints on behalf of the Authority. Clause 52 of the Bill provides for the establishment of the Legal Practitioners Disciplinary Tribunal for complaints that go to a hearing.³⁵ The role of the Disciplinary Tribunal is to consider applications brought by the Authority as to whether a specified act or omission by a legal practitioner constitutes misconduct.

In the Republic of Ireland, there is not a Legal Services Oversight Commissioner. The Legal Services Regulation Bill 2011 as initiated, however, provides for a Legal Services Regulatory Authority consisting of 11 members. Clause 8 of the Bill provides that the Government shall appoint one of the lay members as the Chairperson of the Authority.

In relation to the recruitment of staff, the 2011 Bill provides that the Minister of Justice and Equality may after consultation with the Authority appoint staff of the Authority as may be approved by the Minister for Public Expenditure and Reform.³⁶ The Minister shall, with the consent of the Minister for Public Reform and Expenditure, determine the grades and the numbers of staff in each grade in the Authority.³⁷

3.2 A Role for Lord Chief Justice in the Appointment of the Commissioner ?

The Law Society suggested that input from the Lord Chief Justice as head of the legal profession would enhance the process of the appointment of the Legal Services Oversight Commissioner. The Law Society noted there is no provision in the Bill as drafted.³⁸

Other jurisdictions

³⁵ <http://www.oireachtas.ie/documents/bills28/bills/2011/5811/b5811d.pdf>

³⁶ Clause 20 (1) of the Legal Services Regulation Bill 2011

³⁷ Clause 20 (2) of the Legal Services Regulation Bill 2011

³⁸ Response of the Law Society of Northern Ireland to the Consultation of the Department of Finance and Personnel to the Draft Legal Complaints and Regulation Bill (Northern Ireland)2013, para 7.1

In England and Wales, the Lord Chief Justice has a role in the appointment of ordinary members of the Legal Services Board. An ordinary member is a member of the Board other than the Chief Executive. Before appointing an ordinary member, the Lord Chancellor must consult with the Lord Chief Justice about the process for appointing an ordinary member and about the person selected for appointment.³⁹ The Chairman of the OLC is appointed by the Board with the approval of the Lord Chancellor.⁴⁰ The Chief Ombudsman is appointed by the OLC.⁴¹

In Scotland, the Board of the SLCC is appointed by Scottish Ministers in consultation with the Lord President of the Court of Session.⁴² In the Republic of Ireland, the 2011 Bill as initiated made no reference to the input of the Chief Justice in the appointments process. Members of the Legal Services Regulatory Authority are to be appointed by the Government. The Bill, however, was amended in the Select Committee to provide that members of the Authority would be appointed by Government with Dail Eireann and Seanad Eireann, by resolution, approving the appointment.⁴³ When initiated, the Bill indicated Members of the Complaints Committee were to be appointed by the Authority with the approval of the Minister. The Bill, however, appears to have been amended at Committee Stage to remove the role of the Minister.⁴⁴ As originally proposed, members of the Legal Practitioners Disciplinary Tribunal are appointed by the Government on the nomination of the Minister.⁴⁵ In the Bill as amended in the Select Committee this has been changed to nomination by the President of the High Court on the nomination of the Minister.⁴⁶

3.3 The Levy

Overview of the Clauses

Clauses 5 and 6 relate to the levy on professional bodies to fund the Legal Services Oversight Commissioner.

³⁹ Schedule 1, para 3 of the Legal Services Act 2007

⁴⁰ Schedule 15 of the Legal Services Act 2007

⁴¹ Section 122 of the Legal Services Act 2007

⁴² Schedule 1 of the Legal Profession and Legal Aid (Scotland) Act 2007

⁴³ Section 8 of the Legal Services Regulation Bill 2011, see section 8 (2) (a) of the Legal Services Regulation Bill 2011 as amended by the Select Committee on Justice, Defence and Equality, <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2011/5811/b58a11d.pdf>

⁴⁴ Section 57 of the Legal Services Regulation Bill 2011 as amended in the Select Committee on Justice Defence and Equality at <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2011/5811/b58a11d.pdf>.

⁴⁵ Section 53 of the Legal Services Regulation Bill 2011

⁴⁶ Section 62 of the Legal Services Regulation Bill 2011 as amended in the Select Committee on Justice Defence and Equality at <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2011/5811/b58a11d.pdf>.

Clause 5, subsection 1 requires the Department of Finance and Personnel to make regulations providing for the imposition of a levy on the professional bodies to fund the Office of the Legal Services Oversight Commissioner. Subsection 2 provides that the levy is payable to the Commissioner. Subsection 3 specifies that before making the regulations, the Department must satisfy itself that the levy is apportioned fairly between the professional bodies. Subsection 4 provides that regulations in relation to the levy must be laid before and approved by the Assembly.

Clause 6 contains supplementary provisions relating to the levy. Subsection 2 provides that regulations may specify the rate of the levy and when it is payable. Subsection 3 provides that any amount owed to the Commissioner can be owed as a debt. Subsection 4 specifies that levy regulations must include provisions requiring the Department to calculate the amount of the levy payable by each professional body, to consult the professional body on the amount of the levy payable by that body and to notify each professional body of its liability to pay an amount of the levy and the time it becomes payable. Subsection 5 provides that the levy regulations may make provision about the collection and recovery of the levy, about the circumstances in which any amount of the levy payable may be waived and the rate of interest when the levy is not paid on time.

DFP's Regulatory Impact Considerations contained within the consultation document on the draft Bill identified the following areas where additional costs might arise:⁴⁷

- Solicitors-The Law Society indicated the costs of a practicing certificate would be increased to meet the costs of administering the new system. (The Department received figures from the Law Society that anticipate an increase the cost of a practising certificate of up to £400 per annum.) In addition, a levy to be imposed to meet the costs of the Legal Services Oversight Commissioner will be applied to all solicitors, the detail of which has to be finalised. Overall costs could equate to an additional cost of £300-£500 per annum on a solicitor;
- Barristers-The costs of the proposed scheme will require additional contributions in the shape of Bar Library subscriptions. They will also be expected to make a contribution towards the cost of the Legal Services Oversight Commissioner. It was suggested that as the number of complaints is much lower, the additional costs may be less than in respect of solicitors;
- Insurance- with the power for the Complaints Committees to award compensation, there may be implications for the cost of insurance premiums. The Department highlighted that, at the time of the Legal Services Review Group, solicitors operated

⁴⁷ Department of Finance and Personnel "Consultation by the Department of Finance and Personnel on the Draft Legal Complaints and Regulation Bill (Northern Ireland) 2013, pg 84-85

under a Master Policy which had an excess of £3500 (although the Department understands this has now increased to £6500 per partner per claim). The Department suggested that increases to the premium would be marginal as a claim for compensation would not breach the excess.

The Consumer Council expressed that funding of the commission by profession is an opportunity rather than a risk to impartiality, suggesting that the legal profession will seek value for money through the commission. Implementation of the polluter pays principle will act as an incentive for the profession to employ good practice.⁴⁸

The Bar Council noted the levy provisions in Clause 5 and 6 in order to fund the work of the Legal Services Oversight Commissioner. The Bar Council has major concerns surrounding the cost of the establishing and operating such an office.⁴⁹ The Bar Council stated that, whilst it recognised the need for public confidence in regulation, the profession should not be unnecessarily burdened by the weight and cost of regulation. The present system it argued was relatively straightforward and cost effective in its operation.⁵⁰ The Bar Council suggested that the potential for cost implications can be quite significant and that the suggestion in the consultation paper was an increase in the practising certificate for a solicitor could be £400. The Chairman of the Bar Council informed the Committee for Finance and Personnel the internal restructuring and the establishment of the Bar Complaints Committee with lay representation would be significantly more costly than that and that was before the role of the Commissioner was considered.⁵¹

The Law Centre suggested that the Law Society could be asked what size of an organisation the Legal Services Oversight Commissioner's Office needs. The Law Centre suggested in its written submission to the CFP that as the Law Society will be funding this, they are likely to want a small, limited resourced commissioner's office.⁵²

In oral evidence to the Committee, the Law Society emphasised its concerns about costs, in particular raising concerns about accountability of the Oversight Commissioner's office and the expenditure it will occur. The Law Society highlighted that the system in England costs £80 million a year to run and Bain decided against this model in Northern Ireland.⁵³

⁴⁸ Consumer Council Correspondent to the DFP Committee Re Draft Legal Complaints and Regulation Bill, 24 January 2014

⁴⁹ The Bar Council "Briefing Paper on Draft Legal Complaints and Regulation Bill", para 17

⁵⁰ The Bar Council "Briefing Paper on Draft Legal Complaints and Regulation Bill", para 17

⁵¹ Committee for Finance and Personnel Official Report "Draft Legal Complaints and Regulation Bill: Bar Council" 29 January 2014, pg 6.

⁵² The Law Centre Briefing Notes for the Finance and Personnel Assembly Committee, Consultation by DFP on the Draft Legal Complaints and Regulation Bill (NI) 2013

⁵³ Committee for Finance and Personnel Official Report, Draft Legal Complaints and Regulation Bill: Law Society, 29 January 2014 pg 7.

As well as levy costs, other costs considerations were raised in relation to the Solicitors Disciplinary Tribunal. The Law Society highlighted it has to meet the Tribunal costs in full under the Solicitors Order and the additional costs are on top of the costs of the contribution to the levy for the LSOC and the costs of the Solicitors Complaints Committee.⁵⁴ The Law Society suggested that the total extra cost per practising solicitor could be £700-£900 in addition to the £1100 practising certificate and that this might result in closure of smaller firms, reducing competition.⁵⁵

England and Wales

Section 173 of the Legal Services Act 2007 makes provision for the Board to make rules for a levy to cover the expenditure of the Board, the OLC and expenditure of the Lord Chancellor on the establishment of the Board and the OLC. Before making rules, the Board must satisfy itself that the apportionment of the levy as between different leviable bodies will be in accordance with fair principles. The leviable bodies are the approved regulators, the person designated as the regulator in relation to claims management services under the Compensation Act 2006 and other persons the Lord Chancellor may prescribe by Order. Approved regulators include:⁵⁶

- The Law Society;
- Bar Council;
- Chartered Institute of Legal Executives
- Council for Licensed Conveyancers;
- Chartered Institute of Patent Attorneys;
- Institute of Trademark Attorneys;
- Association of Costs Lawyers;
- Master of Faculties (regulatory body for notaries)

The levy rules require the Board to calculate the apportionment of the levy among the bodies which are required to pay it and notify the bodies of their liability to pay the levy and the times it is payable.⁵⁷ Amounts received by the Board or to the OLC must be

⁵⁴ Response of the Law Society of Northern Ireland to the Consultation of the Department of Finance and Personnel to the Draft Legal Complaints and Regulation Bill (Northern Ireland)2013, 22 January 2014, para 11.1

⁵⁵ Response of the Law Society of Northern Ireland to the draft Legal Complaints and Regulation Bill 2013, p 3, paras 4.4-4.7.

⁵⁶ http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm

⁵⁷ Section 174 of the Legal Services Act 2007

paid into a Consolidated Fund. These amounts include sums received in relation to the levy.⁵⁸ The Legal Services Act (Levy) (No2) Rules 2010 sets out the principles for determining the levy.

There are different rules for recouping the expenditure of the Legal Services Board and the OLC. The rules for recouping the costs of the Board apportion costs on the basis of the number of authorised persons regulated by each approved regulator. According to the Board, the LSB has reduced its costs since its inception in 2009, and the total number of practitioners has gradually increased over this period. Therefore the approximate amount attributable to each authorised person for LSB leviable expenditure has reduced from in the region of £34 to £25.31 for 2013/14.⁵⁹

The methodology calculating the levy to recoup the costs of the OLC was based on the average number of complaints per year based on a three year period ending 31 December 2009. The Legal Services Board Review of Levy Rules highlighted that this was not ideal but served as an adequate proxy until the Legal Ombudsman had been operating long enough to base the charges on actual data.⁶⁰

The table below sets out the current amounts payable by each approved regulator for 2013/14.⁶¹

2013/14 Levy		
Approved Regulator	Average number of complaints	OLC Estimate based on Legal Ombudsman budget
	3 year period ending 2009	
		£
The Law Society	13,311	14,881,828

⁵⁸ Section 178 of the Legal Services Act 2007

⁵⁹ LSB Review of the Levy Rules: Consultation on the proposed amendments to the levy rules made under sections 173-174 of the Legal Services Act 2007, 18 December 2013, pg 6. Available at http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/lrb_review_of_levy_rules_consultation_181213.pdf

⁶⁰ LSB Review of the Levy Rules: Consultation on the proposed amendments to the levy rules made under sections 173-174 of the Legal Services Act 2007, 18 December 2013, pg 7

⁶¹ LSB Review of the Levy Rules: Consultation on the proposed amendments to the levy rules made under sections 173-174 of the Legal Services Act 2007, 18 December 2013. Available at http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/lrb_review_of_levy_rules_consultation_181213.pdf

General Council of the Bar	421	470,682
Chartered Institute of Legal Executives	8	8,944
Council for Licensed Conveyancers	194	216,894
Intellectual Property Board Regulation	8	8,944
Faculty Office	5	5,590
Costs Lawyers Standards Board	1	1,118
Total		15,594,000

The LSB Review on the levy rules proposed changes to the referencing period for the three years ending 31 March 2014 and that this should be automatically rolled forward each year. This would mean using the most up to date information available when estimates were given to the approved regulators of their likely contributions around June of each year to determine the amount needed to include in the practising certificate.⁶²

The Table below provides information on the 2014/15 levy on the latest data available. (The figure 12,445,32 below is possibly an error and should be 12.44532 million as the total is over 13 million).

2014/15 Levy

Approved Regulator	Average number of complaints	OLC Estimate based on Legal Ombudsman budget
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⁶² LSB Review of the Levy Rules: Consultation on the proposed amendments to the levy rules made under sections 173-174 of the Legal Services Act 2007, 18 December 2013, pg 8

(3 year period ending 30/09/2013)		
		£
The Law Society	7,739.33	12,445,32
General Council of the Bar	279.33	449,541
Chartered Institute of Legal Executives	0	0
Council for Licensed Conveyancers	139.33	224,231
Intellectual Property Board Regulation	10.33	16,625
Faculty Office	2.33	3,750
Costs Lawyers Standards Board	0.33	531
Total	8171	13,150,000

Scotland

Section 27 of the Legal Profession and Legal Aid (Scotland) Act 2007 requires an annual general levy to be paid to the SLCC by practising solicitors and advocates, conveyancing and executry practitioners and persons exercising a right to conduct litigation or a right of audience acquired by section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The Commission may also recover unpaid sums and interest due for late payment as a debt. Section 28 outlines the

circumstances in which a practitioner may be required to pay a complaints levy to the Commission. The circumstances include where:

- Mediation takes place in relation to the complaint and the outcome of the mediation is accepted by the both the complainant and the practitioner;
- A settlement proposed by the Commission in relation to the complaint;
- The Commission makes a determination to uphold the complaint.

Section 29 enables the Commission to determine the annual general levy and complaints levy in respect of each financial year. The Commission is required to consult the professional organisations and their members each financial year on the proposed budget. The SLCC published its draft budget for the operational year 2013/14 on 8th April 2014. A summary of the budget is as follows:⁶³

- Anticipated expenditure- £2,772,580 (previous year £2,913,410);
- Anticipated Income- £2,695,871 (previous year £2,709,286)
- Anticipated funds released from reserves £76,709 (previous year £204,124)
- General levy-£324 full levy (previous year £324-no increase on previous year0)
- Complaints levy- there will be no change to the complaints levy

The complaints levy is set at zero for service complaints resolved by mediation and the investigation stage and up to a capped level of £5000 for complaints upheld in full or part in determination.⁶⁴

The total actual levy required by each professional body for 2014/15 is outlined below:⁶⁵

⁶³ SLCC "SLCC Budget 01 July 2014 to 30 June 2015" http://scottishlegalcomplaints.com/media/49496/slcc_2014-2015_budget.pdf

⁶⁴ <http://scottishlegalcomplaints.com/for-practitioners/budget-levy/budget-2012-2013.aspx>

⁶⁵ SLCC "SLCC Budget 01 July 2014 to 30 June 2015" http://scottishlegalcomplaints.com/media/49496/slcc_2014-2015_budget.pdf , page 5

Organisation	£
Law Society of Scotland	2,597,996
Faculty of Advocates	72,663
Association of Commercial Attorneys	212
Total	2,670,871

Republic of Ireland

Part 6 of the Legal Services Regulation Bill 2011 imposes a levy on the Law Society and the Bar Council to cover the expenses of the Legal Services Regulatory Authority and the Disciplinary Tribunal. Clause 69 sets out in detail the formula by which the levy will be calculated. The Minister for Justice and Equality shall, with the consent of the Minister for Public Expenditure and Reform, determine the operating costs and administrative expenses incurred by both the Authority and the Tribunal in that financial year. Costs and expenses include:

- The remuneration of members of the Authority;
- The remuneration of inspectors and members of staff;
- Any superannuation contributions paid in respect of members of the staff of the Authority out of moneys provided by the Oireachtas;
- Fees due to consultants and advisers;
- The cost of office premises; and
- Any other costs expenses incurred by the Authority in the performance of its functions.

In calculating the levy, the Minister in consultation with the Authority has to determine the expenses incurred by the Authority in the performance of its functions and determine the expenses incurred by the Authority in the consideration of investigation of complaints relating to solicitors and barristers (Clause 69 (4)). Clause 69 (5) contains similar provisions in respect of the Disciplinary Tribunal.

The levy in relation to the expenses of the Authority and the Tribunal is apportioned as follows:⁶⁶

- 10 per cent of that amount shall be paid by the Bar Council;
- 10 per cent of that amount shall be paid by the Law Society ;
- The remaining 80 per cent shall be paid pro rata by the Bar Council and the Law Society according to the proportion of expenses incurred in the consideration and investigation of complaints relating to barristers and solicitors.

Clause 79 provides that the Authority must as soon as practicable, after the beginning of each financial year provide the Bar Council and the Law Society with a levy assessment notice.

Clause 82 of the Bill allows the Authority to make regulations in respect of the levy, on a number of matters such as the date when the levy is payable, collection and recovery, rates and interest on amounts not paid when due and other matters relating to the imposition, payment and collection of the levy.

4 Legal Complaints

4.1 Statutory Scheme for Complaints

Part 2 and Part 3 of the draft Bill outline the complaints schemes for both legal professions; Part 2 covers barristers and Part 3 solicitors. Clause 11 of the draft Bill requires the General Council of the Bar to make provision requiring every barrister to participate in or make arrangements or be subject to procedures for the resolution of relevant complaints against them. Clause 29 makes similar provision in respect of solicitors. Clauses 14 and 33 of the draft Bill require the complainant to use the respondent's complaints procedures in the first instance. Clauses 13 and 31 bring a

⁶⁶ Clause 79 (7) of the Legal Services Regulation Bill 2011 as amended in the Select Committee.

complaint within the jurisdiction of the complaints committees if it relates to the act or omission of a barrister or solicitor in the course of providing professional services.

Provisions on eligibility to make complaints are contained in Clauses 15 and 33. Clause 15 sets out conditions of eligibility in relation to complaints to the Bar Complaints Committee. Subsection 2 specifies that the first condition is that the complainant is an individual or a person or a body described in an order made by the Department of Personnel in accordance with a recommendation under clause 16 of the draft Bill. Subsection 3 sets out the second condition: that the services to which the complaint relates were provided by the barrister to the complainant, the barristers provided the services complained of to a solicitor who procured the services on behalf of the complainant; or the complainant meets other conditions as set out in an order made by the Department of Finance and Personnel in accordance with a recommendation under clause 16. Subsection 4 specifies that a complainant is excluded from bringing a complaint to the committee if the complainant is a solicitor and procured the services on behalf of another person or if the complainant falls within a description in an order made by the Department of Finance and Personnel in accordance with a recommendation under section 16. An order made under clause 15 is subject to negative resolution (Subsection 5).

Clause 33 outlines conditions relating to the eligibility of a complainant to have a complaint dealt with by the Solicitors Complaints Committee. The first condition is that the complainant is an individual; or a person (other than an individual) or body of a description prescribed by an order of the Department of Finance and Personnel in accordance with a recommendation under clause 34. The second condition is that the complainant must show that the services to which the complaint relates were provided by the solicitor to the complainant and that the services were provided by the solicitor in their capacity as a personal representative or trustee or to a person acting as a personal representative or trustee or the complainant meets other conditions as set out in an order made by the Department of Finance and Personnel in accordance with a recommendation under clause 34. Subsection 4 excludes the complainant from bringing a complaint to the Complaints Committee if the complainant is a solicitor and the services relating to the complaint were procured by the complainant on behalf of another person. Subsection 4 also provides that a complainant is excluded from bringing a complaint if they are a person or body prescribed by an order made by the Department of Finance and Personnel in accordance with a recommendation under clause 34.

Clause 17 of the draft Bill relates to the procedure for complaints for the Bar. The Bar Complaints Committee must make rules setting out the procedure for the making of complaints to the Committee and the investigation, consideration and determination of complaints by the Committee. The rules must provide that a complaint must be made within established time limits and allow for the possibility of an extension of time limits.

Subsection 3 provides for specified persons to continue a complaint made by a person who has died or is otherwise unable to act. Subsection 4 sets out a list of areas in which the Committee may wish to make rules but the list is not exhaustive. Subsection 5 lists the circumstances in which a complaint may be dismissed. Subsection 6 provides that the Committee may not make rules requiring a person to provide information or give evidence or to produce any document that person would not be compelled to provide or give evidence in civil proceedings before the High Court. Subsection 7 provides that, where an award has been made in favour of the Committee, the sums are payable to the Executive Council of the Inn of Court of Northern Ireland. Subsection 8 provides a rule making power to the Committee to order that an amount payable by an award bears interest. Subsection 9 specifies that an amount payable is recoverable as a debt.

Clause 36 sets out a detailed procedure for complaints against solicitors. According to subsection 1, the Solicitors Complaints Committee must make rules setting out the procedure for the making of complaints to the Committee and the investigation, consideration and determination of complaints by the Committee. Subsection 2 requires the Committee to set out time limits in the rules and that the rules may provide that the Committee may extend the time limit in specified circumstances. Subsection 3 requires the Committee rules to make provision permitting specified persons to continue a complaint made by a person who has died or is unable to act. The rules may modify references to the complainant. Subsection 4 provides that the rules may make provision for a number of areas but does not limit the extent of the Committee's rule making powers. The rules may make provision for:

- The dismissal of a complaint without consideration of its merits;
- The reference of a complaint to another person or body with a view to the complaint being determined by another person or body other than the committee;
- The evidence which may be required or admitted, requiring parties to the complaint to attend to give evidence, produce documents and provide information;
- For the Committee to award expenses to persons in connection with attendance at a hearing before the committee;
- For the Committee to award costs against the respondent in favour of the complainant;
- For the Committee to award expenses against the respondent in favour of the Committee for the purposes of providing a contribution to resources used in dealing with the complaint. The Committee may also award expenses against the complainant if the complainant acted so unreasonable in relation to the complaint that it is appropriate to make an award;

- For the purpose of facilitating the settlement of a complaint with the agreement of the parties to it;
- For specified persons or bodies to be notified of complaints made to the Committee.

Subsection 5 of Clause 36 sets out the circumstances in which the Committee may dismiss a complaint without consideration of its merits. Circumstances include if the Committee considers the complaint to be frivolous, vexatious or totally without merit or the complaint would have been better dealt with by arbitration or legal proceedings. The Committee may also dismiss the complaint if it considers that there had been undue delay in the making of the complaint or in provision of supporting evidence. Complaints may also be dismissed if the Committee is satisfied that the matter has been previously dealt with by the Committee or by legal proceedings or if there are compelling reasons why it is inappropriate for the complaint to be dealt with by the Committee. Subsection 6 stipulates that no person may be required by the rules to provide information, evidence or documents which that person would not be required to produce in civil proceedings. Subsection 7 provides that where an amount under an award made in favour of the Committee shall be payable to the Law Society. Subsection 8 provides that rules may authorise the Committee, when making an award of costs, to order that that the amount payable bears interest from a time specified in accordance with the order. Subsection 9 specifies that an amount payable to a person is recoverable as a debt to that person.

The Law Society objects to the proposal that the LSOC should be able to veto nominations to the complaints body, noting it was not part of the Bain proposals.⁶⁷ Schedule 3, paragraph 2 provides that the Law Society may not make an appointment without the consent of the Legal Services Oversight Commissioner. In England and Wales, Scotland and the Republic of Ireland there are no similar provisions in order to make comparisons possible on this issue. .

4.2 Complainants

The Law Society raised concerns about proposed changes as to who can complain. A representative from the Law Society suggested that the core of the model is that those who can complain have to be a client of the solicitor or a personal representative on any type of administration of estates. The representative argued that, if complaints are about a solicitor, they have to be based on a relationship between the solicitor and the complainant. Furthermore, he said it would be inappropriate if third parties with no

⁶⁷ Response of the Law Society of Northern Ireland to the draft Legal Complaints and Regulation Bill 2013, p 3, para 6.1; also Appendix A Law Society of Northern Ireland's response to the Department of Finance and Personnel's Consultation on the Legal Complaints and Regulation Bill(Northern Ireland) 2013, para 9.1.

relationship to the solicitor should suddenly start complaining about that solicitor; this would possibly lead to more vexatious complaints.⁶⁸ The Law Society representative considered that the draft Bill was insufficiently clear on this point.

England and Wales

The legislative provisions relating to complainants in England and Wales are similar to those proposed in the draft Bill. Section 128 of the Legal Services Act 2007 sets out the conditions as to who can make complaints under the scheme. The first condition is that the person must be an individual or person (other than an individual) of a description prescribed by an Order made by the Lord Chancellor in accordance with a recommendation made under section 130. The second condition is :

- The services to which the complaint relates were provided by the respondent to the complainant;
- The services to which the complaint relates were provided by the respondent to an authorised person who procured them on behalf of the complainant;
- The Services to which the complaint relates were provided by the respondent in the respondent's capacity as a personal representative or trustee or to a person acting as a personal representative or trustee and the complainant is the beneficiary of the trust in question; or
- The complainant satisfies other conditions in relation to the services to which the complaint relates as may be prescribed by an Order made by the Lord Chancellor under Section 130.

Under section 128, a complainant is excluded from the Ombudsman Scheme if the complainant is an authorised person in relation to a reserved legal activity and procured the services to which the complaint relates on behalf of another person (i.e a solicitor who instructs counsel on behalf of a client may not complain about counsel. A complainant is also excluded if it is a public body or falls within an Order made by the Lord Chancellor pursuant to a recommendation made under section 130.

Scotland

Section 2 of the Legal Profession and Legal Aid (Scotland) Act 2007 outlines who can make a complaint to the SLCC. Any person can make a conduct complaint. Persons who can make complaints alleging inadequate services are those that appear to the Commission to be directly affected. The Explanatory Memorandum to the Act states that the Commission is not required to take forward a complaint made by someone who

⁶⁸ Committee for Finance and Personnel Official Report "Draft Legal Complaints and Regulation Bill: Law Society" 29 January 2014, pg 9.

is not directly affected unless they are one of the persons listed under subsection 2. This subsection lists a number of public office holders and bodies including:

- The Lord Advocate;
- The Advocate General for Scotland;
- Any judge, including a Sheriff;
- The Auditor of the Court of Session;
- The Auditor of any Sheriff Court; and
- The Scottish Legal Aid Board.

Republic of Ireland

Clause 48 of the Legal Services Regulatory Bill 2011 as initiated makes provision for the admissibility of complaints. The Authority is required not to consider frivolous or vexatious complaints. The Authority cannot consider complaints that have been determined under relevant procedures for considering complaints before the legislation comes into force. The Authority can make rules regulating the making of complaints and procedures to be followed by the Authority and the Complaints Committee in investigating complaints. The Bill was amended at Committee Stage to separate the provisions on regulations and admissibility.⁶⁹

4.3 Determinations by the Committees

The draft Bill includes provisions relating to determinations made by the Complaints Committees. Clause 19 relates to determination of complaints against barristers. According to subsection 1, the Bar Complaints Committee may determine a complaint by upholding the complaint; dismissing the complaint or part of the complaint. Subsection 2 states that the determination upholding the complaint may include

- A direction that the respondent makes an apology to the complainant;
- A direction that the barrister's fees to which the respondent is entitled to in respect of the services relating to the complaint are limited to an amount specified by the direction;

⁶⁹ Clauses 48 and 50 of the Legal Services Regulation Bill 2011 as amended in the Select Committee on Justice,, Defence and Equality

- A direction that the respondent pay compensation to the complainant in respect of any loss suffered by the complainant as a result of the respondent's negligence;
- A direction that the respondent pay compensation to the complainant in respect of any inconvenience or distress caused to the complainant as a result of the matter connected with the complaint;
- A direction that the respondent secures rectification at their own expense of any error, omission or other deficiency in connection with the matter under complaint;
- A direction that the respondent completes the matter within reasonable time, or
- A direction that the respondent take other action at their own expense, in the interests of the complainant as the direction may specify.

Subsection 3 enables the Bar Committee to make a determination that any fees (whole or part) paid by the complainant may be refunded or remitted or the right to recover fees be waived, either wholly or to a specified extent. Subsection 4 provides that the direction may provide that the rate payable under the direction may bear interest. Subsections 5 and 6 provide for the limitation of fees where barrister's fees are subject to taxation. Subsection 7 specifies the maximum amount of the compensation to the complainant in respect of loss must not exceed £3500. Subsection 8 sets the maximum amount of compensation payable for inconvenience and distress at £3500. Subsection 9 provides that if the respondent fails to comply with a direction, any person can make a complaint of that failure to the General Council of the Bar.

Clause 18 deals with notification requirements in relation to determinations of Bar Complaints. Subsections 1 and 2 provide that, if a complaint is excluded from the jurisdiction, dismissed by the Bar Complaints Committee, referred to another body or is settled, determined, withdrawn or abandoned, the Committee must notify the complainant and the respondent. Subsection 3 specifies that where the Committee has determined a complaint, the Committee must prepare a written statement giving reasons for its determination. Subsection 4 requires the Committee to give a copy of the statement to the complainant, the respondent, the Benchers, the General Council of the Bar and the Legal Services Oversight Commissioner.

Clause 37 deals with notification requirements in respect of determinations in complaints against solicitors. Clause 37 subsections 1 and 2 specify that if a case is excluded from the jurisdiction of the Committee, is dismissed, referred to another body or settled, determined, withdrawn or abandoned, the Solicitors Complaints Committee

must notify the complainant and the respondent. If the complaint is excluded or dismissed or referred to another body, the Committee must give reasons. Subsections 3 and 4 require the Committee, on determination of a complaint, to give a copy of the statement to the complainant, the respondent, the Law Society and the Legal Services Oversight Commissioner.

Clause 38 relates to determinations made by the Solicitors Complaints Committee. Subsection 1 allows the Solicitors Complaints Committee to uphold the complaint or part of the complaint, or dismiss the complaint or part of the complaint. Subsection 2 of clause 38 sets out the directions that may be made by the Solicitors Complaints Committee in determinations including a direction that the respondent make an apology to the complainant or that the solicitor's costs to which the complaint relates are limited to a specified amount and under subsection 3, a direction may include that the solicitor refunds the costs to comply with this requirement. Determinations may also include a direction that the solicitor pays compensation to the complainant for inconvenience, distress or loss that does not fall within the category of negligence. A direction may include that the solicitor pay compensation for any loss as a result of, in the opinion of the committee, the solicitor's negligence, the solicitor secures rectification at their own expense, of any error, omission or deficiency arising in connection with the complaint. The Committee's determination may include a direction that the solicitor takes steps to complete the matter within a reasonable time frame specified in the direction or that the solicitor at their own expense takes such other action in the interests of the complainant as specified in the direction.

Subsection 4 allows the amount payable under the direction to bear interest. Subsections 5 and 6 relates to the limitation of fees where a solicitor's costs are subject to taxation. Subsection 7 specifies that the amount of compensation payable in respect of loss suffered by the complainant as a result of the solicitor's negligence must not exceed £3500. Subsection 8 specifies that the amount of compensation payable to the complainant for inconvenience or distress must not exceed £3500. Subsection 9 provides that if the solicitor fails to comply with a direction made by the Committee may be complained about to the Solicitor's Disciplinary Tribunal. Clause 39 of the draft Bill allows the Department to amend the compensation limit of £3500 in the clause 38 by an Order which would be subject to negative resolution.

Clauses 21 and 40 of the draft Bill provide that the Department must with the concurrence of the Lord Chief Justice make regulations providing for appeals to the High Court against determinations of the Bar and Solicitors Complaints Committees. Regulations may not be made unless a draft has been laid before and approved by a resolution of the Assembly.

The Law Society highlighted that there is no equivalent in Northern Ireland to section 2 of the Compensation Act 2006 in England and Wales which provides that an apology,

an offer or treatment of redress, shall not of itself amount to an admission of negligence or breach of statutory duty. The Law Society considers this to be essential.⁷⁰

The Law Society noted that clause 38 (2) (b) gives a power to make orders against a respondent as set out in clause 49 of the draft Bill. The Law Society considers that it is appropriate the determinations should be against a solicitor or his firm, particularly in the context of fee reduction.

The Law Society suggested that the remedy for failure to comply with a determination should not lie with the Solicitors Disciplinary Tribunal (SDT). Such referrals they argue should be reserved for serious levels of misconduct and provision should be made for the Solicitors Complaints Committees to refer matters of concern to the Society for action in a similar way to the provisions for failure to provide documents under clause 42.⁷¹

The Law Society also raised issues with regards to clause 37 which requires the Solicitors Complaints Committee to provide copies of determinations to the parties to the complaint, the Law Society and the LSOC. The Law Society considered this to be overly bureaucratic and suggested that this is a more appropriate topic for regulation or protocol by agreement to establish the most practical workable scheme.⁷²

The issue of compensation limits was highlighted by a number of consultees. The Law Centre noted that the recommendation for a £3,500 compensation limit by the Review dated back to 2005; however the consultation is proposing no increase despite the passage of eight years.⁷³ The Bar Council indicated to the Committee for Finance and Personnel that it would resist an increase in the proposed figure stating “the bottom line is that the whole purpose of the sanction is for it to be a fair and proportionate one: it is not to be a punitive one.”⁷⁴ The Law Society indicated that it was satisfied that the figure of £3,500 was a proportionate figure. It drew attention to the system in England where the awards were typically hundreds of pounds rather than thousands. The medium to high award was generally around £1000.⁷⁵

⁷⁰ Response of the Law Society of Northern Ireland to the Department of Finance and Personnel to the Draft Legal Complaints and Regulation Bill 2013, 20 February 2014, 8.3

⁷¹ Response of the Law Society of Northern Ireland to the Department of Finance and Personnel to the Draft Legal Complaints and Regulation Bill 2013, 20 February 2014, 8.3

⁷² Response of the Law Society of Northern Ireland to the Department of Finance and Personnel to the Draft Legal Complaints and Regulation Bill 2013, 20 February 2014, 8.4

⁷³ The Law Centre Briefing Notes for the Finance and Personnel Assembly Committee, Consultation by DFP on the Draft Legal Complaints and Regulation Bill (NI) 2013

⁷⁴ Committee for Finance and Personnel Official Report “Draft Legal Complaints and Regulation Bill: Bar Council” 29 January 2014, pg 7.

⁷⁵ Committee for Finance and Personnel Official Report “Draft Legal Complaints and Regulation Bill: Law Society” 29 January 2014, pg 7.

The Law Society noted that there was no provision for an appeal process against determinations in the draft Bill and this would be determined by rules yet to be drafted. The Law Society argued that the availability of an effective and proportionate appeal system would be essential to the integrity of the scheme.⁷⁶

England and Wales

Section 135 of the Legal Services Act 2007 makes provision for notification requirements. If the complaint is excluded, dismissed, referred to another scheme, settled, withdrawn or abandoned, the Ombudsman must inform the complainant, the respondent, and any relevant authorising body in relation to the Respondent. If a complaint is excluded or dismissed, the Ombudsman must give reasons.

Section 137 sets out the directions an Ombudsman may make in a determination. They include:

- The respondent make an apology to the complainant;
- That the respondent's fees for services to which the complaint relates are limited to a specified amount;
- That the respondent pay compensation for inconvenience, loss or distress;
- That the respondent at their own expense secure rectification of any specified error, omission or deficiency in connection with the matter to which the complaint relates;
- That the respondent at their own expense take action in the interests of the complainant that the direction may specify.

Section 137 (4) allows for the amount payable under the determination to bear interest.

Section 138 places limitations on the value of directions under the Ombudsman Scheme. The section ensures that total value of directions made under section 137 on the determination of a complaint under the Ombudsman Scheme does not exceed £30,000 (excluding interest). Prior to the commencement of the Act, the highest level of compensation in the legal sector was £15,000.⁷⁷ Section 139 allows the Lord Chancellor to alter the limits on the total value of directions imposed by section 138. The limits were raised by the Lord Chancellor in 2012 to £50,000.⁷⁸ However, the Ombudsman's website indicates most awards are less than £1000. The Ombudsman

⁷⁶ Response of the Law Society of Northern Ireland to the Department of Finance and Personnel to the Draft Legal Complaints and Regulation Bill 2013, 20 February 2014, 9.2

⁷⁷ <http://www.legislation.gov.uk/ukpga/2007/29/notes/division/7/6/2/26>

⁷⁸ See the Legal Services Act (Alteration of Limit) Order 2012 SI 2012/3091

Scheme rules do not appear to have an appeals process against determinations. Ombudsman decisions are the final stage of the complaints process.⁷⁹

Scotland

Section 10 of the Legal Profession and Legal Aid (Scotland) Act 2007 provides that when the SLCC makes a determination upholding a complaint, it may take certain steps to provide redress for the complainer, which it considers fair and reasonable in the circumstances. The steps are:

- To determine that the fees and outlay to which the practitioner is entitled for services provided to the client and to which the complaint relates is nil or an amount that the Commission may determine in the direction;
- To direct the practitioner to secure rectification at their own expense of any error, omission or deficiency arising in connection with the services;
- To direct the practitioner at their own expense to take such action in the interests of the complainant as the Commission may specify;
- To direct the practitioner to pay an amount of compensation not exceeding £20,000 as the Commission may specify for any inconvenience, distress or loss resulting from inadequate professional services;
- Where the practitioner is deemed to have insufficient competence in relation to any aspect of law or legal practice, to report the matter to the relevant professional body.

Where the practitioner is an employee of an employing solicitor, then any direction in respect of reducing fees or outlay or carrying out remedial work will be made against the employing practitioner not the employee. A direction in relation to payment of compensation may be made to either the employing practitioner or employee, or both. If the determination is made against both, then the compensation should be allocated between them as the Commission deems appropriate. Before determining whether to reduce fees or outlays, the Commission may submit the practitioner's accounts for fees and outlays in question to the Auditor of the Court of Session for taxation. Section 10 provides that Scottish Ministers after consultation with the relevant professional groups and consumer interest groups may by order amend the maximum level of compensation the Commission may award under section 10.

⁷⁹ <http://www.legalombudsman.org.uk/research-decisions/ombudsman-decisions.html>

Section 12 of the 2007 Act makes provision for notification of determinations. The Commission must give notice of determinations in writing, whether complaints are upheld or not. The Commission must provide a copy of the determination to the complainant, every practitioner mentioned in it and, where appropriate, the employing practitioner. Section 12 also requires the Commission to give reasons for the determination where a complaint is determined by one of the Commission's determination committees.

Section 21 of the 2007 Act permits the complainant, practitioner to whom the complaint relates, the employing practitioner, the practitioner's firm and the relevant organisation to appeal to the Court of Session, with the leave of that court, to appeal against any decision of the Commission under Part 1 of the Act.

Republic of Ireland

Clause 51 of the Legal Services Regulation Bill as initiated sets out the directions that the Divisional Complaints Committee can include in a determination in upholding a complaint. The measures include:

- A direction to the legal practitioner to complete the legal service the subject of the complaint or a direction to the legal practitioner to arrange the performance or completion of the legal service subject of the complaint by a practitioner nominated by the complainant at the expense of the legal practitioner subject to the complaint;
- The issue of a caution to the legal practitioner in respect of an act or omission the subject of the complaint;
- A direction to the legal practitioner that they participate in one or modules of a professional competence scheme and they furnish evidence of participation to the Authority within a specified period of time;
- A direction to the legal practitioner that they waive all or part of any fee payable by the complainant to the practitioner concerned, or refund fees paid to the practitioner in respect of services subject to the complaint.

Where the Divisional Committee considers that the act or omission constitutes misconduct or where the complainant or practitioner does not consent to the complaint being disposed of as outlined, it must either:

- Bring an application to the Legal Practitioner's Disciplinary Tribunal for the holding of an inquiry as to whether the act or omission complained of constitutes misconduct; or
- May investigate the matter further and investigation may include requesting an inspector to attend the legal practice of the practitioner.

The Legal Services Regulation 2011 Bill as amended in the Select Committee included additional measures in clause 59 that could be directed by the Divisional Complaints Committee. These included:

- A direction that the legal practitioner take other such action in the interest of the client as the Committee may specify;
- A direction to the legal practitioner to comply with an undertaking given by the legal practitioner to another legal practitioner or to another person or body;
- A direction to the legal practitioner to amend or withdraw an advertisement;
- A direction to the legal practitioner to pay a sum not exceeding €5,000 as compensation for financial or other loss suffered as a result of inadequate legal services provided or purported to have been provided by the practitioner;
- A direction that the legal practitioner pay a sum to the Authority not exceeding €5,000 by way of contribution towards costs for investigation of the complaint;
- A direction that the legal practitioner pay a sum not exceeding €2,500 to the Authority where the Divisional Committee determined that the legal practitioner refused, neglected or failed to respond in a timely manner in the course of the investigation.

Clause 59 provides that where the Division Committee determines that the act or omission does not constitute misconduct, it must advise the complainant and the practitioner, giving reasons for the determination. Where the Division Committee considers that the act or omission the subject of the complaint appears to constitute misconduct and considers one or more of the measures is an appropriate way of determining the complaint, it may where the complainant and practitioner consent in writing, direct the legal practitioner to act accordingly.⁸⁰

Where a legal practitioner does not consent to the imposition of measures within 21 days of notification, the amended Bill provides that the Divisional Committee it will apply to the Legal Practitioner's Disciplinary Tribunal to hold an inquiry into the complaint.⁸¹ The Bill provides for appeals against determinations of the Disciplinary Tribunal. Appeal may be brought to the High Court.⁸²

⁸⁰ Clause 59 of the Legal Services Regulation Bill 2011, as amended in the Select Committee for Justice, Defence and Equality,

⁸¹ Clause 59 (8) (b) of the Legal Services Regulation Bill 2011 as amended in the Select Committee for Justice, Defence and Equality

⁸² Clause 70 of the Legal Services Regulation Bill 2011 as amended in the Select Committee for Justice, Defence and Equality

4.4 Lay Representation

Provisions in the draft Bill provide for a move to lay majorities on Complaints Committees. The Bain proposals supported a move to lay majorities on complaints committees, chaired by a lay person.⁸³ Schedule 2, paragraph 4 of the draft Bill provides that the Benchers must ensure that at least two thirds of the Committee are lay persons and the chair of the Bar Complaints must be a lay person. Schedule 3 imposes the same requirements on the Law Society to ensure two thirds lay representation in respect of the Solicitors Complaints Committee and a chair who is a lay person.⁸⁴ Reference to a lay person in the draft Bill is a reference to a person who is not and has never been a solicitor or a barrister.⁸⁵

The Consumer Council believes that the appointment of a lay chair and lay majority on complaints committees will enhance 'openness, transparency and consumer trust.'⁸⁶

The Bar Council appreciates the view that increased lay representation increases transparency and confidence. However, the Bar Council expressed concern that it would be difficult to adjudicate complaints regarding the provision of legal services and potential breaches of professional duties without experience of practice, knowledge of the legal system and understanding of the law. The Bar Council would be supportive of an equal representation of lay and barrister representatives on the Bar Complaints Committee.⁸⁷

The Law Society notes that the requirement of a two-thirds majority of lay-persons to solicitors members provided for in the draft Bill were not part of the Bain proposals. The Law Society considered the original proposals were sufficient and the changes would have a negative impact for the following reasons:⁸⁸

- The effect of reducing the number of professional members is to increase the burden of attendance on them;
- There could be delays in the process due to non-availability of solicitor members on a given date, resulting in cancelled meetings, delays in processing cases and missed targets, resulting in potential fines for the Society from the LSOC;

⁸³ Para 11, page vi and pages 43-44.

⁸⁴ See Schedule 3, paragraph 4 (2)

⁸⁵ Schedule 3, paragraph 4 (3)

⁸⁶ Consumer Council Correspondent to the DFP Committee Re Draft Legal Complaints and Regulation Bill, 24 January 2014.

⁸⁷ The Bar Council "Briefing Paper on Draft Legal Complaints and Regulation Bill", para 25

⁸⁸ Response of the Law Society of Northern Ireland to the Consultation of the Department of Finance and Personnel to the Draft Legal Complaints and Regulation Bill (Northern Ireland)2013, para 9.2

- An established Committee with a small number of very regular attendees (as minority solicitors will become) can unintentionally result in an over reliance on that established expertise and trust that undermines the independent input of a majority lay committee, particularly over a five year term of office.

In oral evidence to the CFP, a representative from the Law Society again expressed concern about the weighting of lay representation on the Committee.⁸⁹

“We are worried that if the ratio is two thirds to one third, the committee will become dependent on the very limited number of participating solicitors for legal advice. That would be a bad thing, because flexibility is needed in the working of those committees. Also sub-committees will derive from those committees, so we think we need to look closely at that. We are however committed to have a majority lay balance on the committee and a lay chairman.”

England and Wales

In England and Wales, the Legal Services Act provides that the Legal Services Board is to consist of a Chairman appointed by the Lord Chancellor, a Chief Executive and at least seven members but not more than 10 members. The majority of members must be lay members and the Chairman must be a lay person. The OLC is comprised of eight members. Schedule 15 of the 2007 Act provides that the OLC is to consist of a Chairman appointed by the Board and at least 6 other members appointed by the Board in consultation with the Chairman.⁹⁰ The Board are required to ensure that the majority of members of the OLC are lay members and the Chairman must be a lay person. The OLC must appoint a lay person as Chief Ombudsman.⁹¹

Scotland

In Scotland, the SLCC comprises a Lay Chair, 5 lay members and 3 lawyers. The Legal Profession and Legal Aid (Scotland) Act 2007 provides that the number of non-lawyer members must be greater than the number of lawyer members. The number of non-lawyer members must be no fewer than 4 and no greater than 8 and the number of lawyer members must be no fewer than 3 and no greater than 7.⁹²

⁸⁹ Committee for Finance and Personnel Official Report, Draft Legal Complaints and Regulation Bill: Law Society, 29 January 2014 pg 6.

⁹⁰ Schedule 15 of the Legal Services Act 2007

⁹¹ Section 122 of the Legal Services Act 2007

⁹² See Schedule 1, paras 8 and 9 and the Legal Profession and Legal Aid (Scotland) Act 2007

The Professional Conduct Committee of the Law Society of Scotland is comprised of an equal number of solicitors and non-solicitors.⁹³ The Faculty of Advocates complaints procedure provides that a complaint will come before a Complaints Committee consisting of four persons. Two advocates are drawn from the Dean, Vice Dean and eight other senior members of the faculty. Two other members are drawn from a panel of lay persons.⁹⁴

Republic of Ireland

In the Republic of Ireland, the Bill when introduced proposed that members of the Complaints Committee are to be appointed by the Authority and shall consist of no more than 16 members of whom the majority will be lay members.⁹⁵ Not less than 3 members will be appointed by the Law Society each of whom has practised in the State as a solicitor for more than 10 years.⁹⁶ Not less than 3 members, each of whom has practised in the State as a Barrister for more than 10 years, will be appointed by the Bar Council.⁹⁷ The Complaints Committee shall act in Divisional Committee, consisting of not less than three members, shall consist of an uneven number of members and shall consist of a majority of lay persons. Where a complaint relates to a solicitor, the Divisional Committee shall include a solicitor and equivalent provisions are included in respect of complaints against barristers.⁹⁸

The Bill as amended in the Select Committee on Justice, Defence and Equality indicated that the Complaints Committee shall consist of not more than 27 members of whom the majority would be lay persons. Not less than eight persons would be appointed by the Law Society, each of whom has practised as a solicitor in the State for more than 10 years. The amended Bill also provided that not more than four persons shall be nominated by the Bar Council, each of whom has practised in the State as a barrister for more than 10 years.⁹⁹ In terms of Divisional Committee, the Bill was amended by the Select Committee suggesting that the Divisional Committees will consist of not less than three members and not more than five members.¹⁰⁰ The amended Bill also provides that, when a Divisional Committee consists of five members, two members will be a solicitor or a barrister.¹⁰¹

⁹³ Law Society of Scotland "Conduct Complaints against Scottish Solicitors"
<http://www.lawscot.org.uk/media/713942/conduct%20complaints%20against%20scottish%20solicitors.pdf>

⁹⁴ <http://www.advocates.org.uk/complaintsprocedures.html>

⁹⁵ Clause 50 of the Legal Services Regulation Bill 2011

⁹⁶ Clause 50 (1 b) of the Legal Services Regulation Bill 2011

⁹⁷ Clause 50 (1) (c) of the Legal Services Regulation Bill 2011

⁹⁸ Clause 50 (6) and (7) of the Legal Services Regulation Bill 2011

⁹⁹ See Clause 57 of the Legal Services Regulation Bill amended by the Select Committee on Justice, Defence and Equality
<http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2011/5811/b58a11d.pdf>

¹⁰⁰ See Clause 57 (5) of the Bill amended by the Select Committee on Justice, Defence and Equality

¹⁰¹ See Clause 57 (11) of the Bill amended by the Select Committee on Justice, Defence and Equality

4.5 Powers to Remove Members of the Committees

The provisions relating to removal of members are set out in Schedules 2 and 3. Schedule 2 contains provisions on membership to the Bar Complaints Committee. The term of office for membership to the Committee is five years and on expiration of a first term a member shall be eligible for reappointment. Members may resign by giving notice to the Benchers or may be removed from office by the Benchers. Benchers may not remove a person from office unless any of the following conditions are satisfied: the member has been convicted of a criminal offence, became bankrupt or made an arrangement with that person's creditors, failed to exercise the member's functions for a continuous period of six months or has become unfit or unable to exercise that member's functions. Consent of the Legal Services Oversight Commissioner must be obtained before removing a member from office. Benchers must also consult the Chair before removing a member other than the Chair.

Schedule 3 contains similar provisions in relation to the Solicitors Complaints Committee. Again, a person can be appointed as a member for a term of five years and is eligible for reappointment for a further term. A member may resign from office or may be removed by the Law Society. The Law Society may not remove a person from office unless it is satisfied that: the member has been convicted of a criminal offence, became bankrupt or made an arrangement with that person's creditors, failed to exercise the member's functions for a continuous period of six months or has become unfit or unable to exercise that member's functions. Consent of the Legal Services Oversight Commissioner must be obtained before removing a member from office. The Law Society must also consult the Chair before removing a member other than the Chair.

The Law Society expressed concerns in its written submission about the limited powers to remove members of the SCC having regard to the importance of effective and efficient operation of the SCC for public confidence in the scheme and the need to avoid exercise of powers by the LSOC. The Society suggested that, if there were to be no change, the term of office should be three instead of five years.¹⁰²

England and Wales

In England and Wales, ordinary members of the Legal Services Board are appointed for a period not exceeding 5 years and may be reappointed for a further period not exceeding five years. An ordinary member may resign at any time by giving notice to the Lord Chancellor and may be removed from office by the Lord Chancellor.¹⁰³ The Lord Chancellor must be satisfied that the member has failed without reasonable

¹⁰² Response of the Law Society of Northern Ireland to the Consultation of the Department of Finance and Personnel to the Draft Legal Complaints and Regulation Bill (Northern Ireland)2013, para 9.3

¹⁰³ Schedule 1 para 7 of the Legal Services Act 2007

excuse to discharge the functions of the office for a continuous period of at least six months, has been convicted of an offence, is an undischarged bankrupt or otherwise is unfit to discharge the functions of the office.¹⁰⁴ Members of the OLC may resign from office at any time and may be removed by the Board.¹⁰⁵ The grounds for removal are the same as those for the Board ie the member has failed without reasonable excuse to discharge the functions of the office for a continuous period of at least six months, has been convicted of an offence, is an undischarged bankrupt or otherwise is unfit to hold office or discharge the functions of the office.¹⁰⁶ The Board must consult with the Chairman when removing a member.¹⁰⁷ The Chairman of the OLC may be removed from office only with the consent of the Lord Chancellor.¹⁰⁸

Scotland

In Scotland, members of the Scottish Legal Complaints Commission are appointed for a term of period of five years. Members may resign by giving notice in writing to Scottish Ministers. Members may be removed from office if the chairing member is satisfied that any of the following apply: that the member is insolvent, has been absent from meetings of the Commission for a period longer than six consecutive months, has been convicted of a criminal offence or is otherwise unfit to discharge the functions of a member.¹⁰⁹

Republic of Ireland

In the Republic of Ireland, the 2011 Bill provides that the Government may remove a member of the Authority if in the opinion of Government the member has become incapable through ill health of effectively performing the functions of office, the member has committed stated misbehaviour, the member has a conflict of interest of such significance that he or she should cease to hold office or the member's removal is necessary for the effective functioning of the office.¹¹⁰ The Bill does not make provision for the removal of members of the Complaints Committee or the Disciplinary Tribunal.

4. 6 Informal Resolution of complaints

The DFP consultation indicated that a complaint would be within the jurisdiction of the complaints scheme if it met certain conditions; one of these would be that there would normally be a preliminary attempt to resolve the complaint before it goes to the complaints committee. DFP emphasised that informal complaint resolution was an

¹⁰⁴ Schedule 1, para 7 (3) of the Legal Services Act 2007

¹⁰⁵ Schedule 15, para 8 of the Legal Services Act 2007

¹⁰⁶ Schedule 15, para 8 (2) of the Legal Services Act 2007

¹⁰⁷ Schedule 15, para 8 (4) of the Legal Services Act 2007

¹⁰⁸ Schedule 15, para 8 (3) of the Legal Services Act 2007

¹⁰⁹ Schedule 1 of the Legal Profession and Legal Aid (Scotland) Act 2007

¹¹⁰ Clause 12 of the Legal Services Regulation Bill 2011

important step in the scheme and accepted the comments of the Review Group that professional bodies should have a scheme in place to resolve complaints informally.¹¹¹

Clause 14 of the draft Bill provides that a complaint does not fall within the jurisdiction of the Bar Complaints Committee unless the complainant has first used the respondent's in-house complaints procedures. However, subsection 3 of the clause allows the Bar Complaints Committee to disapply this in certain circumstances.

Clause 32 of the draft Bill makes similar provisions in respect of solicitors. It provides that complaints will be excluded from the jurisdiction of the Solicitors Complaints Committee if the respondent's in-house complaints procedures have not been used in the first instance. However, clause 32 allows the Complaints Committee to disapply this in certain circumstances.

One of the members of the Committee for Finance and Personnel, Mr Bradley highlighted that the proposals suggested there should initially be an informal procedure to deal with complaints. The Bar Council suggested it would use mediation in the first instance, like the Scottish model which initially offers mediation. The Bar Council said it envisaged that initially it might offer mediation as a means of opening the informal procedure. If this procedure does not work, the Bar Council proposed that it would have another couple of stages that are more transparent where someone would look at the complaint and perhaps carry out an investigation. If this does not resolve the issue, the complaint would be referred to another committee and appropriate cases would be filtered to the Bar Benches Committee which is the second and more formalised tier.¹¹²

England and Wales

Section 126 of the Legal Services Act 2007 excludes a complainant from the Ombudsman Scheme if they that have not first used the respondent's complaints procedure. As is the case in the proposals in Northern Ireland, scheme rules may provide that this does not apply in certain circumstances.¹¹³ The Legal Ombudsman Scheme rules provide that a complainant cannot use the Legal Ombudsman unless the complainant has first used the authorised person's complaints procedure. The scheme rules provide that a complainant can use an Ombudsman if:¹¹⁴

¹¹¹ DFP Consultation on the Draft Legal Complaints and Regulation(Northern Ireland) Bill 2013, pg 14

¹¹² Committee for Finance and Personnel Official Report, Draft Legal Complaints and Regulation Bill: Bar Council, 29 January 2014 pg 5.

¹¹³ Section 126 (3) of the Legal Services Act 2007

¹¹⁴ Legal Ombudsman Scheme Rules, 1st February 2013, Para 4.2,
<http://www.legalombudsman.org.uk/downloads/documents/publications/Scheme-Rules.pdf>

- The complaint has not been resolved to the complainant's satisfaction within eight weeks of being made to the authorised person; or
- An Ombudsman considers that there are exceptional reasons to consider the complaint sooner or without it having been made first to the authorised person; or
- Where an ombudsman considers in-house resolution is not possible due to irretrievable breakdown in relationship between an authorised person and the person making the complaint.

An ombudsman may decide that the Legal Ombudsman should consider the complaint where the authorised person has refused to consider it or delay would harm the complainant.¹¹⁵

The Legal Ombudsman will try to resolve complaints at the earliest possible stage by whatever means it considers appropriate including informal resolution.¹¹⁶ According to the OLC's Annual Report for 2012/13, informal resolution takes the form of getting both sides to agree with the views and analysis of investigators to reach a solution as quickly as possible. In cases where it is not possible to get agreement, a more formal approach is needed and after detailed investigations the cases are referred to the Ombudsman. According to the annual report, the OLC was more successful in dealing with cases via informal resolution than via any other route. However, the report also noted that the number of decisions requiring a formal Ombudsman decision increased and the reasons for this was unclear. The report noted that there was evidence from other Ombudsman schemes that complainants have a propensity to pursue their complaints as far as possible. However, without detailed investigation of the decline in informal resolutions, it was not possible to explain this trend.¹¹⁷

Scotland

In Scotland, section 8 of the Legal Profession and Legal Aid (Scotland) Act 2007 provides that the Commission may refer a services complaint back to the complainant and legal practitioner or the legal practitioner's firm when it considers the complaint to have been made prematurely. The Commission may also refer a complaint back where it considers that the legal practitioner or firm has made no attempt or an insufficient attempt to achieve a negotiated settlement with the complainer.

¹¹⁵ Legal Ombudsman Scheme Rules, 1st February 2013, Para 4.3,

¹¹⁶ Legal Ombudsman Scheme Rules, 1st February 2013, Para 5.17,

¹¹⁷ The Office for Legal Complaints "Annual Report and Accounts for the year ending 31 March 2013", page 12 available at <http://www.legalombudsman.org.uk/publications/index.html#reports>

In addition the provision enables the Commission to offer to mediate between the parties, but only if both consent. The Commission must discontinue mediation in relation to the complaint, if either the practitioner or complainer withdraws consent or and may discontinue mediation for any other reason. If the mediation is discontinued, the Commission must give notice in writing of the reasons for discontinuing mediation.

The SLCC has a free mediation service which provides a confidential process for resolving service disputes. It provides a more speedy way to resolve disputes than the formal investigation process as the mediation process can take place in a matter of weeks. Whilst it is preferable that mediation takes place in person, the SLCC can arrange mediation via skype or teleconferencing. According to the SLCC, 4 out of 5 mediations result in agreement. The SLCC use independent, experienced mediators from a variety of backgrounds including who must meet the standards required by the Scottish Mediation Network.¹¹⁸

Republic of Ireland

Clause 56 of the Legal Services Regulation Bill 2011, as amended at Committee Stage, requires the Authority to prepare and publish guidelines in relation to the resolution of complaints by mediation or informal means. The provision says that the guidelines may:

- Set out the process where a determination can be made in respect of whether a complaint can be resolved by mediation or informal means;
- Providing for the recording of the manner in which a complaint was resolved and the terms of any agreement between the complainant and the practitioner;
- Outline the steps to be taken if the complaint cannot be resolved by mediation;
- Contain any other matters that the Authority considers necessary or appropriate for the means of facilitating the resolution of the complaint by mediation or informal means.

5 Research and Monitoring Complaints

One of the areas of interest to the Committee was the number of complaints and whether the capture of complaints was an accurate reflection of levels of dissatisfaction. The Law Centre noted that there were very few complaints and this

¹¹⁸ <http://scottishlegalcomplaints.com/making-a-complaint/mediation.aspx>

may reflect; high levels of satisfaction with the work of solicitors; a lack of awareness of complaints procedures; or a lack of faith in a solicitors body investigating its own complaints. The Law Centre stated that there was no empirical evidence as to which is true.¹¹⁹ It also queried, in its written submission to the Finance and Personnel Committee, whether the profession had ever done surveys of consumer confidence in complaints handling procedures.¹²⁰

The Chairperson of the Committee for Finance and Personnel asked representatives of the Bar Council whether they had conducted research to identify the number of complaints against barristers. The Bar Council informed the Committee for Finance and Personnel that, having reviewed the figures, there had been some increase in complaints in recent years. The Bar Council indicated that this was not as a result of falling standards but was rather due to publicity about complaints procedures and increasing public awareness of the complaints system.¹²¹ There were, the Bar Council stated, no more than 40 complaints coming in each year at this stage. In 2013 two serious complaints were sent to what was called a summary panel headed by a QC, one junior counsel and a layperson. The Bar Council said the two complaints were dealt with successfully. More serious complaints go to a disciplinary hearing prosecuted by a QC.¹²²

The Law Society for Northern Ireland was also asked by the Chairperson of the Committee for Finance and Personnel what research it has undertaken to identify the number of complaints. The Law Society brought in new communication regulations in 2008 which required the solicitor to write to a client to inform them that the solicitor has an in-house complaints system. The Law Society monitors the number of hits on its website on the section on complaints. Mr Cooper informed the Committee that the Law Society received 280 inquiries but the immediate response is to signpost those to the in-house complaints system. Mr Cooper stated:

The consequence of that is the 280 inquiries that we got or, in the previous year, the 348 inquiries that we got-were reduced to in each instance, around 100 complaints that were actually registered. That means that those inquiries either went away because they were misplaced in the first place.¹²³

The Law Society alluded to its monitoring regime which covers complaints, accounts and conveyancing. Law Society monitors visit solicitors to ensure in-house complaints systems are in place and that systems are robust, transparent and recorded. Monitors

¹¹⁹ The Law Centre Briefing Notes for the Finance and Personnel Assembly Committee, Consultation by DFP on the Draft Legal Complaints and Regulation Bill (NI) 2013

¹²⁰ The Law Centre Briefing Notes for the Finance and Personnel Assembly Committee, Consultation by DFP on the Draft Legal Complaints and Regulation Bill (NI) 2013

¹²¹ Committee for Finance and Personnel Official Report, Draft Legal Complaints and Regulation Bill: Bar Council, 29 January 2014

¹²² Committee for Finance and Personnel Official Report, Draft Legal Complaints and Regulation Bill: Bar Council, 29 January 2014, pg2-3.

¹²³ Committee for Finance and Personnel Official Report, Draft Legal Complaints and Regulation Bill: Law Society, 29 January 2014, pg2.

aim to visit practices once every two to three years. The Law Society indicated that the complaints system was developed as a result of interaction with the Bain Committee in anticipation of reforms included in the draft Bill.¹²⁴ A system of monitoring overall complaints that have not reached the Society has not been developed.¹²⁵ The Law Society does not compel solicitors to report all complaints but suggested to the Committee for Finance and Personnel that it would be willing to discuss that issue with the Oversight Commissioner.¹²⁶

England and Wales

The Legal Ombudsman publishes detailed annual complaints data on its website. The data includes information on the following:¹²⁷

- Who complained- the Equality Act 2010 requires the Ombudsman to collate data about individuals who have a complaint and the data is analysed to ensure that there is not a negative effect on different equality groups;
- People or organisations who made a complaint, for example a trustee, beneficiary or member of the public;
- Who was complained about;
- The complaints by area of law;
- The number of complaints received by area of law and regulator type and what the complaints were about for example, excessive costs or failure to advise;
- What was the remedy type;
- The resolution method by area of law, e.g if complaints were closed, if they were dealt with informally or if they went through an Ombudsman decision;
- How the Ombudsman put things right.

The Ombudsman also publishes detailed data on its website on Ombudsman decisions data. This data contains the names of firms, the number of decisions and the Ombudsman remedy required.¹²⁸

¹²⁴ Committee for Finance and Personnel Official Report, Draft Legal Complaints and Regulation Bill: Law Society, 29 January 2014, pg 2.

¹²⁵ Committee for Finance and Personnel Official Report, Draft Legal Complaints and Regulation Bill: Law Society, 29 January 2014, pg 3

¹²⁶ Committee for Finance and Personnel Official Report, Draft Legal Complaints and Regulation Bill: Law Society, 29 January 2014, pg 5

¹²⁷ <http://www.legalombudsman.org.uk/research-decisions/complaints-data.html>

¹²⁸ <http://www.legalombudsman.org.uk/ombudsman-decision-data/ombudsman-decision-data.aspx>

Scotland

The SLCC has published various pieces of into complaints. In June 2012, the SLCC commissioned research to look at complaints numbers and the methods used by practitioners to resolve complaints. The research was intended an initial fact finding exercise but it highlighted that there was scope for further work for the SLCC to undertake as part of its ongoing oversight role. This research produced two reports: Report on Complaints Numbers and Complaints Handling amongst Scottish Legal Firms; and a Report on Complaints Numbers and Complaints Handling amongst Scottish Advocates.¹²⁹

The SLCC also published a report in 2013 to mark the five year anniversary of the commission. The report analysed five years of legal complaints data to consider if there were insights to help practitioners and the public. The report includes information on the area of legal work that attract the most complaints, the most common type of complaints and how complaint trends have changed over time.¹³⁰

¹²⁹ <http://scottishlegalcomplaints.com/resources/oversight-research/2013-research-into-complaint-numbers.aspx>

¹³⁰ <http://scottishlegalcomplaints.com/resources/oversight-research/2013-five-years-on-facts-and-figures.aspx>