Northern Ireland Assembly

Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

Legal Complaints and Regulation Bill: Bar Council for Northern Ireland

21 October 2015

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Members present for all or part of the proceedings:
Mr Dominic Bradley (Deputy Chairperson)
Ms Michaela Boyle
Mr Gordon Lyons
Mr John McCallister
Mr Ian McCrea
Mrs Emma Pengelly

Witnesses:

Mr Gerald McAlinden	Bar Council of Northern Ireland
Mr David Mulholland	Bar Council of Northern Ireland
Mr Gary Potter	Bar Council of Northern Ireland

The Deputy Chairperson (Mr D Bradley): I welcome Gerald McAlinden, David Mulholland, and Gary Potter. We invite you, gentlemen, to make an opening statement.

Mr Gerald McAlinden (Bar Council of Northern Ireland): Deputy Chairman and members of the Committee, thank you for the opportunity to address you today on the Legal Complaints and Regulation Bill. I am the chairman of the Bar Council, and with me today are Gary Potter, a barrister of 32 years' experience who is the chairman of the professional conduct committee (PCC) of the Bar of Northern Ireland, and David Mulholland, who is chief executive of the Bar Council. We welcome the opportunity to address members today and to answer any questions about the Bill.

The Bar Council is an elected body of 20 members of the Bar acting as the representative body of the Bar of Northern Ireland. The Bar Council's written submission to the Committee highlights our belief that appropriate regulation is of fundamental importance in ensuring that the justice system works in the public interest and for the maintenance of confidence in the professions that provide legal services. We welcome the steps taken by the Department in the implementation of the Bain review. We regard that as an endorsement of the independent referral bar, and we support the provision of a statutory basis for the regulation of professional legal services in this jurisdiction.

By way of background, the Bar Council discharges its regulatory functions through a separate committee known as the professional conduct committee, which consists of two lay members and a cross-section of 12 independent practising barristers. No member of the Bar Council can sit as a member of the professional conduct committee. Under the present structure, all complaints are investigated by the PCC.

Depending on the type and seriousness of a complaint, the professional conduct committee might deal with matters, or it may refer charges to a summary panel or a disciplinary committee. Those

committees have extensive powers to admonish, reprimand, censure, fine, order the repayment of fees, suspend or expel from membership of the Bar library or disbar an individual from practising as a barrister. My colleague Mr Gary Potter will answer questions that members might have about the current system for handling complaints through the professional conduct committee.

The model for the future management of complaint handling, which is being put forward by the Department, represents a significant change in the oversight arrangements for the profession, with the establishment of a Legal Services Oversight Commissioner. The creation of that new independent mechanism is to be welcomed. The Bar Council will seek to engage constructively with the commissioner, sharing relevant information and consulting where appropriate as part of an open, proportionate and transparent system of regulation. However, we have some concerns about the precondition for the commissioner to be a layperson, as we do not believe that previous experience of legal practice would be a hindrance to the role. In fact, we believe that it would provide a beneficial understanding of the nature of the services provided by the legal profession. We take the view that any appointment must be made on merit and that no individual with previous experience of legal practice should be excluded, provided that they can serve the functions of the office to the required standard.

We also point out our concerns about clause 4, which relates to the powers of the commissioner to conduct reviews into the organisation and regulation of the professional bodies at the request of the Department. That could, potentially, apply to a range of matters, including education, training, entry and admission criteria, and even the fundamental nature of the Bar as an independent referral profession. We agree with the need for transparency and openness in the regulatory structures; however, we believe that clause 4 is drafted too widely, as the commissioner's role in respect of the rules and regulations should relate to those that apply solely to the provision of professional services by a barrister.

The proposals in the Bill for the establishment of the Bar complaints committee will deal with the structure and organisation of the Bar's internal complaints system. That will see responsibility for the complaints-handling function transferred from the Bar Council to the benchers in order to achieve complete functional separation between the regulation and representation of the profession. The Bar Council has already made substantial investment in preparing for those changes by implementing comprehensive changes to the constitutions of the Inn of Court and of the general council of the Bar of Northern Ireland, which were approved by the 2015 annual general meeting. We are confident that the changes that have been effected in consultation with the Department will embed a rigorous and independent system of regulation in keeping with the aspirations of the Bill.

In considering the work of the Bar complaints committee, we point members to clause 19, which makes provision for compensation to be paid in relation to complaints. That has been set by the Department at £5,000. However, we are particularly concerned about the potential for the committee to make a finding of professional negligence against a barrister. We do not consider it appropriate for a committee with a lay majority and a lay chairperson to be tasked with determining whether a barrister has failed to comply with his or her professional duty of care to his or her client.

The determination of an issue such as this, having such serious consequences, should be restricted to a court of law, and, indeed, at present, such an avenue of redress for complainants already exists. We do not consider it appropriate to empower a Bar complaints committee to adjudicate on matters that already fall within the jurisdiction of the courts.

The Bar Council welcomes the opportunity to give evidence to the Committee on this important Bill and is committed to the implementation of this legislation. Subject to some specific issues highlighted in our submission, we believe that the model put forward by the Department is appropriately tailored to best serve the public interest in Northern Ireland. There is broad consensus across the professions and consumer groups that the framework is proportionate and reasonable, given the number of complaints received. We are happy to answer members' questions.

The Deputy Chairperson (Mr D Bradley): Thank you very much. In relation to an earlier point that you made on clause 1(3), now clause 1(4), about the appointment of a layperson as oversight commissioner, how would you respond to the argument that the exclusion is necessary in order to strike a balance between self-regulation and a completely independent system?

Mr McAlinden: I would answer that in the following manner. By enshrining in legislation the principle that a former lawyer cannot set aside his or her professional loyalties to address complaints properly, you are enshrining in legislation the principle of perceived or actual bias on the part of the legal

profession. If you have on the one hand a piece of primary legislation that says that former lawyers cannot be trusted to adjudicate properly on complaints against the legal profession, how can you have any confidence in the judiciary, which is made up of former lawyers, when it addresses similar issues in cases involving complaints against members of the legal profession?

You cannot have a legislative principle that says that we cannot trust lawyers at the same time as having a judiciary that, day in day out, determines cases of complaints against lawyers. That fundamental principle is at stake, and it has to be addressed in the legislation. There is no reason why a former solicitor or barrister cannot set aside their previous professional loyalties and determine fairly issues of complaint against the legal profession, just as judges, who were formerly lawyers, set aside their professional loyalties to adjudicate justice dispassionately and impartially.

The Deputy Chairperson (Mr D Bradley): I see the point that you are making, but there is the issue of public perception. If people see a former lawyer in the role of commissioner, they may not be inspired to have total confidence in the complaints procedure.

Mr McAlinden: By enshrining that principle in your legislation, you undermine the impartiality of the judiciary. How can you say, on one side, that a former lawyer in the public eye cannot be seen to be impartial when dealing with complaints against the legal profession in the context of this Bill but is seen as impartial when sitting as a judge? There has to be consistency throughout the process, and consistency can be maintained only by ensuring that the role of legal complaints commissioner is open on merit to the person best suited to fill the role, irrespective of his or her professional background.

Mr Lyons: My question has been answered.

Ms Boyle: Thank you for presenting to the Committee today. On the overall powers of the commissioner provided in clause 2(1)(b), the Bar proposes that the power of the commissioner to "investigate" how complaints are handled by professional bodies is amended to "engage in consultation" with the professional bodies. Given that the legislation here is not going as far as that in GB and the Republic of Ireland, in a fully independent system, what is the justification for diluting the power of an oversight commissioner and leaving them powerless?

Mr McAlinden: As a lawyer, I always look at things from first principles. The first principle that any lawyer adheres to is that of the primacy of the rule of law. OK? Now, what does the rule of law mean? It means that no one is above the law. It means that everyone is subject to the law and that the state, in all its guises, must act in accordance with the law. The question is this: how do you ensure that?

The first primary requirement is an independent judiciary — a judiciary free from state interference. However, a secondary requirement, especially in an adversarial system such as we have, is that there must be an independent legal profession. An independent legal profession substantially free of state control is an important element in ensuring that the state acts within the law. If the legal profession is too closely controlled by the state, the question is can the citizen have any confidence that, when he or she challenges the legality of actions of the state, he or she will be fearlessly represented by an independent lawyer able and willing to take on that case against the state? The fundamental principle is simply this: if you have a legal profession that is tightly controlled and regulated by the state, how can the citizen have confidence in that legal profession to take his or her case against the state?

There is the issue of consumer protection here, which we are all in favour of, but there is also the fundamental issue of the protection of the concept of the rule of law by the preservation of an independent judiciary and an independent legal profession. When you have overriding, tight scrutiny of the legal profession by a legal commissioner appointed by a Department, you run the risk of the public seeing that as a loss of independence by the legal profession and the loss of an ability by that legal profession to properly challenge acts of government. These are the large, high-level principles that I am interested in. I accept that there has to be regulation. I accept that there has to be oversight by this commissioner. However, at the same time, I urge you to take account of the fact that the fundamental principle here is the preservation of the rule of law and the protection of the individual against excesses by the state.

Ms Boyle: I certainly hear what you are saying, but the protection of consumers must be absolutely at the heart of it.

Mr McAlinden: Absolutely.

Ms Boyle: To again go back to what the Deputy Chairperson said about the public perception about leaving the commissioner's likely power, you can understand how that could be perceived.

Mr McAlinden: Absolutely. However, it is a case of education here. When you look at the Bill and what it is trying to achieve, you also have to look at the wider context in which it is set. I was at conference in London two weeks ago, and this whole issue of the control of the legal profession was addressed by the heads of the Bars of Canada, Germany and other countries. They looked at me quite quizzically when I described the powers of the commissioner in the Bill. Their views, expressed to me quite strongly, were "Are you sure that this is the route to go down?". That is in the context of a German lawyer, an elderly man, who remembers state control of the legal profession, what that meant and where that led to.

I had a masterclass given to me by a lady from Ontario about how the legal profession in Canada jealously guards its independence to ensure the whole concept of the rule of law. She pointed me in the direction of a Supreme Court case from Canada from as far back as 1982. I do not want to give a lecture in law, but I think it is important that I quote a passage of a nine-member Supreme Court panel back in 1982, referring to the importance of the independence of the legal profession. What the Supreme Court in Canada said in 1982 is as important here today as it was in Canada then:

> *"There are many reasons why a province might well turn its legislative action towards the regulation of members of the law profession. These members are officers of the provincially-organized courts; they are the object of public trust daily; the nature of the services they bring to the public makes the valuation of those services by the unskilled public difficult; the quality of service is the most sensitive area of service regulation and the quality of legal services is a matter difficult of judgment."*

The crucial bit is this:

> *"The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally."*

The tension here is between the issue of consumer protection and the issue of the independence of the legal profession as a means of ensuring that the actions of government are always liable to proper accountability. Those are the two tensions. In designing and implementing your legislation, you have to keep in mind those two important goals. You have to ensure that those two important goals are married by means of regulation that is not too intrusive or too pervasive but ensures the protection of the rule of law.

Ms Boyle: It is difficult to argue with that one. If you allow me, Chair, I have just one more question. What further explanation can be provided in relation to the statement by the Bar that there are concerns that remain around probity of the Department setting the maximum amount and, ultimately, receiving a penalty? What amendments would the Bar suggest by way of putting forward safeguards to address that concern?

Mr McAlinden: I have spoken for far too long here, so I had better pass it over to Mr Mulholland.

Mr David Mulholland (Bar Council of Northern Ireland): The point we are trying to illustrate there is that it will be an important aspect of any confidence in the new system that the costs, fees levies and financial model for it are subject to appropriate scrutiny and probity. I think that some of that ground was covered a little earlier. We are just raising a concern that, at the moment, there are broad indications as to the running cost and the fees that might be involved in the system. We are just flagging up that, before those become encoded, we need a lot more detail about the mechanisms by which the cost of the system would be established, how it would be held to account and what audit and probity, similar to what was described earlier in the Scottish example, would be available to us.

On the specific point about a levy for a finding, the level that was described for Scotland of £3,500 was the level that we would previously have been comfortable with.

Ms Boyle: Is it something that you will continue to look at and monitor as the legislation goes on?

Mr Mulholland: Yes.

The Deputy Chairperson (Mr D Bradley): In May 2014, the Committee received anonymous correspondence purporting to come from a group of barristers that made uncorroborated allegations about unsavoury and unprofessional conduct and practices in the Bar. In response to that, in June 2014, the Bar undertook to brief the Committee on the outcome of an independent review of professional practices that was initiated as a result of this issue. What was the outcome of the independent review of professional practices in the Bar, and what, if any, improvements resulted from that exercise?

Mr Gary Potter (Bar Council of Northern Ireland): Once we received the three anonymous letters to which you refer, we decided to bring in Marie Anderson, the deputy ombudsman, to scrutinise the material. We had several helpful meetings with her. We went through the heading of each letter to address and assess to what extent the code, as it stood, was able to cope with the issues that were arising.

The fundamental issue, as you rightly said, Deputy Chair, was that the letters were anonymous. The view of Marie Anderson was that one could not act on anonymous complaints, but, in bringing her in, we were able to have her look at the provisions of the code. Whilst in the normal way one would want to be improving one's procedures all the time, we got a reasonably clean bill of health in relation to that.

One important thing that we wanted to introduce — we are almost there — was a whistle-blowing policy so that, in the event that some of the issues that arose in those anonymous letters are real issues of concern, that could be brought through a whistle-blowing policy. We have a person to receive any whistle-blowing complaint. Anything of a serious nature can be dealt with down that line.

As far as the Bar is concerned, there were a few recommendations made by Marie Anderson. In May of this year, we produced a revised code with new or amended provisions, including several new appendices. That code and appendices can be accessed by any member of the public. In fact, I implore you to have a look at our Bar website. If you go on to "How to make a complaint", you will be able to access the whole code and appendices. We reviewed the code. We feel it is easily accessible and easy to use. In so far as one can be content, we are reasonably content with what we have done arising from those anonymous complaints.

The Deputy Chairperson (Mr D Bradley): I recall reading the letters at the time. The allegations were anonymous, and there were no names in the letters. However, one got the impression that whoever wrote them had knowledge of what they considered to be practices or malpractices in the Bar at the time. You have outlined the action that you took in response to that: would you consider that the writing of those letters was a form of whistle-blowing?

Mr McAlinden: I would like to answer that. The three letters were written before I took up my role as Chair in September 2014. One of the first things that I took as a priority was to address the issues raised in those anonymous letters of complaint. Between the three of us, we urgently constructed a whistle-blowing policy, which is very comprehensive. We have managed to obtain the services of a former Lord Justice of Appeal, Lord Justice Higgins, who will be the person who receives those complaints, and we have set up a procedure whereby those complaints will be anonymously dealt with by him, and, if he sees that there is any evidence of wrongdoing, he will refer those matters to the appropriate authorities. So we have taken those complaints seriously, even though they were entirely unsubstantiated and anonymous. We set up a system whereby members of the profession can make anonymous complaints about issues that they see are wrong with the profession. I think it is a testament to the system now in place that, since 1 September 2014, when I took over, there has not been any complaint of a similar nature addressed to the Bar. We have taken things seriously, looked at it and set up an appropriate system for dealing with it. I think that confidence in the Bar Council and its governance has been restored.

Mr Potter: Can I just follow up on that? There is one other step that we took that I think is important that I mention to you. We revised the equality code, which is in one of the appendices to the code of conduct which you can access. When it was drafted, it was sent to the Equality Commission, which came back with a number of suggestions. We have incorporated those suggestions into the new code

of conduct, so we are also benchmarking the equality code with the Equality Commission. That was another step that we took.

The Deputy Chairperson (Mr D Bradley): Thank you very much for the detail of that. One of the impressions I got from those letters was that those who had written them felt that there was a culture of fear in the Bar about making complaints. Obviously, if the allegations in the letters were true, one can understand why the letters were written anonymously. The question I want to ask you now is this: how can you ensure that there is not a culture of fear in the Bar and that people who have complaints, such as those outlined in the letters and others, feel confident that they can make those complaints with impunity, as it were?

Mr McAlinden: The whistle-blowing policy is completely separate from the Bar Council. It is operated by a former Lord Justice of Appeal, so there is independence between the Bar Council, the PCC and the new whistle-blowing structure that is in place. That should engender confidence on the part of any member of the profession who seeks to raise an issue anonymously about something going wrong in the profession. There are a number of associations within the Bar — the Personal Injuries Bar Association, the Commercial Bar Association, the Family Bar Association etc, and there is the Young Bar Association. As chairman, I make it my business to go round and consult widely with those associations and have regular meetings with them, to ensure that, if there are any issues of concern in the Bar, from the trivial to the most serious, I make sure that I listen, hear all those issues and bring them to the Bar Council so that they are properly addressed.

Now, there was one issue that I felt needed particular care when it was looked at, and that was the issue of gender imbalance or the possibility of discrimination against women at the Bar. That is something that I take very seriously. The Bar Library now has a system of mentoring young female barristers. That is carried out by members of the judiciary and members of the Bar, both male and female. That mentoring process is all about ensuring that young female members of our profession have the confidence to know that their ability and their ability alone will enable them to progress in our profession. That is something that we and the Law Society are doing.

I was inspired by our present Lord Chief Justice, who said that it was something that both branches of the profession have to look at. We set it up under his guidance and auspices, and it is working well. I am mentoring two female lawyers at present, and I find it a very valuable process because I gain clear insight into their concerns and the fears that they have about their professional development. It enables me to take those matters back to the Bar Council and make sure that our systems are in place so that female members of our profession have as good an opportunity to progress through it as our male members do. It is something that I take very seriously.

The Deputy Chairperson (Mr D Bradley): I appreciate what you are saying about the informal monitoring that you carry out with the various subgroups of the Bar. Would you consider a more formal approach so that you are absolutely sure that the confidence is there among all those groups to use without fear the whistle-blowing system that you have developed?

Mr Mulholland: Your question was about culture. Culture takes some time to change, but what we are describing are the immediate actions that we have taken, the whistle-blowing policy being one of those. At the time of describing openly to everyone that we were introducing the whistle-blowing policy, we redoubled all efforts to raise awareness about what the code contained and the changes that we were making to it and to actively encourage a culture of proactive raising of concerns.

We also recognise that we cannot rely on snapshots or anecdotal feedback. One of things that we have done since the letter was to conduct a formal, independent, external survey of our membership, which covers a wide range of topics, admittedly, but it is meant to give us some independent insight into the state of people's practice and their views and attitudes towards the Bar. We want to make that an annual process, and we want to continue to run it by external and completely independent means through a confidential survey as a means of engaging better with the true sentiments and concerns of the membership.

The Deputy Chairperson (Mr D Bradley): Would you envisage that the oversight commissioner might have a role in relation to conduct complaints as well as service complaints?

Mr Potter: Conduct complaints would continue to be dealt with by a body such as the professional conduct committee. The Bill, which we endorse, with a few points that we have made, deals with a

complaint made by a client about their barrister's professional services. The conduct complaints would continue to be dealt with by the Bar, and we see that as being outwith the commissioner's role.

Ms Boyle: My supplementary question has been partly answered, but, Gerald, you said that, at the time, you urgently constructed the whistle-blowing policy. Just for clarity, there was a code of conduct but there was never a whistle-blowing policy.

Mr McAlinden: No. Whistle-blowing policies are really in the context of employer and employees. I thought that because of the nature of these anonymous letters, although this is not an employer/employee situation, we had to have something akin to this. We looked at the best models that were available in Northern Ireland. We basically constructed a policy that used the best models available. We then asked Lord Justice Higgins to look at it. He looked at it very thoroughly and came back with a lot of very sensible recommendations about changes to our policy to ensure that it was stronger and more independent and to ensure that his role was beefed up. We have taken on board his recommendations, and that policy is now in place.

Confidence has been restored. There has been no form of complaint about the way in which the Bar is governed or about people being unable to progress in the profession. No complaint of that nature has been made since I was appointed chairman. Under my leadership, the council has engaged in a radical overhaul of the constitutional systems of governance of the Bar and the implementation of a whistle-blowing policy.

Ms Boyle: That is good to hear.

Mrs Pengelly: Thank you very much for coming along today. I want to touch on the point that was raised about a perceived conflict of interest. Rather than it being an option to have legally qualified members, it would be desirable to have that type of knowledge on those panels to look at issues. Although I do not know the disciplinary procedures in the medical profession intimately, from the knowledge that I have, it is seen as highly desirable to have medical professionals there when looking at matters of professional conduct. A layperson will find it difficult to assess what is appropriate professional advice or conduct in a certain context. It is not just an option that should be available; it is highly desirable. I accept the points that you have made about independence and the ability to come to it with a very much unbiased position.

Connected to that is a point that you raised in your submission about detailing the specific grounds for a complaint and some issues with timescales. I am very conscious of that, for example, when the Committee for OFMDFM looked at reforms to the ombudsman — I think that it is the ombudsperson Bill at the moment, but will shortly become the ombudsman Bill again. One of the issues involved in that, and looking at that experience, was that, very often, disgruntled people would come along to complain some considerable time afterwards. There were also issues about whether there was a proper complaint and the motivation behind complaints. In its considerations, the Committee found it useful to put in much more specified grounds about what a person could complain about. It also provided timescales to give people some certainty, so that, for example, something would not come down the line to a self-employed barrister some two or three years after he or she had thought that it was fully settled.

To clarify, are you supportive of more detailed guidance in relation to the grounds for a complaint and the timescales? Do you feel that that should be in the primary legislation? We could put some enabling clause in and have guidance on it.

Mr Potter: Following on from what the Scottish expert told you, it might be best to have that in secondary legislation.

We would welcome a time frame. The present PCC does not have a time frame, and we have to use our own judgement. For example, a complainant who has been in prison may come in two years later and say that his barrister did not represent him properly. He ought to have known that immediately and brought a prompt complaint, so we could use our discretion at that stage to dismiss a complaint under the present system on a time issue alone. A time limit, such as a year, would be welcomed by us, but there has to be an exceptionality provision. There will always be circumstances that you might not foresee, in which somebody might not be aware that they have a legitimate complaint until later.

The type of complaint should be set out in the secondary legislation not the primary legislation. There has to be some flexibility. The problem that the PCC has at the moment is that we entertain every

complaint from every source, whether it comes from a judge, a solicitor or a personal litigant on the other side about the barrister representing his wife in a family case. All that takes time, and so there have to be some guidelines and specifications relating to the nature of the complaint that would be brought against the barrister by the client, which is what this Bill is all about.

Mrs Pengelly: As I mentioned to the previous witness, there is a fair bit of detail in the legislation, although some of it is enabling. Would you be of the view that some of this could be stripped out and put into secondary legislation? Would that be desirable? Maybe it is something that you want to write to us about after fuller consideration. I am conscious of the Scottish experience, that having the clauses in this type of legislation was too rigid and did not allow for something coming along further down the road. We would be into presumably at least a six-month or 12-month, possibly an 18-month, process to try to amend that within our legislative framework.

Mr Potter: I do not think that it should be too prescriptive at this stage. Ultimately, what we want to have, and I am sure that you do as well, is a Bill that is proportionate and cost-effective. Ultimately, we do not have a big problem with complaints as far as the Bar is concerned, and so we do not want to have a system that is cumbersome, difficult to use from the complainant's point of view or over-rigid. We would be happy with something that has flexibility and that is fair both to the barrister complained about and to the consumer.

Mrs Pengelly: I will just touch on the levy. In your submission to the Committee you raised issues about social mobility challenges in the Bar Library. Certainly it is worth putting on record that, although there has been a lot of coverage of some people who are highly paid at one end of the Bar Library, for every person who is highly paid, there are perhaps five barristers across the spectrum of perhaps 20 to 25 years who find it a lot more financially difficult at the Bar. I am thinking in particular of the junior Bar. I am very conscious that it has been a very tough period for many junior barristers. I certainly have had contact with some who have indicated how difficult it has been, perhaps with the emergence of solicitor advocates, what has been happening in the property market over the last four or five years and work being retained within solicitors' firms. I think that the junior Bar has been hit very hard. That has also led directly to a huge number of young barristers leaving the Bar, particularly young female barristers, as the junior Bar tends to be more female than the senior Bar, as you are well aware. I think that there is a concern about what impact that is going to have on the Bar in 10 or 20 years' time as people start to move through the ranks and into judicial office and the opportunities there.

I know that you made some reference here to concern about the levy. I suppose that my proposal to you would be to take a look at the traditional graduated levy, even if it is only a small amount. It works to a certain extent. Now, I think, people beyond that five- or six- or seven-year period are struggling. I suggest looking at a fairer system, where maybe the top end of the Bar could take much more of the burden, even more perhaps than is proposed here, giving some further relief to the junior Bar, which is very much struggling.

I have not looked at the figures, but clearly the Law Society receives a significantly greater number of complaints than the Bar. Is it your view that the levy should take into account simply the Bar complaints thus far and that, therefore, it should be lower, with maybe a higher levy for solicitors, given that, based on the evidence, there are likely to be more complaints on that side of things?

Mr McAlinden: There is a fundamental difference between the Bar and the solicitors' profession. The Bar, because of independent referral, does not, in any circumstances, hold clients' money. I think that a lot of the complaints that we have in relation to the legal profession relate to the management of clients' money. Therefore, that distinct difference means that there are going to be a lot fewer complaints against the Bar than there are against members of the solicitors' profession. I think that the Department has indicated that there will be a difference in levy between solicitors' practices and members of the independent referral Bar, because you are dealing with solicitors' practices, I presume, based on the number of solicitors employed by that practice, paying a certain amount, and then you are dealing with the independent referral Bar, with a very low volume of complaints against it, paying a very substantially reduced levy. That is how we see it in operation. I take on board your point that, in terms of structuring and graduation within the independent referral Bar, there could be work done to ensure that those at the very start of their career are not penalised by the imposition of a levy quite similar to the levy imposed on the upper reaches of the profession. I do not think that that would be fair; I think it would be a disincentive to progress in the profession.

Mr Potter: If I could briefly add to that, I think it highlights a point which we have touched on a number of times this morning: proportionality. As I said in an earlier answer, the overall cost of administering the new system should be proportionate, and, within that, the division of where the burden falls for absorbing that cost should be proportionate. One aspect of that is the division between solicitors and barristers. A third aspect is the one that has been raised, and we will definitely take it away and look at it: within what falls to the Bar to absorb, are there ways in which we can make it proportionate for our membership? We will certainly look at that.

Mrs Pengelly: I do not want to go into this in too much detail at this stage, but we talked a bit about mediation. It is obviously absent from these proposals. Is that something that you are open to looking at?

Mr Potter: We have already looked at it. What we foresee is that the Bar will be the gateway for all complaints, whether conduct, service or, as some of them will be, hybrid complaints. The idea is that a subcommittee of the professional conduct committee, on receiving a complaint, will assess whether it goes down the service line or the conduct line. If it is a hybrid complaint, it will probably go down the service line until it can be clarified where we are. For any complaint that goes down the service line, we anticipate that both the complainant and the barrister will have to go through a mediation process to see whether that can sort out the complaint at an early stage. We see that as a good idea, cost-effective and so forth. My experience on the PCC of a lot of complaints is that there is sometimes a lack of focus, and maybe a lack of understanding of the process in which they were involved. If that is explained to the client, quite often that resolves matters. So, mediation, I think, is crucial. We have already looked at that, and we anticipate introducing something on that line.

If mediation does not resolve the complaint — there will be some cases, obviously, as the previous witness said, that are simply not suitable for mediation — it will proceed, as appropriate, to the Bar complaints committee and will be dealt with by the body that is envisaged under the Bill. However, we definitely think that mediation is an important step.

Mrs Pengelly: So you would prefer, at this stage, that the mediation remains almost informal and does not have that statutory basis. It is before it gets to that stage, as opposed to where it would be under this Bill, for example, funded through this. Obviously, there would be some cost associated with the levy as well, that would go towards that. Would you prefer to keep that informal, at this stage?

Mr Potter: Yes, we would, if possible. That is what we envisage. We see that as a sensible measure to try to expedite complaints and resolve the issues between the parties. As I say, our experience of many complaints is that there is just sometimes a misunderstanding about the process, or, because we have an adversarial legal system in this country where you have a winner and a loser, the loser says, "There must be a reason why I lost the case". It may be that they lost the case for entirely proper reasons, and they have been properly represented. When that process is explained to the complainant, that quite often resolves matters. So we see that as something that would be important to the process, and I think that it would be useful if it were kept on an informal basis. We intend to proceed on that basis.

The Deputy Chairperson (Mr D Bradley): Thank you, Emma. Schedule 2 (4) refers to the appointment of laypersons to the Bar complaints committee. What role and contribution does the Bar envisage laypersons making to the complaints committee?

Mr McAlinden: In addition to being a barrister, I sit as a legal chairperson of a mental health review tribunal, which has a medical member and a lay member on it. I have first-hand knowledge of the value that the lay member brings to the assessment of the issues that have to be determined by the mental health review tribunal. They bring common sense, humanity, a wealth of external experience, and I find —

The Deputy Chairperson (Mr D Bradley): You are not saying that barristers do not have that knowledge.

Mr McAlinden: No, but we sometimes focus too much on legal issues and sometimes cannot see the wood for the trees, etc. So, it is always important for panels such as the mental health review tribunal to have the expertise of the doctor there and to have the common sense of the lay member there. I find it absolutely invaluable, and I assume that the same level of common sense and the wide range of

experience will all prove to be invaluable in the context of the Bar complaints committee. So, I welcome lay involvement. I think that it is a vital element, and it will enrich the process.

The Deputy Chairperson (Mr D Bradley): You mentioned the qualities of the layperson, which you see as necessary, useful and desirable: how do you encompass those qualities in criteria for filling the laypersons' posts on the complaints committee?

Mr Mulholland: We have some live examples of how that can be done well, in that, as was described earlier, if a conduct complaint progresses towards the stage of requiring a disciplinary hearing, that is heard in front of a Lord Justice of Appeal and lay members appointed by the office of the Lord Chief Justice to participate in that. That panel of lay members for those purposes is being refreshed at the moment, and the office of the Lord Chief Justice has been running that recruitment exercise, looking at the criteria and the make-up of what would constitute a suitable layperson. So, there are live examples there that we can build upon, amplify or retain as we move into this model. They speak to the experience, skills and attitude of what makes a good layperson, and I do not think that we need to massively change those if we want to extend it into this process.

The Deputy Chairperson (Mr D Bradley): Under the current system, the benchers appoint those people, in consultation with the oversight commissioner. What is your view of the laypersons' being appointed by a body that is independent of the legal profession, for example, by the Department?

Mr McAlinden: The benchers, by very virtue of their nature now because of the separate constitution that the Inn of Court has, are independent from the legal profession. The benchers, under the constitution, have a majority of judicial members. So, in essence, the lay members to the Bar complaints committee will be appointed by members of an independent judiciary. That is as good a guarantee of the quality of the appointment and the independence of the appointment as one can achieve. It is an efficient, effective and proportionate means of ensuring that those virtues are present on the Bar complaints committee. I do not think that you need to set up a different process for the appointment of those individuals.

Mr McCallister: I asked our Scottish colleague this question. I assume that you do not think the commissioner needs any more teeth or more independence, as it has in other parts of the UK and the Republic of Ireland.

Mr McAlinden: If you were to take the Bill to Canada or Germany, it would probably breach the fundamental law regarding the independence of the legal profession that is enshrined in those constitutions. When you say "more teeth", remember that you have to achieve a balance between consumer protection and the maintenance of the rule of law. The independence of the legal profession is key to the maintenance of the rule of law.

Mr McCallister: Yes. In the best practice of regulation, you would have to accept the separation between regulation and representation that is there. Some of the arguments on that are probably the same arguments as you would get in the United States for doing nothing about gun control and the fear of an overburdening Government.

Mrs Pengelly: I am not sure if we can compare barristers with guns, to be fair.

Mr McCallister: Your concern on that issue was about a Government getting out of control. That is the argument that the gun lobby uses in the United States.

Mr McAlinden: The issue of gun control is one that highlights how a constitution that was written in 1776 is not applicable to a 21st-century society. That is the danger of a written constitution. You can frame and enshrine certain rights, such as the right to bear arms, so that you do not have an overbearing Government. That might have been necessary in 1776, but, when you draw the modern comparison, the right to bear arms is a total anachronism.

The context of my argument is that there are fundamental principles, and a fundament principle that I think all democratic societies must adhere to is that the rule of law is sacrosanct. That is as applicable in the United States as it is here. You ensure that by having an independent judiciary and an independent legal profession. That is the job that you have: to ensure that the independence of the legal profession is not compromised by the Bill. Ensure that the consumer is protected, by all means,

but please remember that in order to ensure that the rule of law is sacrosanct, one has to have the twin planks of an independent judiciary and an independent legal profession.

Mr McCallister: I absolutely respect the independence of the judiciary, but, in the best bits of regulation — from a public confidence perspective — I do not think lawyers looking into lawyers meets that criteria. That is why I support keeping that totally separate and having the limit on somebody from a legal profession sitting in that role. Emma mentioned doctors. Yes, people might bring medical people in to advise and assist, but, in the best practice of modern-day regulation, we are very clear in separating them, whether that is doctors, pharmacists or lawyers. That is where I think the separation should be. I want a completely independent judiciary that we can look to. I want to have legal challenges to the power of government. I also want an opposition here that you can change. I want to have a challenge to the Government and a power that comes from the people when they cast their vote. In the best efforts of regulation and public confidence, you should keep those separate.

Mr McAlinden: You are arguing about public confidence and public confidence in an independent regulator of the legal profession. How would public confidence in the independent regulator of the legal profession be in any way damaged by upholding the principle that a former lawyer can exercise a decision-making capacity without actual or perceived bias? If you enshrine in legislation the principle that a former lawyer cannot be trusted to look over or supervise the legal profession, what is the position of your judiciary? You have undermined the independence of the judiciary in one fell swoop by enacting that in legislation. You are saying that lawyers cannot be trusted to look after the interests of the public when deciding on disputes between the public and lawyers. That is the fundamental issue here: you are enshrining in legislation the principle that you cannot trust lawyers. You are undermining your judiciary by doing so.

The Deputy Chairperson (Mr D Bradley): That is the conclusion that you draw from your perspective.

Mr McAlinden: That is the only logical conclusion to draw.

The Deputy Chairperson (Mr D Bradley): For example, it might be a very good way to protect your profession to have a layman as commissioner, because it puts your profession in the role of dealing with complaints beyond reproach. Not only that, it has the second edge, as John says, of reassuring the public that what they get from this process is something that is in no way influenced.

Mr McAlinden: I am not precluding a layperson from taking the role; I am saying that it should be open to everyone irrespective of their professional background. That is all. I am not saying —

The Deputy Chairperson (Mr D Bradley): What I am saying to you is that it is almost a protective role for your profession to have a layperson in that position.

Mr McAlinden: If that layperson is the best person for the role, excellent. All that I am saying to you is that you should not exclude a section of society from applying for the role because, in doing so, you say that that section of society cannot be trusted.

The Deputy Chairperson (Mr D Bradley): That is the conclusion that you draw.

Mr McCallister: I think that what we are saying is that, for the profession's own sake, it is much healthier and better and the best practice of regulation to have that distance between the two and to have a layperson in that role.

Mr McAlinden: That is a matter of debate. All that I am saying to you is that, in my submission, you cannot exclude former members of the profession from applying for this job, because, in doing so, you enshrine in legislation the notion that they cannot be trusted to look after the interests of the public. When you have judges doing that, day in and day out, that is the wrong message to give.

Mr McCallister: In having it open like that, the message, in the public's mind, is that it is lawyers looking after lawyers. That is damaging to the profession and to public confidence. I do not suspect that will we agree entirely on that.

The Deputy Chairperson (Mr D Bradley): What John is saying is that we will not have any meeting of minds here on that issue.

Gentlemen, thank you very much for coming here today. It has been a very interesting discussion. If we require further information from you, we would appreciate it if you would provide that to us.

Mr McAlinden: Absolutely. We very much appreciate the time that you have given us this morning. It has been a very worthwhile experience for us as well.

The Deputy Chairperson (Mr D Bradley): You are very welcome. Thank you very much.