



Northern Ireland
Assembly

Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

Legal Complaints and Regulation Bill:
Scottish Legal Complaints Commission

21 October 2015

NORTHERN IRELAND ASSEMBLY

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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 David Buchanan-Cook Scottish Legal Complaints Commission

The Deputy Chairperson (Mr D Bradley): I welcome David Buchanan-Cook, head of oversight and communications at the Scottish Legal Complaints Commission. Thank you for coming. I invite you to make an opening statement when you are ready.

Mr David Buchanan-Cook (Scottish Legal Complaints Commission): Good morning, Deputy Chairperson and members. Thank you for inviting me to give evidence on behalf of the commission. Legal entity regulation is changing in various ways throughout the whole of the United Kingdom. We are pleased to contribute in whatever way we can to your debate, so that you can learn from the experience that we have gleaned over the past seven years. I understand that there are various issues that you might want to discuss, and I am happy to take those in turn.

The Deputy Chairperson (Mr D Bradley): OK. The Northern Ireland Bar states that it, along with the president of the Law Society, should have a role in the appointments process for the Legal Services Oversight Commissioner. Given that the Department of Finance and Personnel has amended the Bill at clause 1(3) to place a responsibility on itself to consult the Lord Chief Justice before appointing the commissioner, do you feel that that is necessary?

Mr Buchanan-Cook: I do not know if I am in a place to express a view on that. We have a completely different system in Scotland, where the commissioners are appointed by the Scottish Parliament after the normal public appointments process. There is no say in the appointment of our commissioners by either the Law Society or, in our case, the Faculty of Advocates.

The Deputy Chairperson (Mr D Bradley): In your view, how might the Bill as currently drafted be improved or strengthened to provide a better regulatory framework?

Mr Buchanan-Cook: Again, I can speak only from the experience that we have in Scotland. From my perusal of the Bill, and I cannot claim by any means to be an expert on it, there are various

advantages in it that we do not have. For example, the Legal Services Oversight Commissioner will have powers to set targets, insist on plans and impose fines on organisations if they do not put those plans in place. The training provision for people who are dealing with complaints is a very powerful thing that we do not have in our remit.

There are significant restrictions in the Legal Profession and Legal Aid (Scotland) Act 2007 on confidentiality that prevent us from publishing the names of solicitors in complaints without their consent. As you can imagine, that is unlikely to be provided. I think, too, that the duty to consult with the oversight commissioner is very powerful. Generally in Scotland, we will be asked to take part in consultations by the Law Society or whatever, but there is no statutory basis for that. I think that is a very powerful way for the oversight commissioner to let his voice be heard.

There are clearly certain advantages that we have with our different model in Scotland. The most significant, I think, is probably the fact that we are the single gateway for all legal complaints in Scotland. Whether a complaint is about a solicitor or an advocate, inadequate professional services or conduct, those complaints come to us at first instance. That is a fairly clear message for legal consumers. They know who to make their complaint to. Service complaints stay with us; we deal with them from cradle to grave. We assess the eligibility of conduct complaints, and if we deem them to be eligible, we will pass them on to the professional body. That is where my role is quite similar to that of the oversight commissioner in that my area has oversight of how those complaints are dealt with by the professional bodies. A complainer can make what we call a handling complaint to us about how the professional body has dealt with a conduct complaint. That seems to be very similar to the setup that is envisaged here.

We have other advantages that are not contained in this proposed legislation. Mediation is built into our process, which is defined in our statute. It lies very much at the heart of our process. We find that mediation is an incredibly effective means of conciliating and resolving complaints. More than that, it has helped to develop a culture where there is a much clearer focus on conciliation and early resolution on the part of the profession and on the part of our own staff and processes. Even if a complaint does not resolve at mediation, we find that just having mediation at the centre of our processes encourages our staff to look for ways to reconcile and conciliate complaints at all parts of the process. Clearly, the earlier you can resolve a complaint, the less the case cost is for the complaint.

We also have a duty to oversee the guarantee fund and the master policy in Scotland, that is, the indemnity insurance arrangements of the profession. We have a duty to analyse trends in complaints in the subject matter or in the business areas that tend to generate most complaints, and on that basis we have a duty to issue guidance to the profession on best practice in dealing with those complaints and in dealing with those matters that most often lead to complaints. For example, the majority of our complaints relate to residential conveyancing transactions. We produce guidance for the profession on how best to avoid the main issues that tend to recur. We have also pushed that slightly in that we have more recently produced guidance for consumers as well, to manage their expectations better about the service that they can expect from the profession and so that they can avoid the pitfalls that lead to complaints. As I said, those are possibly the main differences that I have detected so far and the advantages that we perhaps have over this system and vice versa.

The Deputy Chairperson (Mr D Bradley): Thank you very much for that. Do you have any suggestions as to how the Bill might be amended to make the arrangements more streamlined and avoid an overly bureaucratic system for the consumer and for the legal profession?

Mr Buchanan-Cook: We are obviously talking about proportionality. In Scotland, it is a much larger profession. I think it is about 10 times the size of the legal profession in Northern Ireland. Proportionality has to be taken into account. Arguably, a system such as we have would not be proportionate for Ireland.

In terms of streamlining, one of the disadvantages, using the hindsight of seven years of experience of our process, is that so much of it is minutely detailed in our primary legislation. For regulation to be effective, it is really important that legislation is adaptable and flexible, and you cannot really have that if all your detail is enshrined in primary legislation. It takes too long to change it and keep up to date with changes in the legal landscape.

We are hoping for a new legal services Bill in Scotland, and that we can persuade the Government to remove quite a lot of the detail from our primary legislation and allow us to put it in rules so that we can change it, obviously after consulting with the profession and other bodies. This will give us

greater flexibility and a greater ability to deal with other changes. For example, at the moment, we are looking at the EU alternative dispute resolution directive, which came into force earlier this month. We spent a lot of time looking at how we could amend our processes to comply with the directive, but, at the end of the day, we discovered that our "totally without merit" test, which is enshrined in primary legislation, would have to be taken away to deal with those cases that fall under the directive. There is not sufficient parliamentary time to get that in place. I know that, in terms of the Bill, there is a raft of suggestions as to things that the process may include. That is probably the right way to approach it, and it may be better to have that in rules rather than in primary legislation, which is the situation that we are in at the moment.

The Deputy Chairperson (Mr D Bradley): So you think the Bill, as drafted, allows for more flexibility.

Mr Buchanan-Cook: It appears to, yes.

Mr McCallister: You are very welcome. I will pick up on some of the Chair's points. In a lot of these things, I think that mediation would go a long way. You made a comment on our model. Have we not been strong enough in encouraging mediation on this? The other end of it would be this: should the function of a Legal Services Oversight Commissioner be strengthened? How do we give the commissioner as much bite as possible given that other parts of the UK and the Republic of Ireland have gone for a completely independent model?

Mr Buchanan-Cook: We certainly find, as I said, that the ability — it is actually a duty on our part — to issue guidance is a very strong message because it really demonstrates our independence and that we are taking information from the complaints, using that as a learning exercise and feeding that back into the profession so that it can see some benefit from the work that we do and the work that, at the end of the day, it is paying for. That is quite a powerful thing that we have that is not included in here.

Another thing that occurred to me is that we have an ability to audit the records of the professional bodies in as far as those relate to conduct complaints, and I do not see that in your Bill either. It means that we can go beyond simply the complaints that are referred to us. When a complaint is referred to my department, we will carry out a two-part process. In addition to investigating the issues that the complainer has complained about, we will also audit that file against the professional body's process. It may be that, through doing that, we identify issues that the complainer is unaware of, for example, if the Law Society has not followed its own process or the complainer is unaware of that. That is something that we can pick up on and make recommendations to the professional body to amend its procedures to make sure that sort of thing does not happen again. Having that wider ability to audit the records is quite important and not just the cases that are referred through complaints.

Mr McCallister: In your first answer, you touched on the appointment process being entirely a matter for the Scottish Parliament: is that a better model to make and feel completely independent of?

Mr Buchanan-Cook: Definitely. We also have a lay majority on our commission. We have three legal members and seven or eight lay members. All our ultimate decisions are made by determination committees, which usually comprise three members. They are chaired by a legal member and the other two people have to be lay members. So, it has to have a lay member majority. That same message is provided if you also have an outside body that is appointing those members.

Mr McCallister: Chair, we have been scrutinising the Bill and the Committee has questioned the Department on whether the definition of a complaint should be included in the Bill for consistency across professions. What approach did Scotland take on that?

Mr Buchanan-Cook: We have a definition of complaint. It is in section 46 of our Act. It is defined as any expression of dissatisfaction. I think that it is quite important that we have a wide definition, because as soon as you start trying to define it, you end up excluding issues that are potential complaints, if not actual complaints. We know from research carried out by YouGov, for example, that a lot of clients perceive that there is a power imbalance between themselves and the practitioner who is giving legal advice. In that situation, it is very difficult for a consumer to voice their concerns if there is something that they are dissatisfied with, particularly if they want the practitioner to do some work for them. The last thing they want to do is upset the legal practitioner. So, quite often, the research indicated that the consumer is more likely to take a softer approach in raising their concerns and hinting that something might not be right. Having a wider definition allows you to capture that

dissatisfaction. Once you have identified it, presumably, it will allow you to remedy the complaint much sooner as well. In our view, the sooner you can resolve a complaint, the better.

Mr McCallister: At an earlier stage and, hopefully, through mediation rather than —

Mr Buchanan-Cook: Or even before formal mediation.

Mr McCallister: Finally, obviously there is a cost involved in the establishment of the Legal Services Oversight Commissioner in the form of a levy. From your experience, what mechanisms or procedures can you put in place to ensure that there is some control on those costs and it does not overburden the profession?

Mr Buchanan-Cook: Again, because we have a slightly different model in Scotland, we took a slightly different approach to it initially because we were taking the investigation of service complaints from the Law Society. For the first few years, the Law Society reduced its practising certificate fee for practitioners to compensate or to offset against the amount of the commission's levy.

We also had a set-up fund from the Scottish Government. As we move forward, we are responsible for setting our own budget every year. That includes the revenue that we will get from the levy. We consult on that every year, in January, so the professions and practitioners have an opportunity to scrutinise our accounts, budget, proposed expenditure and the amount of levy that we propose.

Mr McCallister: Is it purely paid by the profession? You had the initial grant from the Scottish Government to set up whatever office you needed, but it is all profession-funded now. Is there much tension or has there been much tension between what you think is a reasonable amount and what the broader profession thinks? I know that you have a chance to consult and discuss between the two, but is there much tension there?

Mr Buchanan-Cook: It is probably human nature that most practitioners would prefer not to have to pay the levy at all. What we have is a sliding scale. The most that any practitioner will pay is just over £300 per year, and that is for a fully qualified solicitor who is beyond three years qualification. Lesser amounts are paid by newly qualified solicitors. Advocates pay lesser amounts because, proportionately, we see far fewer complaints arising from the work of advocates than from solicitors in practice. In-house solicitors pay a smaller amount as well, again because we do not see terribly many complaints about in-house solicitors, but we do see some.

The Scottish model was very much set up on the basis that "polluter pays". As well as the general levy, we also have a complaints levy where we uphold the complaint. Currently, the maximum we can levy at that point, at the end of a complaint, is £3,500. What we have done in the past is we have not taken that in as anticipated revenue, because I do not think it sends across a good message that we are setting targets for the amount we want to recover from upheld complaints. That would go against the grain of trying to conciliate complaints. What we have done this year is look back at the amount that we have recovered in complaint levies over the past five or six years and figured that, on average, we can expect about so much. So, we would expect a similar amount this coming year. As a result of that, we have reduced the levy slightly. If that model is successful, we would hope to try to progress that so that it becomes a system whereby the "polluters" — the people who cause us most pain — are those who will pay most towards the cost of the commission.

Mr McCallister: On your side of it, you have actively tried to keep your costs under control? What most people in the profession would worry about is that, if you set up a body and it is independent, it can grow like Topsy. It gets a bigger empire, and costs keep going up every year.

Mr Buchanan-Cook: We, obviously, have to look at efficiencies all the time. Although we are not, strictly speaking, a non-departmental public body, we try to follow what the Scottish Government says in terms of savings for the other public bodies. So we are constantly looking at ways to try and save money. Again, our staffing levels and all those things are open to scrutiny by the professional bodies and through the consultation process that we have for our budget every year. Staff cost is our biggest outlay. The reason we have such a high level of staff is because our staffing is reliant on the process that we have. After seven years, if we were looking at starting up a new process from scratch, and we had a blank piece of paper, then I do not think that we would have exactly what we have now.

Mrs Pengelly: Thank you very much for coming along today. I do not know a huge amount about the Scottish system, so forgive me if these questions are a little simplistic. In relation to your complaints system, are there specified grounds under which people can make a complaint? For example, one of the issues raised in relation to this is whether to narrow it to the professional services given by barristers and solicitors or open it to other issues. I see that you have a referral system, for example, on conduct or other issues. Do you have specified, limited grounds on which people can complain?

Mr Buchanan-Cook: No. Anyone can complain about any element of inadequate professional service. Anyone can make a conduct complaint.

Mrs Pengelly: In relation to your time frames, I am keen to look at the issue of giving people certainty, even from the point of view of the person being complained about. You have indicative timescales in the paper that was shared with the Committee. Are they flexible? There is no specified time frame for making a complaint, for example. I know that you mentioned that there are targets in our proposed legislation; you do not have targets in yours. However, in terms of hearing the case or concluding it, that is something that you do not have in Scotland currently.

Mr Buchanan-Cook: In terms of how we handle the complaints that we deal with or —?

Mrs Pengelly: In terms of guidance for people. For example, in a number of other professions, you would have, say, three months to make your complaint and, after that period, it is fairly limited. Likewise, from the profession's point of view, you could have a specified period of time where the complaint would need to be dealt with.

Mr Buchanan-Cook: I see what you mean. In normal circumstances, a complaint has to be made to us within one year of the conduct or misconduct event being complained about or the end of the service that is being complained about. However, we can accept a complaint outwith those parameters if there are exceptional circumstances.

Mrs Pengelly: Do you know how many of those you tend to accept? Are people much more likely to come forward fairly quickly, or do you find that there is a scatter across the spectrum and that some people wait a considerable time?

Mr Buchanan-Cook: Some people do. For example, in a conveyancing transaction, it might not be until somebody goes to sell their house that they discover that there was a problem with the purchase, so those are things that we would accept. If it was something to do with very serious conduct, but it was outside the one-year time limit, then it would be very unusual if we did not admit that into the process.

I do not have the numbers in front of me, but we get some complaints that are time-barred, which is how we classify them. The other aspect is that if a complaint comes to us and is premature, in that the solicitor — the practitioner — has not had the opportunity to look at the complaint, we will generally refer it back for the practitioner to look at, and we will generally see that the practitioner has a period of at least four weeks to deal with the complaint. Research that we commissioned showed that, on average, solicitors take about 13 weeks to deal with a complaint before it then comes to us.

We try to avoid the situation where somebody comes to us and we say, "Sorry, it is premature", where it then goes back to the practitioner and then, by the time he or she has dealt with it and it comes to us it is time-barred. We try to avoid that by getting them to at least register the complaint with us first so that we are aware of it.

Mrs Pengelly: On the reference you made to mediation — again, we have a little bit of information about that — when you receive complaints, do they all go forward to mediation, or is that simply with the consent of the parties?

Mr Buchanan-Cook: First, we cannot mediate conduct complaints, and that is quite right; we would not want to mediate conduct. We will only look at service complaints, potentially, to mediate. There are certain circumstances where we may consider that it is not appropriate to mediate. If it is really obvious that the relationship between the complainer and the practitioner is irretrievably broken down, and we can see that from the way in which the complaint has been handled at the first tier, then we can say that there is no way that those parties are going to get together. However, that is very rare. It is an opt-in process.

We will try to encourage the practitioner and complainer to take part in mediation. That is the biggest challenge really, particularly for complainers. I think that that is understandable, because they will have had the issue, they will have spoken to the practitioner about it already, and then they come to us. We say, "Yes, it is an eligible complaint", and then the first thing we suggest is that they sit down in a room with the practitioner and mediate to try to resolve it. We thought of various ways to get round that. Quite often, we have the parties in separate rooms. We have tried to do mediation by Skype, so that the parties can be, physically, in different places. We recently conducted mediation in a prison. We do everything we can to encourage mediation.

We have commissioned research to try to better understand the barriers that prevent people from taking up mediation. Once people do take it up, it is very, very effective.

Mrs Pengelly: What percentage heads towards mediation? Do you have an approximate figure, or does it vary?

Mr Buchanan-Cook: I do not know that, but I know that the success rate for all the cases that go to mediation fluctuates between 60% and 70%.

Mrs Pengelly: I know that you cannot give a percentage, but is it a minority of cases at this stage? Are you focusing on growing that, or it is evenly balanced?

Mr Buchanan-Cook: I do not know for certain. I would guess that it is a minority of cases, because we certainly want to encourage more.

Mrs Pengelly: Do you have mediators as part of your organisation, or do you procure in a third party?

Mr Buchanan-Cook: We have external mediators, qualified professionals who carry out the mediation for us. We have a pool of about eight or 10.

Mrs Pengelly: In relation to the costs of the mediation versus the investigatory side of it, is mediation more cost-effective? I know that it is probably a better outcome, but is it more expensive?

Mr Buchanan-Cook: It obviously has some cost implications. Generally, where possible, we will hold mediations in our own premises. We have parallel meeting rooms, so that is quite easy to facilitate. We have to pay for the services of a mediator. Sometimes, if we have to have the mediation outside our premises — for example, in Inverness — we might have to hire a room somewhere to hold the mediation. However, in comparison with the costs of a complaint that goes all the way through the process, those costs are far reduced.

Mrs Pengelly: You mentioned flexibility and said that you found that in the Scottish model so much being in the primary legislation has left it too rigid. Although there is some flexibility in the legislation, there is also significant detail in the legislation itself. I am not expecting you to have read all the detail and to know the minutiae of it.

Mr Buchanan-Cook: Good.

Mrs Pengelly: However, is that something that we should look at, in the sense that there should be more enabling powers in this type of legislation and we should bring forward the detail of that by way of some other vehicle that is more flexible to take account of some scenarios, perhaps, that could arise in future and we have not foreseen?

Mr Buchanan-Cook: Absolutely. It is certainly something to take into account. As I said, it is an ever-changing landscape, and we do not know what is round the corner. The EU alternative dispute resolution (ADR) directive is an example where we found ourselves hampered by what was in our legislation. There will be other challenges further on, I am sure. If you can take as much out of the legislation and put it into rules — and have governance over how those rules are changed — you will see far more flexible and agile regulation coming out of it.

Mrs Pengelly: I suspect that few could describe our legislative process as agile.

Mr Buchanan-Cook: Very few legislative processes can be described as agile, unfortunately.

Mrs Pengelly: It is certainly worth looking at.

Mr Lyons: Thanks very much for coming here today; it has been very useful. I would like a little bit more information and your view on the levy. I have been looking at some of the details over the last few years online. The general levy has come down from £324 to £312, but the Department of Finance and Personnel has indicated that the expected levy here would be £80 to £100. That is an awful lot less, and I will ask more questions about it later. What is your view? Do you have any understanding of why, despite the legal profession being ten times bigger, there is still such a difference in cost?

Mr Buchanan-Cook: It is partly to do with the size of the profession in Scotland, which has much larger numbers, but it is mainly because we have taken over part of the process that was with the Law Society. We have the investigation process of service complaints and there are more service complaints than conduct complaints. The vast majority of our staff deal with investigating and determining service complaints. That is where most of the cost lies in our expenditure.

As I said earlier, my role is pretty similar to that of the commissioner. I have a staff of three, including communications for the whole organisation, policy and various other aspects. A smaller model is not inconceivable; compared with that, the commission as a whole has a staff of about 50.

Mr Lyons: You have different levies depending on experience; they will be different for someone with three years' experience, for example. It is my understanding that there will be only one levy, which will be for each practitioner in Northern Ireland. Is that a good idea, or would you advocate something more like Scotland? Perhaps because the sum is so much smaller it does not really matter.

Mr Buchanan-Cook: It is a fairly small sum, but there is merit in showing that you are taking cognisance of the fact that some people have more experience and, therefore, you would expect them to be earning more, I suppose, and should know better when it comes to issues that arise from complaints. Proportionally, from our experience, there are certain elements of the profession that tend not to attract many complaints, so why should they shoulder the same burden as the rest of the profession?

The Deputy Chairperson (Mr D Bradley): No other member wants to ask a question. Thanks very much for coming, David, and for giving us the benefit of your experience and expertise. If we require any further information, we will be in contact with you.

Perhaps I could finish with one item. The Committee has queried the reliability of the data on the number of complaints in Northern Ireland. Given that, in the case of solicitors, clients whose complaints are unresolved are required to pursue them through three tiers — the solicitor, the Law Society and the Lay Observer — and that a power relationship can exist between the practitioner and the client, what safeguards could be built into the Bill to ensure that the process is not too onerous for the complainant?

Mr Buchanan-Cook: That is a good question. That is a difficulty for us as well.

There are two aspects to that question, the first of which is the complaint numbers. We get about 3,000 enquiries a year, which result in about 1,000 complaints. Quite a lot of those 3,000 enquiries will be cases that, through dealing with the enquiry, we will recognise as premature and need to go back to the practitioner first. Some of the 1,000 complaints are also premature because people did not know to go to the practitioner first, and so we refer those back. They do not all come back to us.

What happens to those complaints? The research that we commissioned three or four years ago suggested that about 50% of the complaints are resolved by the practitioner at first tier, but we do not know what happens to the rest. Do they all come back to us? We are not sure. We have no visibility over what happens at first tier. Under the Law Society's rules, which are mandatory in Scotland, solicitors' firms have to keep a log of all their complaints, but there is a bit of a gap in the legislation because the Law Society's rules do not give it an ability to monitor that, and we do not have the ability to look at first-tier records. That is something that we might want to amend. Without having that visibility, it is very difficult to know what the true complaint numbers are.

The Deputy Chairperson (Mr D Bradley): You do not know whether complainants are satisfied at one stage or another or whether they might get disillusioned and walk away from their complaints.

Mr Buchanan-Cook: Absolutely.

The Deputy Chairperson (Mr D Bradley): In your view, would it be possible and desirable to have an overview of that data?

Mr Buchanan-Cook: That would be a very useful thing to have, and it is certainly something that we are lobbying for in Scotland.

There are already various safeguards. Under the Law Society's rules, in the event of dissatisfaction, solicitors are required to signpost that a complaint can be made to us. In practice, we normally find that that is contained in a terms of engagement letter that contains paragraphs and paragraphs, if not pages, of other information that a client is unlikely to read. Even if they do read it, by the time an issue occurs, they have probably forgotten that we exist. In fact, when a complaint comes to us, we ask the complainer how they heard about us, and the vast majority say that it was from the Law Society. Practitioners have that duty, but it is obviously not quite working. We think that there is an untapped body of complaints that we are not seeing.

We are scoping a research project that is being funded jointly by us, the Scottish Public Services Ombudsmen and Citizens Advice Scotland to look at the journey of some of those who fall out of the system. We want to know what happens to those people who do not come back and whether they get resolution elsewhere, or, as we suspect, they get so dissatisfied with the whole process that they fall out of it completely. That is certainly a concern. I think that what comes to us at the end of the day is the tip of an iceberg.

The Deputy Chairperson (Mr D Bradley): You said earlier that you did not go for a hard-and-fast definition of a complaint and that you left it fairly broad under the concept of dissatisfaction: is that not a recipe for collecting all sorts of trivial complaints?

Mr Buchanan-Cook: Not in our experience. It is important to have a wide definition so that you capture things, because what might be trivial to one person is possibly very important to another. Clients tend to see solicitors in distressful situations. It tends to be a distress purchase, and little things that might not have an adverse impact on you or me might have a huge impact on them because of the position that they are in emotionally. Being alert to any element of dissatisfaction is crucial. You might identify something that you can deal with there and then if you pick it up, if you are attuned to it, and if you are empathetic towards it. Otherwise, if left to fester, it could result in something much bigger, much more difficult to deal with and much more problematic for all the parties concerned.

The Deputy Chairperson (Mr D Bradley): Thank you very much, David. As I say, if we require any further information, we will be in contact with you. Thank you very much for coming today.

Mr Buchanan-Cook: Thank you very much for the opportunity. I am happy to provide any information in due course.