



2 September 2015

From: The Chief Executive

**By email**

Mr Shane McAteer  
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Dear Mr McAteer

**RE: CALL FOR EVIDENCE ON DRAFT LEGAL COMPLAINTS AND REGULATION  
BILL 2015**

Please find enclosed the Law Society's response to the Committee's call for evidence in respect of the Draft Legal Complaints and Regulation Bill 2015. The Society looks forward to meeting with the Committee to discuss the various aspects of the Draft Bill and to answer any questions arising from our submissions.

Should you have any queries in relation to the above or related matters in the interim, please do not hesitate to contact me otherwise we look forward to seeing you on 23 September 2015.

Yours *eh*

**ALAN HUNTER**  
Chief Executive

Encls:

## **Law Society of Northern Ireland Comments on Legal Complaints and Regulation Bill 2015 as introduced.**

**1.1** The Society welcomes the opportunity to comment further on the Bill prior to giving evidence before the Department of Finance and Personnel Committee. The Society will not repeat points made in its previous submissions but will focus on where changes have been made or issues have developed since the Bill was first published. We attach our first response to the Bill. These two documents are to be read together as the Law Society's response on the final draft of the Bill.

### **The Legal Services Oversight Commissioner**

**2.1** The LSNI welcomes the amendment at clause 1(3) to include consultation with the Lord Chief Justice before the appointment of the LSOC. We hope that in pursuing the recruitment process, the Bain proposals that the appointment panel should consist of a Chair provided by the Civil Service Commissioners, an independent Lay Assessor and a nominee of the Lord Chief Justice, will be followed, to maintain confidence in the independence of the appointee.

**2.2** With regard to the powers of the LSOC, the LSNI still has reservations about the ability of the LSNI to effectively challenge the LSOC in the exercise of his/her powers particularly in relation to clause 2(4) previously clause 2 (2) of the Bill and the power to impose a fine as an appeal process is not included in the Bill. We said in our response that the powers were shaped in a manner as to encourage their use as a first as opposed to last resort. We note the DFP's view is however, that the imposition of a fine will be "the option of last resort for the LSOC" and that that power must be looked at in the context of general powers of the LSOC, and will therefore "not occur overnight". It is envisaged by DFP that use of the power will involve careful consultation with the PBs, working to protocols and guidelines to be drawn up once the new system goes live. Clause 2(3), now clause 2(5) is referred to by the DFP as "a moderating influence", as the LSOC must consult with the PB and afford it a reasonable opportunity of appearing to make representations.

**2.3** The DFP sees the powers as giving the LSOC "teeth" to operate where the complaints handling processes are failing but that the power should only be invoked where it is reasonable to be invoked.

**2.4** The Society notes the reassurance offered by the extrapolation of how the DFP sees the powers being applied in practice and expectation by DFP that protocols and guidelines will be developed. We welcome the assurance that DFP will continue dialogue with the Society and other interested parties as the process moves forward. The DFP says that it would be unusual to add a general right of appeal to the existing right to seek judicial review, however we are still of the view that an effective appeal mechanism should be included although we would anticipate, taking account

of the expect protocols and guidelines that it would require to be used only in extreme circumstances .

**2.5** With regard to the maximum fine, the LSNI had concerns about how this was to be calculated, particularly with reference to the assets of a PB and the number of its members. We asked that this be restricted to liquid assets. DFP say this was included so that the LSOC had another relatively accessible marker. We also raised the possibility of redirecting the fine back into the complaints handling process rather make payment to the DFP. It is noted that DFP will consider the LSNI proposal on redirecting the penalty and also the fact that the issue of which of the PBs assets will be taken into account when setting the penalty, is open to further exploration between LSNI and DFP.

**2.6** The Society had no objection to Clause 3(6) where the LSOC is given a consultative role in relation to all future regulations proposed by the Society, the Society already being a co-regulator with the OISC, HMT and FCA. With regard to Clause 4, the Society sees this as a powerful provision giving effect to para 5.31 of the Bain report i.e. the intention that NI consumers have same protection as E&W, as it allows the DFP to require the LSOC to review and report on such matters relating to the organisation on regulation as the DFP may specify. This is a significant change to the operation of the DFP in relation to the legal professions as it allows the DFP direct input in the operation of the professions. The Society did not object to the power per se, but was of the view that the circumstances under which such a request can be made should be clearly defined and that the DFP should in any event have continuous dialogue with the Society. Proportionality and resources are key considerations, particularly in circumstances where the DFP may be asking the LSOC to conduct a review at the expense of the Society.

**2.7** The cost efficiency of the overall scheme is important to the Society and the costs of the office of the LSOC are important factors being paid for by a levy on the professions as provided by clauses 5 and 6. We note that this important aspect of the procedure is to be governed by secondary legislation and also by protocols between all the key players. We note the concerns of DFP that there could be the possibility of a risk of overreaching the influence of the professional bodies in the operation of the office, if a balance was not struck in the course of the consultation. The Society said that effective and transparent consultation with the PBs on the office of the LSOC was required from the outset, including its aims in detail; the projected costs of such an office, the level of salary paid to the LSOC and thereafter staff salaries and numbers, together an input into office accommodation and ancillary expenses. We would expect that the officials of the DFP are well placed to ensure that there will be no overreaching by the PBs. As we are all aware, publicly funding for legal services is being cut and professional fees squeezed with the private legal market not recovered from the recession. In places, the legal market is still contracting and therefore, additional costs will put a strain on any firm and ultimately be reflected in costs and jobs and therefore costs control is an important issue.

**2.8** We have dealt at length with the LSOC office and powers above because so much of what is required for the set up and operation of the office is off the face of the Bill. It is reliant on secondary legislation for the levy, protocols and guidelines for the operation of the LSOC's powers and further interaction between the PBs and DFP officials. There is a considerable volume of detail to be explored, after the primary legislation, before we have a clear operational picture.

### **The Solicitors Complaints Committee**

**3.1** The LSNI welcomes the amendments to schedule 3 in terms of ensuring the LSOC has a consultation role in the appointment of members of the SCC and the need only for a bare majority of lay persons on the SCC. Recruitment will be on Nolan principles, with open competition.

**3.2** We welcome the amendment at para 5(5) (a) and (b) of schedule 3 to provide for the removal of committee members where there has been a failure to handle complaints in accordance with a plan or failed to comply with a recommendation of LSOC. The ability to take remedial action, where there has been such failure, will be of benefit to the Society and the public.

**3.3** We note that para 8 of schedule 3 has not been amended to allow for delegation of powers beyond a subcommittee. DFP have considered such delegation would be a dilution of the SCC legal accountability and references the Planning and Water Appeals Commission, where no such delegation exists. We would refer to the delegation provisions set out in the Legal Profession and Legal Aid (Scotland) Act 2007 Schedule 1 Paragraphs 13 (1) to (4), which could be adapted. We suggest this is examined again as the purpose is to ensure effective and efficient processing of complaints in their initial stages where issues like time limits, premature complaints and other more appropriate remedies have to be considered.

### **General Matters**

**4.1** We note the DFP see no need for a provision similar to section 2 of the Compensation Act 2006 which provides that an apology shall not of itself amount to an admission of negligence or breach of statutory duty. Whilst the Legal Ombudsman has power to require an apology, that is protected by the provisions of Section 2. The SLCC does not have a specific power to order an apology and section 2 provisions are not as yet replicated in Scotland. However we note that the Apologies (Scotland) Bill 2015 is going through the Scottish Parliament, will apply to all civil proceedings including inquiries etc, and has a similar though wider reaching effect than section 2. We believe there is a case to be made for inclusion of a similar provision in the Bill.

**4.2** The LSNI notes the appeal provisions against determinations of the SCC have yet to be determined and further detailed consultation will be required before moving to secondary legislation.

**4.3** The Society considered that the provisions in clause 8 relating to privilege were too wide and the LSOC should be subject to the same rules as any other individual. The DFP respond that the provision is sensible and therefore no amendment is proposed. We would re-state our opinion and refer the DFT to Section 42 of the Legal Profession and Legal Aid (Scotland) Act 2007 on the matter of privilege, which states:

*For the purposes of the law of defamation, the publication of any report under .... Paragraph 16 of schedule 1 is privileged unless the publication is proved to be made with malice.*

Reports, published under schedule 1 Paragraph 16 as referred to, are annual reports as required for the Minister on the activities of the Scottish Legal Complaints Commission.

## **Projected Costs**

**5.1** We note the DFP comments in respect of costs, clarifying that costs of LSOC's office is estimated to be in and around £100 per practitioner and that, as a result, the overall cost for practitioners is likely to be £500 per annum. In truth we cannot be sure what the costs may be as the number of complaints which may arise as a result of the new scheme, with compensatory powers, cannot be known with certainty. We would however caution against characterising the regulatory impact as £10 per week per practitioner. The business model for legal work includes that each firm meets the practice and regulatory costs of each legal professional employed in the firm, it does not e.g. come out of salaries. Costs include practising certificate fees, compensation fund contributions, compulsory insurance, and ongoing CPD seminar costs. An additional lump sum payment of £500 is a hefty additional charge for small firms. 52 per cent of our firms are sole practitioners and 94 per cent are either sole practitioners or under five person partnerships and may employ a number of assistants. A sole practitioner with 4 assistants will have to find an extra £2500 per year. It may give pause for thought in terms of professional head count in the office. It may mean additional costs being passed on to the private fee paying client, (the publicly funded clients' fees already reducing). The Society judged that the public confidence to be gained from the new complaints model outweighed the negative impact of the additional costs. Nevertheless, the Society will have to exercise due diligence in relation to the costs of SCC offices and the LSOC will have to ensure that he/she does not unnecessarily escalate the costs of that office.

## **In-house complaints resolution and mediation procedures**

**6.1** We note the exposition of views and concerns about “informal” complaints resolution or first tier resolution, as described by the Lay Observer, by various parties responding to the consultation. The model of self resolution of complaints has been in place in the legal profession in E&W and Scotland for many years. It is an accepted and recognised model across a range of professions and industries, including the financial services industries, the utilities, air travel etc. The public are used to working within such schemes. In addition, mediation and ADR processes are now part of the consumer redress landscape through EU Law. The experience of SLSS and LEO suggest the direct resolution of complaints is improving as complaints are reducing. We continue to support the Bill as a means of meeting the needs of legal consumers in Northern Ireland in a cost effective, user friendly way.