

Updated (23.11.15)

Legal Complaints and Regulation Bill Key Issues arising from the Evidence

(Note: this document contains paraphrased extracts from the stakeholder submissions and DFP responses, please refer to your Bill folder for the original papers)

Stakeholder Issues	DFP Response
Clause 1: The Legal Services Oversight Commissioner (LSOC)	
<p>Law Society: wanted input by Lord Chief of Justice in appointment process for appointing LSOC and wants DFP to follow the Nolan Principles.</p> <p>Bar Council: Argued that it should, along with the President of the Law Society, have a role in the appointments process of the LSOC.</p> <p>Clause 1(4) - requested reconsideration of the provision that requires that the LSOC must be a lay person and must never have been a barrister or solicitor. Argued that 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.</p>	<p>Bill was amended to include input by Lord Chief Justice (LCJ)</p> <p>It is important that any appointment of LSOC is removed from the professional bodies so that there is no perception that they have had an influence on whomever the post-holder is. The appointment by DFP – following the Bain model – followed by consultation with the LCJ, should provide sufficient confidence to all interested parties, both consumers and professionals, and will maintain openness, transparency and independence.</p> <p>Accepted that certain former legal professionals or those who have retired could perform the functions of the LSOC post effectively, but believes that it is a better system that sees the LSOC as someone who has not been a solicitor or barrister, as this should completely remove any possible perception of the conflict.</p> <p>(Also, the Committee commissioned relevant research on approaches for other professions)</p>

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Clause 2: General Powers of the Commissioner	
<p>Bar Council: Clause 2(1) (b) – concerned that scrutiny of the legal profession by LSOC appointed by a Department, will 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. Proposes that the power of the Commissioner to ‘investigate’ how complaints are handled by the professional bodies is amended to ‘engage in consultation’ with the professional bodies.</p> <p>Law Society: raised concern with clause 2(8)(b) in that it includes assets, but is not restricted to liquid assets.</p> <p>Committee for Finance and Personnel (CFP): There is a need to more clearly set out the remit of the LSOC as it is not completely clear from the provisions in this clause what the Commissioner is doing.</p> <p>- Clause 2 (a) Can Commissioner compel provision of</p>	<p>Does not share the Bar’s concern re the term “investigate”. The LSOC has been given powers to examine complaints handling systems of the professional bodies and should be able to examine, by way of investigation, the manner in which complaints are handled. In practice, this investigation will likely involve the “engagement in consultation” with the professional bodies, but DFP is not minded to change the wording on the face of the Bill.</p> <p>The purpose of this clause is to provide the LSOC with guidance in terms of any possible penalties. The use of the assets of the professional body is designed as a marker, in addition to other factors outlined at clause 2(8) including the total number of complaints and the size of the organisation. DFP considers that the LSOC should consider, in circumstances where a penalty is being determined, all of these relevant factors in reaching such a determination.</p> <p>Bill is modelled on the Bain recommendation that complaints committees of the Law Society and the Bar should be supplemented by a LSOC with strategic oversight powers. No intention for LSOC to become involved in individual cases. LSOC will be looking at how the professional bodies handle complaints against their members from a strategic perspective,</p>

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<p>information?</p> <ul style="list-style-type: none">- Clause 2 (b) Can Commissioner re-open investigations? If that is the case, then the Commissioner is very operational and probably not the expected purpose outlined in the Explanatory and Financial Memorandum (EFM).- Clause 2 (1) (c) training, How might this provision apply? What if the recommendations are not implemented?- Clause 2 (1) (g) 'any other thing' What is this about?- Clause 2 (2) What are these powers to compel? How is an individual's data protected?- Clause 2(4) What will happen to the money from penalties – does it go to the Department (Clause 12 (a)? If so, how will this be ring fenced or hypothecated for relevant purposes? What assurance exists that the penalty will not simply be passed on to members through an increase in fees/subscriptions? What alternative options are there to give the Commissioner power to intervene to direct changes in the complaints procedure and apply sanctions which are more likely to change behaviour?	<p>analysing their plans, including the targets therein. From a general perspective, DFP is content to reflect on the narrative contained in the Explanatory and Financial Memorandum (EFM) in order to make this clearer.</p> <p>Clause 2(a): LSOC can require a professional body to make reports/provide information about the handling of complaints against its members. It is not necessary to have a power for the LSOC to compel provision of information. It could be that if information was not provided to allow the LSOC to carry out the functions of the office, that the Commissioner could enforce the provisions contained at 2(4). DFP does not see much distinction to be made between LSOC requiring a professional body to provide this information and compelling them to do so.</p> <p>Clause 2(b): It is not intended that the LSOC will have the power to re-open investigations in individual cases.</p> <p>Clause 2 (1) (c): This provision arises from a specific proposal in Bain that the LSOC should have a role in relation to the training of members of the relevant complaints committee. The LSOC is empowered to make recommendations for the training of those members to assist the relevant complaints committees and to ensure that they fulfil their obligations to have properly trained members. Bain received evidence that there was an issue around the induction and training given to lay members</p>

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<i>Stakeholder Issues</i>	<i>DFP Response</i>
	<p>in particular participating in the complaints system. The LSOC can take any non-implementation of his recommendations into account in the context of the wider powers of that office, and in any reports the office holder makes.</p> <p>Clause 2(1) g: This clause is a technical addition; it does not confer a wide power on the LSOC to do anything he/she wants. It is within the parameters of this Bill, or any future statutory provision. So if a future Bill confers powers on the LSOC, for example. There are no other statutory provisions already. The clause is there to signpost readers.</p> <p>Clause 2(2): This is to effectively provide the LSOC with the power to audit complaint files. The purpose of this will be to help inform the broader oversight role, in terms of informing how the professional bodies are handling complaints, and can be used in conjunction with clause 2(1). It was a proposal in Bain, and which certain consultees considered would be useful on the face of the Bill. Data protection legislation will apply to the LSOC as it does to any other public body. DFP will examine again whether any additional safeguard is required on the face of the Bill as alluded to by the Committee.</p> <p>Clause 2(4): It is intended, as per clause 2(9) that money from any penalty will end up with DFP. Would not be appropriate for the LSOC to retain that money because there could be a conflict of interest in issuing a penalty if the funds were kept</p>

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<i>Stakeholder Issues</i>	<i>DFP Response</i>
	<p>by that body. The money going to the Department is a more neutral position. Protocols and guidelines will determine how this money will be used. Will consider the Law Society suggestion that money be put back into the complaints-handling system, but initial view is that there could be a dilution of the incentive for the professional body to improve and maintain the improvement in its complaint handling systems if, ultimately, any penalty that it pays for not doing so is given back.</p> <p>In terms of the passing on of the penalty through an increase in fees/subscriptions, it will be the professional body which will be responsible for the payment of a penalty. It will be a matter for it to determine how that is paid for,. The rationale for the penalty is that it provides an incentive for all solicitors and barristers, and their professional bodies, to improve their complaints –handling systems, making them more open, transparent and fairer, thus ensuring that the issue of a financial penalty is only applied where this system has broken down. The Department is open to discussion with the Committee in relation to other options for the Commissioner to have powers to direct changes but is of the view that the imposition of a financial penalty will give the LSOC teeth to adequately oversee the relevant professional bodies. The LSOC will, of course, make an annual report to the Department</p>

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<p>Law Centre (NI): initial submission pointed out that there is no empirical evidence on whether the relatively few complaints in NI due to high levels of satisfaction with the work of solicitors, a lack of awareness of the complaints mechanisms, or a lack of faith in a solicitors body investigating its own members.</p> <p>Scottish Legal Complaints Commission (SLCC): on a related point, the SLCC highlighted a gap in the Scottish legislation whereby neither the Law Society nor the SLCC have the ability monitor what happens to the handling of complaints at ‘first tier’ (i.e. at the level of the individual solicitor’s practice). This is something that they might amend in order to provide visibility as to the true complaint numbers.</p> <p>Lay Observer: stated that he did not know how many complaints are received at ‘first tier’; acknowledged that, from a governmental angle, there may be good reasons for wanting these figures; emphasised that it is important that the Law Society knows whether its professional members are following</p>	<p>relating to the carrying out of the Commissioner’s functions during the year. (see Schedule 1 (14)) and that report (together with the facility to make additional reports) will also act as another tool in ensuring that the professional bodies are performing as they should.</p> <p>Minister accepted this point, which was highlighted during Second Stage debate on 16 June 2015.</p>

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<p>the regulations set down for them. His personal view, however, was that it is not important to know the information on number of complaints at ‘first tier’ and cautioned against an overly bureaucratic system.</p> <p>Dr Hosier: highlighted acknowledgment by Law Society that it does not currently have reliable information on the overall level of complaints [i.e. including the number received by solicitor practices or the ‘first tier’]; pointed out that the statistics which have been cited on the rate of complaints in NI are those complaints which have been made known to the Law Society and this may represent only a small proportion of the total number of complaints; and argued that it is therefore difficult to accept assurances that the level of complaints is of a lower order than that which has been recorded in other jurisdictions. Proposed that LSOC should have enhanced power to enable him to compel professional bodies to provide accurate information regarding the total number of complaints received by their members, and also by professional bodies in relation to their members. Also, the LSOC should be under a duty to accumulate such data annually, which should be made available to the Department.</p> <p>Committee agreed to commission the Assembly Bill Office to draft an amendment to press for these powers and duty to be specified on face of the Bill, given concerns re complaints figures</p>	<p>Confirmed that it would consider an amendment to cater for the issue of “first-tier” complaints which the Committee has raised throughout its scrutiny of the Bill. Subsequently confirmed that Department had issued instructions to Office of Legislative Counsel (OLC) on this issue, and Counsel has provided the Department with an early draft to make changes to the Bill to reflect this policy. The Department, subject to the final views of OLC, and agreement by the Minister, expects to be in a position to provide an amendment to the Committee in advance of its clause by clause consideration.</p>

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<p>being 'tip of the iceberg'. Committee subsequent agreed, in principle, that it was content with the draft amendment provided by the Bill Office but also forwarded this to DFP for information.</p>	
Clause 3: Duty of certain bodies to consult Commissioner	
<p>Bar Council: Clause 3 and 4 are drafted too widely, as the LSOC's role in respect of the rules and regulations should relate to those which apply to the provision of professional services by a barrister. Argued that 'it would not be beneficial for the professional bodies to be required to consult with an individual who is not legally qualified about matters other than complaints which relate to the professional services provided by a barrister'</p>	<p>Clauses 3 and 4 are designed to cover aspects of regulation other than professional services, not just for complaints but for other aspects of regulation such as education, training, continuing professional development, conduct and the whole remit of regulation. Intention is to provide LSOC with a strategic view on the regulations of the Bar Council or the Law Society on conduct and their regulations and rules on education and training so that he or she will be able to influence and shape it for future change.</p> <p>DFP is not convinced by the Bar's argument that it would not be beneficial for the professional bodies to consult with an individual who is not legally qualified in relation to other regulatory activities. The LSOC postholder will have the necessary skills to contribute positively in relation to this aspect of the job, and it should not require a legal professional qualification to be able to make such a contribution.</p>

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Clause 4: Duty of Commissioner to review certain matters	
<p>See above Bar Council concerns re clauses 3 and 4.</p> <p>Law Society: raised concern that clause 4 is designed to allow “DFP direct input in the operation of the professions”.</p>	<p>See above, DFP response re Clause 3.</p> <p>DFP did not accept this point and argued that this clause will provide ‘a useful resource in relation to future consideration of the regulation of the legal professions’. It will allow DFP to properly reflect on any future considerations in relation to regulation of the profession, and to allow it to ask the LSOC to review aspects of regulation or organisation of the profession.</p>
Clause 5: The Levy	
<p>CFP: Clause 5(3) What are the ‘fair principles’? If it is intended that this should be applied on a per capita basis, why is this not set out on the face of the Bill (with provision for variation where justified)?</p> <p>Law Society: does not see the rationale for the reporting obligations on the LSOC on the annual expenditure of that office</p>	<p>The apportionment of the levy as between each professional body will be a matter for further discussion and negotiation with the professional bodies. Applying the levy automatically on a “per capita” basis is one model under consideration. Such a provision in regulations gives more scope for change if circumstances change in due course, or to take into account lessons learned from the practice and evidence in forthcoming years. Regulations made under this provision will be subject to the strictest level of Assembly control (i.e. draft affirmative resolution) Having such a clause on the face of the Bill would remove flexibility.</p> <p>Indicated that this will happen in practice. Does not see it necessary to include specific provision within the Bill to allow</p>

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<p>being confined to DFP and C&AG before laying the accounts before the Assembly about its funds. It considers that DFP and the C&AG should take the views of the professional bodies into account when considering the LSOC's financial accounts.</p> <p>Bar Council: emphasised that there are going to be a lot fewer complaints against the Bar than there are against members of the solicitors' profession because the Bar, due to independent referral, does not, in any circumstances, hold clients' money. Therefore, this points to the levy for solicitors' practices taking account of the number of solicitors employed by that practice paying a certain amount and, in the case of the Bar, which has a very low volume of complaints against it, paying a very substantially reduced levy. Also expressed concerns surrounding the cost of the establishing and operating the LSOC office.</p>	<p>the Law Society and Bar Council to have those fairly widespread powers. Need to strike a balance with how much the professional body is involved in the day-to-day running of the LSOC.</p> <p>The Bar, in conjunction with the Benchers, will have the ability to contain and monitor the costs associated with the new system. The precise division of the levy will follow during the work required to make the system operational and the Bar, the Society, and others will have full opportunity to shape that debate. DFP believes that the LSOC will be a modest office estimates a figure of around £100 per practitioner by year as an early indication of the likely costs involved. There may be a degree of variance around that figure but it is not likely to be hugely significant.</p> <p>Expect that the fact that there are more solicitors than barristers will be reflected in the amount of the levy to be placed on the respective professional bodies but will have to factor in the role of the LSOC, how much time the LSOC will be expected to devote to the oversight of complaints handling for solicitors and barristers, the numbers in the profession and the number of complaints that are raised. From a policy perspective, it was accepted that the Bar might not pay quite as much as the Law Society.</p>

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Clause 6: The levy: supplementary provisions	
CFP: Clause 6(5) (b) What is the intention behind this provision? If there is a division of costs among members then what is the basis of the waiver? If a waiver is needed in (5) (b) then why not also in (5) (c)? What examples can be provided of when a waiver would be appropriate?	The detail of the levy will be contained in regulations, under the structure set out on the face of the Bill. Clause 6 sets out certain duties in relation to regulations (see clause 6(4)) but also sets out certain powers in relation to them also. Therefore levy regulations may (as opposed to must) make provision about the circumstances in which any amount of the levy payable may be waived. The norm will be that a waiver will not be required, but need to allow for every possibility in the Bill, and similar provision exists in English legislation. In terms of an theoretical example, if there were circumstances of the LOCS's work in a year being disrupted for a particular reason, the amount of the levy would therefore be set aside, in a small amount, after it had been paid.
Clause 7: Payments by Department	
Clause 8: Privilege for certain publications	
CFP: What does the absolute privilege cover? Can an assurance be provided that it does not give privilege to bad faith or gross incompetence? How does the provision apply to the people from whom the LSOC got the information? Does the absolute privilege also protect the information originator?	The privilege afforded to the LSOC is restricted to any publication of any matter which the LSOC is required to publish or is authorised to publish under this Act. Read in conjunction with Clause 4, and Schedule 1 (14), this will cover the Annual Report of the LSOC, any other report to the Department relating to the discharge of the functions of the LSOC, and any report that the Department may request under the Commissioner's duty to review certain matters.

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	Having reflected on the Committee’s observations in relation to the scope of that privilege and the concerns raised by the Law Society, DFP will bring forward an amendment to clause 8 to address the issue raised by the Committee.
Clause 9: Lay Observer	
Clause 10: Interpretation of Part 1	
Clause 11: Complaints procedures of barristers	
CFP: - Clause 11 (1) ‘The General Council of the Bar must make provision’ falls into the activities ‘participate in’ or ‘arrangement to be subjected to’. What is intended here? What is the purpose? What is the difference between ‘participating in’ and being ‘subject to’? - Clause 11 (1) – ‘such person or body as may be specified by the General Council of ‘the Bar’ and ‘provision must be made ... for the enforcement’ <ul style="list-style-type: none">• Is this another layer of bureaucracy? Why is it required?• What does enforcement mean in practice?• What teeth does it have?• Does it mean striking off solicitors?• What subtlety is provided for in those sanctions?• What happens to customers who engage in this set of	Clause 11 is intended to try to give effect to the similar requirements for solicitors to have their own in-house complaints handling procedures, as outlined at clause 29. It is a common and well tested condition for complaints handling systems that complaints should have the opportunity to be resolved at the first tier, before falling into the formal procedures. Solicitors now must, both under the terms of Clause 29, and under existing regulations, have their own in-house complaints handling procedures available for clients with complaints to use. For the Bar, this is a more difficult aim to accomplish. It would not make sense for 700+ individual self-employed barristers to have 700+ individual “internal” complaints handling procedures. Instead, the policy was developed in such a way that the Bar Council would make provision for each of its members to participate in – or be

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<p>proceedings?</p> <ul style="list-style-type: none">• Are they then disadvantaged/cut out from the Complaints Committee? <p>- Clause 11(3)</p> <ul style="list-style-type: none">• What about services other than ‘professional services’ not provided by a barrister? For example, what the Barrister didn’t do rather than poor service.• Can an assurance be provided that such a scenario is included?• How might this provision be amended for clarity? For example, why doesn’t it say legal services?	<p>subject to – an “internal” complaints handling system. The aim of this is to give a forum whereby complaints against barristers can be sorted out reasonably informally. The Bar Council has agreed to provide such a scheme for its members. In practice, this is not another “layer of bureaucracy”. DFP sees this as a valuable first step for a person who has a complaint against their barrister. The Bar Council will be obliged to take steps to address the complaint, with the barrister in question, with the opportunity to have the complaint dealt with in a way which is satisfactory to all parties. The complainant will be at the heart of this process. In the same way that if the complainant is not satisfied with the outcome of the in house complaints system of a solicitor, a dissatisfied complainant will then be able to invoke the more formal complaints handling options set out for the Bar Complaints Committee (BCC) at clause 12 onwards. Therefore a customer who engages in this set of proceedings will engage with the committee set up the Bar Council, who will aim to resolve the matter to their satisfaction. If this process does not work, or the customer considers it unsatisfactory, the complaint will proceed to the BCC. They will be in no way disadvantaged or cut out from the BCC. This clause relates solely to the Bar. It will not mean striking off barristers, conduct matters will undergo a separate process outwith the provisions of this Bill.</p> <p>Clause 11(3): the professional services provided by a barrister</p>

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<p>Bar Council: called for complainants to pay a fee when initially making a complaint in order to discourage unmeritorious claims and suggested that the fee is returned if the complaint is upheld;</p>	<p>will relate to acts or omissions of the barrister – e.g. if a barrister is instructed to carry out a particular matter, and does not carry out that matter, the Department considers this will fall within the definition of professional services. The Department is content to consider further with Legislative Counsel, but does not immediately view the need for an amendment, particularly as the requirement here needs to be read in conjunction with the provision at clause 13(1).</p> <p>Such a model could deter people from making a complaint. Important that a complainant feels empowered to make a complaint, even if at the end of due process, their complaint may not be upheld. Pointed to provision in clause 17(4) (i) enabling costs to be awarded against a complainant who has acted unreasonably, which should deter frivolous/vexatious claims.</p>
Clause 12: Bar Complaints Committee (BCC)	
<p>CFP: - Clause 12(1) What is the sanction if this duty is not fulfilled and if the provisions of Schedule 2 are not applied? Whilst normally sanctions in Bills are not necessary because Judicial Review applies, in this instance it will be by peers. Why is the Committee not set up as a statutory body, especially given that Schedule 2 contains much of the necessary provision?</p>	<p>It would be an entirely unusual situation for a Committee to be established by power of primary legislation not to be set up under those terms and conditions. The Bar and the Benchers of the Inn of Court were bodies who initially proposed the model to the Bain Committee, proposals that were then freshly supported by both organisations during the subsequent consultations on the draft Bill, and both bodies have been in</p>

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	discussion with the Department since then in terms of preparing for implementation. Not fulfilling those statutory requirements would come at the very least with considerable reputational consequences for both bodies, and would cause the Department to reflect on the adequacy of the whole Bill.
Clause 13: Jurisdiction of the Complaints Committees	
CFP: - Clause 13(1) Is this an act of commission or omission? As per Clause 11(3). Does omission also mean failure to provide professional services? - Clause 13(2) Excluded by contract term. How do you safeguard against blacklisting (informal or formal)? If the complaints procedure is used then specifically how can you prevent solicitors being blacklisted by barristers?	The Department repeats earlier observations in relation to clause 13(1). The Department is not clear as to the concern in relation to clause 13(2) and the reference to blacklisting. The purpose of this provision is to ensure that terms are not issued to complainants that may prevent them from complaining or prevent the complaints committee from examining any complaint. In addition, any complaint against a barrister will relate specifically to the services provided by that barrister (the same applies to solicitors) so the notion of a barrister refusing to take work from a particular solicitor is unlikely to be an issue of significance.
Clause 14: Excluded complaints	
CFP: - Clause 14(1) Respondent's complaints procedure must be used first. This creates a tension between co-operating enough to get to the next level and cooperating too much with the result of not getting to the next level. How can this be navigated? - Clause 14 (3) Why might 14(1) not apply? What examples can be provided? If there are clear examples for disapplying then	The intention is that a customer must first use the less formal procedures to be set up under clause 11 by the Bar, as outlined above. This step provides the opportunity for the complaint to be resolved to the satisfaction of the customer and the barrister, with assistance from the Bar Council. It will be a clear target going forward that if the customer is not satisfied, they can proceed to take their case to the BCC.

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why can these not be included on the face of the Bill?	<p>DFP does not consider that there will be a tension – it is not the case that a customer will have to “co-operate enough” to get to the next level, but we would expect, except in circumstances where this may not be possible, for the customer to first at least engage with this procedure. They can give full co-operation, engage robustly and fully with this process, but still remain unsatisfied with the outcome, and then they may proceed to the next level.</p> <p>Clause 14(3) allows rules to be made to outline circumstances where a complainant does not need to first use the first stage complaints procedures of the Bar. It is difficult to be precise as to when such circumstances apply, but there could be, for example, situations where informal resolution will be impossible or at least very difficult, due to a complete breakdown of the relationship between customer and barrister. The barrister will have a part to play in this less formal resolution and therefore the BCC may judge, and may make rules accordingly, that informal resolution can be waived in certain circumstances. BCC considers it appropriate that the BCC is best placed to make such judgments. In addition, the Committee is directed to clauses 17 and 18 which set out how the BCC approaches this issue.</p>
Clause 15: Complainants	
CFP: - Clause 15(2) (a) Who can use the BCC? What about a case	This legislation is not intended to be used by well-resourced bodies to make complaints against barristers. Repeat users of

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<p>being brought by two or three individuals working together? (Interpretation usually includes singular and plural. However, this is not clear in this instance. There should be clarification on the face of the Bill that it is one or more individuals). - Clause 15(2) (b) What is this provision to be used for? It would be helpful to include a list of examples known by the Department in the Bill or at least in the EFM.</p>	<p>legal services, such as Government Departments, or large companies, have at their disposal other options when it comes to poor service. Barristers simply will not be used again. However, the “man on the street” is in a different position and this legislation is designed for the use of those customers who do not have the resources or the repeat-use of those bodies. DFP will re-examine with OLC the issue in relation to individuals working together. However, the Department has at clause 15(2) (b) acknowledged that the practice going forward and lessons learned from the operation of the legislation may require the definition of complainant to be widened, if that is the experience. Rather than having to amend primary legislation, the Department has considered that a power to prescribe by order other bodies is a useful one to have. It should be noted that the Department’s ability to make such an order will be guided by the provisions of clause 16 – in effect, it will be made on the recommendation of either the BCC or the LSOC, and only after full consideration (including publication of drafts) of the proposed recommendation. Any change will also be subject to Assembly control and input from the Committee. Also pointed out that Section 37(2) of the Interpretation Act (NI) 1954 is relevant and any reference to singular includes plural reference. This will be reflected in any amended EFM.</p>

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Clause 16: Orders under section 15	
Clause 17: Procedure for complaints	
<p>CFP:</p> <ul style="list-style-type: none">- Clause 17(4) (a) is about vexatious litigants. There is a conflict in meaning between Clause 17(4) (a) and Clause 17(5). Clause 17(5): How can a case be dismissed as being without merit when the merit was not considered as directed in Clause 17(4) (a) How might this be amended for clarity? <p>Dr Hosier: raised the same issue, pointing out that this clause requires amendment, as it is not possible for the BCC to reasonably form the view that a complaint is either frivolous, vexatious or totally without merit unless it has firstly considered its merits. Suggested the deletion of the words; “without consideration of its merits” in clause 17 (4) (a) would rectify this problem.</p> <p>CFP:</p> <ul style="list-style-type: none">- Clause 17(4) (b) ‘another person or body’. This appears to create another layer of bureaucracy, another body. What kind of other person or body might become involved? Why can’t this be specified on the face of the Bill or at least covered in the EFP?- Clause 17 (4) (e) and (f) What are the differences between expense and cost?- Clause 17 (4) (g) – ‘a contribution’ What does this mean? Why	<p>Clause 17(4) (a) and Clause 17(5) – the Department confirmed it is content to bring forward an amendment along the lines outlined by the Committee to address this apparent conflict.</p> <p>Clause 17(4) (b) is not intended to create another layer of bureaucracy, but this is a prudent clause to direct complaints to another person or body where that is considered necessary – e.g. where the complaint relates to misconduct (as opposed to poor services), it may be more appropriate for the Bar’s disciplinary processes to be used, or where the complaint may raise potential criminal activity, and a referral to the PSNI may</p>

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Legal Complaints and Regulation Bill Key Issues arising from the Evidence

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Stakeholder Issues	DFP Response
<p>are they not paying recovery of costs?</p> <ul style="list-style-type: none">- Clause 17(4) (h) 'unreasonably' Does this apply in terms of the way the complaint was handled or is it applied only to the unreasonable nature of the complaint itself?- Clause 17(5) (c) – Dismissal and undue delay. How does that fit with 17(2) (a) where there are rules for when the complaint must be made? This is not clear- Clause 17(5) (e) 'compelling' What are these compelling instances? Give examples- Clause 17(8) 'award bears interest' - Retrospection – can it be backdated? 'Determined in accordance with the order' – Who will do this?- Clause 17(9) – 'recoverable as a debt' How is this going to help the solicitor? Is there no place for costs from central funds?	<p>be appropriate. The Department is happy to reflect on the EFM and to provide explanation where required.</p> <p>Clause 17 (4) (e) and (f): Difference between expenses and costs. The provision at 17(4) (e) is wider, in that it relates to expenses to persons in connection with attendance at a hearing, so can include witnesses. Clause 17(4) (f) relates to costs in favour of the actual complainant.</p> <p>Clause 17(4) (g) – it will be for the BCC to make rules to determine how its costs are defrayed by the respondent. This provision is separate to an award of costs in favour of the complainant (although may be in addition to them) but it may be, for example, that the BCC will consider that the respondent should be liable for some of the costs of the hearing, as opposed to all the costs. This should rightly fall for consideration and determination by the BCC.</p> <p>Clause 17(4) (h) is there to give the BCC the power to award costs against the complainant where they have acted so unreasonably in relation to the complaint. It could in theory be applied in terms of the way the complaint was handled by the complainant, or the unreasonable nature of the complaint. The BCC will be best placed to judge these matters. The key for the Department is that a "reasonable" complainant will not be deterred from making a complaint to the BCC through fear of being saddled with an award of costs.</p> <p>Clause 17(5) (c) supports, rather than sits in isolation with,</p>

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Legal Complaints and Regulation Bill

Key Issues arising from the Evidence

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Stakeholder Issues	DFP Response
	<p>Clause 17(2) (a). A complaint may well be made to the BCC to satisfy the time limits that will be set out by the BCC under 17(2)(a) but following this, there may be undue delay in relation to part of the complaint, or in providing evidence to support it.</p> <p>Clause 17 (5)(e) similar observations as noted earlier – e.g. the complainant may have engaged in criminal activity in relation to the complaint, and that it would therefore not be appropriate for the BCC to deal with it.</p> <p>Clause 17(8) it will be a matter for BCC rules to determine whether an award bears interest that may be backdated.</p> <p>Clause 17(9) It is not clear what the reference to a solicitor means here or why costs would be met from central funds. An award made against a barrister will be expected to be met by that barrister, as will any award made against a complainant under 17(4) (h) or (i).</p>
Clause 18: Notification requirements	
Clause 19: Determination of complaints	
<p>Law Society: With reference to clause 19(2)(a) provision for Complaints Committee to direct that legal practitioner issues an apology to complainant, Law Society proposed amendment to remove the ability of such apologies to be used as evidence of liability in civil proceedings. Cited international examples of such clauses which aim to tackle culture of defensiveness in relation</p>	<p>Content to consider an amendment to cater for the concern raised in relation to the issue of an apology. DFP to arrange for amendment to be drafted.</p>

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Legal Complaints and Regulation Bill Key Issues arising from the Evidence

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Stakeholder Issues	DFP Response
<p>to provision of apologies. Also applies to clause 38(2)(a)</p> <p>CFP: Clause 19 Compensation How does the compensation under this clause square with civil proceedings for professional negligence? Does one preclude the other? Could suing be more effective than compensation through this Bill?</p> <p>Bar Council: Clause 19 makes provision for compensation to be paid in relation to complaints, which has been set by DFP at £5,000. Particularly concerned with the use of the term 'negligence' in clause 19 (2)(c), in terms of the potential for the BCC to make a finding of professional negligence against a barrister. 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.</p>	<p>Compensation under clause 19 will be available for lower value professional negligence claims. It is a standard principle of the law of damages that a plaintiff should not receive double recovery. It will be a matter for the complainant as to whether he or she wishes to pursue any professional negligence claim – assuming the value is below £5000 – with the BCC or through the courts. Bain had indicated that the scheme should permit a potentially more cost effective route for lower level negligence cases and clause 19 aims to implement that particular recommendation.</p> <p>Bain considered that consumers should be afforded a more cost effective and streamlined procedure in the determination of low level negligence cases that would avoid a consumer having to initiate court proceedings. It proposed that the complaints committee should have access to an adjudication to determine whether a lawyer has been negligent and the extent of the loss suffered. While the complaints committees will be made up of a lay majority, they will have significant professional membership. The Benchers will have the responsibility for appointing members to the committee and the lay majority should therefore have, at its disposal, adequate expertise to assist in the</p>

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Legal Complaints and Regulation Bill

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Stakeholder Issues	DFP Response
	consideration of low level negligence matters. In addition, the suggestion of Bain, that the complaints committee could have assistance from experts on adjudications of negligence can also be met under the proposed system – Schedule 2 (7) provides for arrangements for assistance and the BCC will be able to make arrangements for persons it considers appropriate for assistance to be provided to it.
Clause 20: Alteration of compensation limit	
Clause 21: Appeals	
Clause 22: Information and documents	
Clause 23: Reporting failures to provide information or produce documents	
Clause 24: Enforcement of requirements to provide information or produce documents	
Clause 25: Reports of investigations	
Clause 26: Protection from defamation claims	
Clause 27: Consultation requirements for Bar Complaints Committee rules	
Clause 28: Interpretation of Part 2	

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Legal Complaints and Regulation Bill

Key Issues arising from the Evidence

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Stakeholder Issues	DFP Response
Clause 29: Complaints procedures for solicitors	
	[Note: if the draft amendment re ‘first tier’ complaints, as prepared by DFP, is agreed by the Committee, then a related amendment may be proposed at clause 29 re the Law Society obtaining information on the number of complaints received by its members]
Clause 30: Solicitors Complaints Committee (SCC)	
CFP: during evidence from the Law Society on 30 September 2015, concerns were raised on CFP with the provisions under clause 30 and paragraphs 2 to 4 of Schedule 3 that the Law Society is responsible for appointing the laypersons to the Solicitors Complaints Committee (SCC). This contrasts with provision for laypersons to Bar Complaints Committee being appointed by the Benchers, who are independent of the legal profession and which therefore achieves functional separation between regulation and representation in the case of the Bar.	The provisions in schedule 2 and schedule 3 place an onus on both the Law Society and the Benchers to consult the LSOC on both the appointments and the manner in which members are appointed. The SCC is, in law, a subcommittee of the Law Society, so there would be legal issues in terms of appointing members to it from an independent body. There is also the question of which independent body would be responsible for appointing those members. In addition, from a policy perspective, the Department does not consider it necessary; there are significant checks and balances within the Bill to ensure that the Law Society will have to appoint members in the most open and transparent way. The provisions at Schedule 3 (2) and (3) which when read together provide a significant safeguard against the notion that lay persons could potentially be hand-picked by the Law Society.
Law Society: requested for delegatory powers to be included on	It would be unusual in primary legislation to delegate powers

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Legal Complaints and Regulation Bill

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Stakeholder Issues	DFP Response
the face of the Bill, which would allow Society staff to exercise powers on behalf of the sub-committee, and pointed to similar provisions in the relevant Scottish legislation.	of a committee to staff of a body which has the same legal standing as the committee. DFP sees nothing to prevent staff associated with the new SCC in preparing papers on matters such as time limits, premature complaints etc, which in practice could be ratified fairly expeditiously by the actual SCC when it sits.
Clause 31: Jurisdiction of the Solicitors Complaints Committee	
Clause 32: Excluded complaints	
Clause 33: Complainants	
Clause 35: Continuity of complaints	
Clause 36: Procedure for complaints	
See issues raised by CFP and Dr Hosier above under clause 17(4)(a) and 17(5)(a), which also apply to clause 36(4)(a) and 36(5)(a).	Clause 36(4) (a) and Clause 36(5) (a) – the Department confirmed it is content to bring forward an amendment along the lines outlined by the Committee to address this apparent conflict.
Clause 37: Notification requirements	
Clause 38: Determination of complaints	
Law Society: With reference to clause 38(2)(a) provision for Complaints Committee to direct that legal practitioner issues an	Content to consider an amendment to clause 38(2) to cater for the concern raised in relation to the issue of an apology.

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Legal Complaints and Regulation Bill Key Issues arising from the Evidence

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Stakeholder Issues	DFP Response
apology to complainant, Law Society proposed amendment to remove the ability of such apologies to be used as evidence of liability in civil proceedings. Cited international examples of such clauses, including in the Apologies (Scotland) Bill 2015, which aim to tackle culture of defensiveness in relation to provision of apologies. Also applies to clause 19(2)(a)	DFP to arrange for amendment to be drafted.
Clause 39: Alteration of compensation limits	
Clause 40: Appeals	
Clause 41: Information and documents	
Clause 42: Reporting failures to provide information or produce documents	
Clause 43: Enforcement of requirements to provide information or produce documents	
Clause 44: Reports of investigations	
Clause 45: Protection from defamation claims	
Clause 46: Consultation requirements for Solicitors Complaints Committee rules	
Clause 47: The Solicitors Disciplinary Tribunal	

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Legal Complaints and Regulation Bill Key Issues arising from the Evidence

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Stakeholder Issues	DFP Response
Clause 48: Recognised bodies	
Clause 49: Interpretation of Part 3	
Clause 50: Interpretation	
<p>Review of the Act</p> <p>Dr Hosier: considers that the Bill fails to reflect a growing consensus within the global academic community which holds that self-regulation of the legal profession is an inherently flawed model. Argues that, as the Bill currently stands, it represents a missed opportunity to bring the regulation of the legal profession in NI into line with best practice internationally.</p> <p>CFP: In light of these and other concerns raised during the evidence gathering, the Committee agreed to commission the Assembly Bill Office to prepare a draft amendment to provide for a review mechanism to be included on the face of the Bill to require that DFP appoints an independent person to review the implementation of the provisions in the Bill within a specified timeframe (3 years) after commencement and that a report on the review is published. Also provides for the terms of the review to be set out in Regulations.</p>	<p>While DFP has not yet responded directly to Dr Hosier's submission, in terms of the Committee's proposed amendment to insert an <u>independent</u> review mechanism on the face of the Bill, the Department considers this unnecessary and points to the provisions at clause 4 which will permit it to refer any matter to the LSOC for review and report.</p>
Clause 51: Further provision	

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<i>Stakeholder Issues</i>	<i>DFP Response</i>
<p>CFP:</p> <ul style="list-style-type: none">- Clause 51 (1) What justification is there for this broad power? Why does the Department need it? Why can the reasons for this power not be set out on the face of the Bill?- Clause 51 (3): Does 'modify any statutory provision' include this Act? Clause 51 (3) is by affirmative resolution - modifying another statutory provision but not if it is modifying freestanding legislation. Does it change effect of law rather than the wording? However it is exercised?	<p>Clause 51(1) is a general provision that is used in many pieces of primary legislation. It must be borne in mind that it relates to supplementary, incidental or consequential provisions; it is not there to make substantive policy changes to primary legislation. It provides a power to make supplementary, incidental or consequential amendments and the power will only be able to be used to the extent that such amendments are required as a result of the Assembly passing this Bill. Clause 51 is essentially a safety blanket in case the operation of the legislative changes leads to unanticipated problems or to address necessary consequential amendments that may have been overlooked inadvertently during the development of the Bill. The clause can only be used in limited circumstances, the power being permissive and limited to each of the terms outlined in the clause. The clause is also limited to the general or particular purpose of the Act or in consequence of, or giving full effect to, any provision made by the Act. Those two planks need to be taken together; the Minister can only bring forward an order that is strictly limited to giving full effect to the intention of the Act and any order can only relate to provisions which are incidental, supplementary, or consequential. The Department provided an assurance that it would therefore have to go through the normal procedures of justifying the order to the Committee and the Assembly. The Department will not rely on this clause to cover any deficiency in the</p>

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Stakeholder Issues	DFP Response
<p>Examiner of Statutory Rules: Clause 51 allows the Department to make orders containing further provision (supplementary, incidental, consequential, transitional and transitory). Orders modifying (including amending or repealing) a statutory provision (which term encompasses both primary and subordinate legislation) are subject to draft affirmative procedure; and in any other case orders under clause 51 are subject to negative resolution. The Department might perhaps wish to refine this so that orders under the clause which modify primary legislation (provision of an Act of Parliament or Northern Ireland legislation) would be subject to draft affirmative procedure; and in any other case orders under this clause would be subject to negative resolution.</p>	<p>policy-making process and is not there to enable the Department to reverse any previous policy decisions.</p> <p>Content to examine Clause 51 to take account of the Examiner’s points and will make a suitable amendment.</p>
Clause 52: Minor and consequential amendments	
<p>CFP: Clause 52 – Minor and consequential Amendments What is ‘minor’? This is not explained in the EFM.</p>	<p>The Department has not defined minor amendment in the EFM. A consequential amendment is an amendment which follows as a consequence of the Bill. A minor amendment is similar, but not necessarily one which follows as a consequence of the Act.</p>
Clause 53: Repeals	

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Stakeholder Issues	DFP Response
Clause 54: Commencement	
Clause 55: Short title	
Schedule 1: The Legal Services Oversight Commissioner for Northern Ireland	
	[Note: if the Committee agrees either the amendment prepared by the Bill Office or that prepared by DFP to deal with 'first tier' complaints then a related amendment may be proposed at paragraph 14(1) of Schedule 1.
Schedule 2: The Bar Complaints Committee	
Bar Council: called that the chair of the BCC should not be precluded from being a non-practising or retired member of the legal profession.	Lay chairs and lay majorities were the key messages flowing from Bain and DFP considers that any dilution of those messages could also dilute public confidence in using the new system when it is enacted.
Schedule 3: The Solicitors Complaints Committee	
Law Society: in its initial response it raised various concerns, including: about the influence of LSOC on the Solicitors Complaints Committee; potential constraints to how the committee would operate due to number of laypersons required; how members could be removed; and suggested that the term of office should be 3 years not 5.	
CFP: Paragraphs 2 – 4: See issue highlighted above under Clause 30 re concerns raised on CFP with Law Society having	(See DFP response under clause 30)

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Legal Complaints and Regulation Bill Key Issues arising from the Evidence

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Stakeholder Issues	DFP Response
responsibility for appointing laypersons to Solicitors Complaints Committee, which contrasts with equivalent provisions for the Bar whereby the layperson are appointed independently of the legal profession (i.e. by the Benchers)	
Schedule 4: Minor and Consequential Amendments	
Schedule 5: Repeals	
Other Issues	
SLCC: highlighted the definition of a complaint in section 46 of the equivalent Scottish Act, which defines a complaint widely as any expression of dissatisfaction. Given the perceived ‘power imbalance’ between consumers and legal practitioners, it was considered important that a broad definition be used in order to enable dissatisfaction to be captured, especially at an early stage.	Does not consider such an amendment would add value to the Bill.
CFP: during evidence with SLCC and others, CFP members queried whether time limitations should be included on the face of the Bill in relation to both the time period during which a complaint can be brought and the time period for dealing with complaints. The potential need to allow for exceptional circumstances if time limitations are included was also raised.	In response to the evidence from the Bar Council, DFP stated that timeframes will be a matter for the relevant complaints committees to determine, and it is right that the complaints committees should set those limits.
CFP: highlighted that the EFM lacks detail. Many of the aforementioned queries could have been avoided had the EFM contained the necessary level of explanatory detail.	DFP is content to reflect on the content of the EFM and examine where value-added changes can be made to it. The EFM is there to assist the reader with the Bill, but it is the Bill

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<i>Stakeholder Issues</i>	<i>DFP Response</i>
<p>What suggestions does DFP have for potential amendments to the Bill to reduce the level of complexity which could potentially arise, and to ensure that the new system is accessible for the public?</p>	<p>itself which contains the policy. DFP can explore with the Committee how to best effect that change within the statutory framework of the Bill.</p> <p>DFP considers that the Bill is relatively straightforward, and is happy to explain this in the EFM. The process under this legislation will be as follows: A complaint made against a lawyer will, except in clearly defined cases, be first dealt with “in-house” in order to attempt to achieve a speedy and satisfactory resolution to the customer. For solicitors, this will mean the complaint going through the solicitor’s in-house process first. For barristers, this will mean the complaint being dealt with by the body set up by the Bar to assist with early resolution of complaints. Irrespective of the model for formal resolution elsewhere, this first step is common throughout all jurisdictions that examine complaints. Should this step fail, or be deemed unsatisfactory by the customer, the complaint will, providing it meets the statutory criteria, be eligible for formal consideration by the relevant Complaints Committee. This Committee will be armed with greater powers than exist at the moment and will be able to consider a broader range of cases. As per the recommendation of Bain, this will include the power to consider low-level negligence cases. The committees will be chaired by lay—persons and have a lay chair, a key recommendation of Bain. Under-pinning this system will be a</p>

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Stakeholder Issues	DFP Response
	<p>system of oversight provided by the LSOC. The LSOC will have a strong role in ensuring that the new system is accessible to the public, and be involved with planning, target-setting and general oversight of the complaints handling mechanisms of both the Bar and the Law Society. This is the model that Bain proposed, which Ministers and the Executive have agreed, and which the Assembly agreed at Second Stage of the Bill. The Department is open to suggestions of how the Bill can be improved within the context of the existing architecture of the Bill.</p> <p>The Department reaffirmed that it can examine the EFM again with a view to adding some detail where this has been identified by the Committee and that it will aim to do that once the amendments have been taken into account and agreed.</p>