



**Northern Ireland
Assembly**

COMMITTEE FOR FINANCE AND PERSONNEL

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DFP Assembly Section
Clare House
303 Airport Road West
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15 October 2015

Dear Gearóid,

Legal Complaints and Regulation Bill

At its meeting on 14 October 2015, the Committee for Finance and Personnel agreed the attached list of initial scrutiny issues arising from its preliminary consideration of the Legal Complaints and Regulation Bill.

The Committee agreed to forward this list of issues to DFP for a response to the questions raised. I would be grateful for a response by **noon on 28 October 2015** in order to inform the planned evidence with departmental officials scheduled for 4 November 2015.

Yours sincerely,

Shane McAteer

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Committee Clerk

Legal Complaints and Regulation Bill – initial queries from the Committee

Clause 2 – General powers of the Commissioner

- There is a need to more clearly set out the remit of the Legal Services Oversight Commissioner ('the Commissioner') as it is not completely clear from the provisions in this clause what the Commissioner is doing. For example:
 - - How far is Commissioner allowed to get involved in individual cases?
 - Is he strategic or is he operational or both?
- Clause 2 (a)
 - Can Commissioner compel provision of information?
- 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)(g) 'any other thing'
 - What is this about?
 - Are there other statutory provisions already?
 - Purpose of reference to other provisions? Which other provisions? If past, why not specify? If future, why needed – future legislation will confer the power itself.
- Clause 2 (1)(c) training
 - How might this provision apply? What if the recommendations are not implemented?
- Clause 2 (2)
 - What are these powers to compel?
 - How is an individual's data protected?
 - If the commissioner has no access to an individual's information then why is this not specified on the face of Bill
- 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?
- How is this an effective penalty to transgressors?
- Have penalties been used in other systems and, if so, what evidence exists that it has worked?
- 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?

Clause 5 – The levy

- 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)?

Clause 6 – The levy: supplementary provisions

- 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?

Clause 8 – Privilege for certain publications

- 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 Commissioner got the information? Does the absolute privilege also protect the information originator?

Clause 11 – Complaints procedures for barristers

- 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’
 - 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 proceedings?
 - Are they then disadvantaged/cut out from the Complaints Committee?
- Clause 11(3)
 - 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?

Clause 12 – Bar Complaints Committee

- 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?

Clause 13 – Jurisdiction of the Bar Complaints Committee

- 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?

Clause 14 – Excluded complaints

- 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 why can these not be included on the face of the Bill?

Clause 15 - Complainants

- Clause 15(2)(a)
 - Who can use the Bar Complaints Committee?
 - What about a case 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.

Clause 17 – Procedure for complaints

- 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?
- 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 are they not paying recovery of costs?
- 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?

Clause 19 – Determination of complaints

- 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

Clause 51 – Further provision

- 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?

Clause 52 – Minor and consequential Amendments

- What is ‘minor’? This is not explained in the EFM.

General Comments

The EFM lacks detail. Many of the aforementioned queries could have been avoided had the EFM contained the necessary level of explanatory detail.

- In light of this, what suggestions does the Department have, at this stage, for potential amendments to improve the EFM?

On a more fundamental point, it has been clearly stated by DFP, including at 2nd Stage, that it does not want to introduce a system which is as elaborate as GB, given that that would be disproportionate to the local circumstances, including in terms of the level of exiting complaints.

- In light of this, what are all the different layers of bureaucracy provided for in the Bill achieving? This includes the provisions for: the Commissioner; procedures by solicitors; complaints Committee; giving compensation with no regard to civil proceedings; etc.
- What suggestions does the Department have, at this stage, 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?