

## Assembly Section

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Mr Shane McAteer  
Clerk  
Committee for Finance and Personnel  
Room 419  
Parliament Buildings  
Stormont

Our Ref CFP/476/11-15

27 October 2015

**Dear Shane,**

As requested in your letter of 05 October, please find enclosed DFP's response to the submissions made by the Law Society and the Bar Council in response to the Committee's call for evidence for the Legal Complaints and Regulation Bill.

Yours sincerely,

A handwritten signature in cursive script that reads 'Gearoid Cassidy'.

**GEARÓID CASSIDY**  
Departmental Assembly Liaison Officer



## **LEGAL COMPLAINTS AND REGULATION BILL**

### **COMMITTEE STAGE**

#### **FURTHER COMMENTS BY THE LAW SOCIETY: DEPARTMENTS RESPONSE**

The Department has received the further comments of the Law Society on the Legal Complaints and Regulation Bill as introduced. The Society issued these comments to the Committee for Finance and Personnel in response to the Committee's call for evidence on the Bill. The Society has indicated that the submission focuses on changes made to the Bill and on issues which have developed since the Bill was first published. It included its earlier response to the consultation, which it issued to the Department in February 2014.

The Department has already responded to the issues raised by the Society in its initial submission during the consultation. A detailed analysis of responses was published and was circulated to the Committee for Finance and Personnel. Officials from DFP spoke to that document in June 2014. In keeping with the Society's approach, the Department therefore will confine its comments to the additional observations presented to the Committee in its call for evidence, and directs the Committee to the analysis document in relation to other aspects contained in the Society's earlier submission. For ease of reference, this document follows the Law Society's numbering in their submission of 2<sup>nd</sup> September 2015.

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

2.1 : The Society recognises the amendment made by the Department as a result of the consultation to add a role for the Lord Chief Justice in the appointment of the LSOC. Bain recommended that the LSOC should be appointed by the Department with an appointment panel consisting of a Chair provided by the Civil Service Commissioners, an independent Lay Assessor, and a nominee from the LCJ office. The Department is committed in ensuring that the appointment process will allow full confidence to be maintained in the independence of the postholder.

2.2-2.3: The Department notes the commentary from the Law Society. It reiterates earlier commentary in the analysis document that the power to require a professional body to pay a penalty is not shaped as a power of first resort. Such a power will be available to the LSOC at the end of a process which will see the professional body prepare plans to handle complaints, and then handle complaints in accordance with the plan. If the professional body fails to submit a plan or fails to handle complaints in accordance with it, it is at this stage that the LSOC can require the body to pay a penalty. However, the Department re-emphasises the provisions contained at Clause 2(5): before a penalty can be required to be paid, the LSOC must consult with the professional body and afford it a reasonable opportunity of appearing before the LSOC to make representations. Therefore, only after the professional body has undertaken the planning process and/or handled complaints in

accordance with any plan, and in the event of failing to meet those obligations has had the chance to explain its position to the LSOC, may the LSOC go on to proscribe a financial penalty.

2.4: The Department considered the call for an automatic right of appeal in relation to the penalty in its original analysis of responses. We note again that in England and Wales, for example, the relevant legislation precludes the right of professional bodies and others to judicially review. That preclusion is not set out in this legislation, and we maintain our position that an additional right of appeal is not required.

2.5: The Law Society has indicated a concern with clause 2(8)(b) in that it includes assets, but is not restricted to liquid assets. 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. The Department considers that the LSOC should consider, in circumstances where a penalty is being determined, all of these relevant factors in reaching such a determination. The Department will review the Society's proposal in relation to the re-direction of any penalty and can consider further with the Society, without the need to invade upon the legislation as drafted.

2.6: We note again the Society's concerns in relation to clause 4. We believe clause 4 will provide a useful resource in relation to future consideration of the regulation of the legal professions. It is not designed, as outlined in the Society's response, to allow "DFP direct input in the operation of the professions". It will however allow the Department 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. It will not be DFP who will undertake such work; rather it will have the facility to ask the LSOC to review and report on matters of this nature. We believe that is a useful resource and the Department will not use it without full consultation with relevant stakeholders in advance.

2.7: The Department has already undertaken to involve the Law Society, and other stakeholders, in the subsequent work which will be carried out in relation to the setting up of the LSOC. The Society, along with others, will be consulted on the secondary legislation that follows from this Bill in relation to the levy, and will be afforded ample opportunity to have its views considered in developing the new system. The Society will therefore be engaged again and can contribute to the ultimate shape of the LSOC.

### **The Solicitors Complaints Committee**

3.3: The Department has had considerable discussion with the Law Society in relation to its request for delegatory powers to be included on the face of the Bill, which would allow staff appointed by the Law Society to exercise powers on behalf of the sub-committee. The Department has noted the provisions contained in the relevant Scottish legislation. The Department maintains its view that the SCC is a committee of the Law Society and in law it will be the committee which takes decisions and will have legal authority to do so. It would be unusual in primary legislation to delegate powers of a committee to staff of a body which has the same legal standing as the committee. We referenced the Planning body and the Water body as examples of two organisations that have staff which take decisions on issues on a daily basis, but it is the actual body itself which has the legal authority to make those decisions. We see 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. We therefore are not minded to make any changes in this regard.

### **General Matters**

4.1: The Department notes the Society's renewed call for a provision similar to Section 2 of the Compensation Act 2006. We also note the Apologies (Scotland) Bill 2015. Our initial view was that the English Act needed to be read in the context of the other provisions of that Act, and that the Legal Complaints and Regulation Bill set a different context. The Department will look again at the Scottish Bill and identify whether there is any scope for the inclusion of relevant clauses in the Legal Complaints and Regulation Bill.

4.3: The Department notes the points made by the Society in relation to privilege and the reference to Section 42 of the Scottish legislation. We consider that it is important that the LSOC can perform their role without fear of action on views in their reports, but will examine the Scottish legislation and consider whether an amendment is feasible.

### **Projected Costs**

5.1: We note the Society's concerns in relation to costs. As has been indicated on several previous occasions, the costs of the new scheme will be divided between the statutory costs of the LSOC, to be met by a levy, and the costs for professional bodies associated with setting up and maintaining relevant complaints committees, to meet the statutory requirements of the Bill. The costs of the former will, in the Department's view, be modest. We reiterate our projections that the costs of the LSOC are unlikely to amount to more than £100 per annum per practitioner in this jurisdiction, if equated on the broad measurement of the total numbers. The Department accepts that it is harder to predict with accuracy the costs that could be associated with the new scheme in terms of the complaints committees. However, the responsibility for running those committees has been entrusted upon the professional bodies and they will have the responsibility for setting budgets and managing costs. Meeting the statutory requirements in themselves does not strike the Department as being particularly onerous, and when set in the context of alternative models, the Department believes that the Bain recommendations, which centred on proportionality, still represent the most cost effective manner of moving to a more open and transparent system of complaints handling. The Department shares the Society's observation that the public confidence to be gained from the new model will outweigh the impact of any additional costs.

## **LEGAL COMPLAINTS AND REGULATION BILL**

### **COMMITTEE STAGE**

#### **FURTHER COMMENTS BY THE BAR COUNCIL: DEPARTMENT'S RESPONSE**

The Department has received the further comments of the Bar Council on the Legal Complaints and Regulation Bill as introduced. The Bar Council issued these comments to the Committee for Finance and Personnel in response to the Committee's call for evidence on the Bill. The Council also submitted, and has again annexed, a detailed response to the consultation on the draft Bill in February 2014.

The Department has already responded to the issues raised by the Council in its initial submission during the consultation. A detailed analysis of responses was published and was circulated to the Committee for Finance and Personnel. Officials from DFP spoke to that document in June 2014. The most recent call for evidence has elicited the Bar's current thinking on the Bill and the Department therefore will confine its comments to the additional observations presented to the Committee in its call for evidence, and directs the Committee to the analysis document in relation to other aspects contained in the Council's earlier submission.

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

**Clause 1:** It is noted that the Bar has broadly welcomed the principles that shape the role of the LSOC. The Bar has repeated its call, made to the Department in the document of Feb 2014, that the Chairman of the Bar Council and the President of the Law Society should be involved in the recruitment process for the LSOC. The Department refers the Committee to its analysis following the consultation. We still are of the view that the appointment of the LSOC should follow existing principles for public appointment, and that such an appointment should be consistent with the recommendations outlined in the Bain report. The Department has already taken steps to allay any concerns of the professional bodies by providing a statutory role for the Lord Chief Justice in this process. We contend that to give a proactive role to the Bar and the Law Society has the potential to cast a perception on the process that may not be helpful. We therefore repeat our earlier view that the appointment by the Department – 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.

**Clause 1(3):** The Department notes the further call from the Bar that an individual should not be precluded from the role of LSOC by reason of them having been a solicitor or barrister. It has suggested that this preclusion ignores the fact that previous experience of legal practice could

provide a beneficial understanding of the nature of the law and legal professional services. It goes on to challenge any implication that any legally qualified professional could not be impartial and able to act in the public interest on matters pertaining to the profession. The Department does not suggest that someone with previous experience of this nature would not be able to provide such an understanding or that they could not be impartial. The potential difficulty, as the Department has previously outlined, relates to perception and one of the themes emergent from Bain that the perception of lawyers dealing with other lawyers in this way was an issue. We accept that certain former legal professionals or those who have retired could perform the functions of the LSOC post effectively, but on balance it is our view 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 outlined above.

**Clause 2:** The Bar has repeated earlier calls for the elements of clause 2 to be drafted in a different manner. Clause 2 has followed templates witnessed elsewhere in relation to the oversight of complaints. We believe it is correct that the LSOC should be able to require a professional body to provide information about the handling of complaints against its members and to investigate the manner in which complaints about members of a professional body are handled. In practice, this will encompass, as the Bar highlights, complaints which relate to services provided by a barrister. It is not the purpose of the legislation to examine, for example, complaints made by one barrister against another, or by a solicitor to make a complaint against a barrister, and this is highlighted by the provisions relating to the relevant complaints committees.

Similarly, we do not share the Bar's concern in relation to the use of the term "investigate" at clause 2(1)(b). 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 we are not minded to change the wording on the face of the Bill.

The role of the LSOC is designed to be proactive. Therefore while the Department notes the Bar's commentary in relation to the complaints procedures, we are of the view that the ability of the LSOC to set targets in relation to the handling of complaints is a sensible objective.

The Department will set the maximum penalty that can be levied by a LSOC if things go wrong. That figure will be determined after further consultation with interested parties, and after appropriate scrutiny by the Minister, the Executive, the Assembly and the Committee. It will create a boundary for the penalty but it must be remembered that it will be the LSOC that will levy the penalty, and not the Department. The Department will therefore have no control over when the LSOC will apply a penalty, why the LSOC will apply a penalty and how much that penalty will be. It would therefore be much more of an issue for the penalty to be paid, for example, to the LSOC, who will have the responsibilities and powers as outlined above. We therefore contend that it is appropriate for any penalty – which of course will not become an issue unless there have been significant problems determined by the LSOC – to vest with the Department.

**Clauses 3 and 4:** The Bar has been exercised over the power of the LSOC to be consulted on rules and regulations – other than those relating to complaints – and the power for the Department to ask the LSOC to review matters relating to the regulation and organisation of the Bar. Both clauses are

designed to give legislative effect to the Bain proposal that the LSOC should also have a role in relation to other aspects of regulation (separate from complaints handling). These include, as the Bar has alluded to, education, entry to the profession, training, and competition. The LSOC will therefore have the capability in future of examining any rules or regulation made by any of the organs of the Bar which relate to this regulatory aspect and this is entirely in keeping with Bain. In relation to clause 3, it is noted that the Law Society has raised no similar concerns to the Bar. We certainly do not consider that it will allow the LSOC “unrestricted access” to review the regulatory objectives of the Bar. The LSOC will have a consultative, influencing effect on future rules and regulations, and will be able to comment upon those to the professional bodies and in any reports issued by the postholder. This will create an additional layer of openness and transparency on the regulatory activities of the Bar, but is not an invitation for the Bar’s independence to be affected by a postholder with greater powers (e.g the power to strike down rules or regulations) than is considered necessary under the current regulatory model. Similarly, clause 4 will provide the Department with a resource in relation to any future regulatory issues that may occur. The Department will not review such matters itself, but will be able to ask the LSOC to examine and we believe this represents a proportionate power going forward.

We are 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 Department will appoint a postholder who 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.

**Clauses 5 and 6:** The Department notes the commentary and welcomes the steps that the Bar has taken and will take in relation to supporting the objectives of the Bill. We repeat our view that the Bar, in conjunction with the Benchers, will have the ability to contain and monitor the costs associated with the new system. The statutory cost to the professional bodies will come from the levy to pay for the office of the LSOC. That office will have oversight responsibilities for the complaints handling systems of both the Bar and solicitors, as well as having additional responsibilities in relation to other aspects of regulation. The precise division of the levy, a key concern for the Bar, 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. However, as already outlined to the Committee and to others during the process, the Department is of the view that the LSOC will be a modest office – complaints in this jurisdiction are not at the levels found elsewhere – and we have arrived at the approximate figure of around £100 per practitioner by year as an early indication of our expectations of the costs involved. There may be a degree of variance around that figure but it is not likely to be hugely significant.

### **Complaints against Barristers**

**Clause 11:** We note the Bar’s commentary on the potential differences between a complaint against a solicitor and one against a barrister. We believe that the legislation is more than capable of dealing with any potential differences. The Department is content to examine with the Bar as the system moves towards operational status, any of the concerns it raises in relation to the definition of professional services.



The Department notes the Bar's call for complainants to pay a fee when initially making a complaint in order to discourage unmeritorious claims. While it suggested that the fee is returned if the complaint is upheld, the Department has strong concerns that such a model could deter people from making a complaint. We have no desire to see the system flooded by frivolous or vexatious claims, but it is entirely right that a complainant feels empowered to make a complaint, even if at the end of due process, their complaint may not be upheld. Accordingly, the Department has included in the draft Bill provisions that will have the effect of making the system free for consumers, but (see clause 17(4) (i) ) where a complainant has acted so unreasonably that it would be appropriate to award costs against them, then such costs can be levied. This should go a long way in deterring the types of frivolous/vexatious claims that no-one would wish to see result.

The Department welcomes the Bar's commitment to provide an informal mediation system as a first port of call for complainants. It agrees that such a system should play a constructive role in resolving issues without the need for more formal consideration by the Bar Complaints Committee. In relation to timeframes, this will be a matter for the relevant complaints committees to determine, and it is right that the committee should set those limits.

**Clause 19:** The Bar has noted a particular concern in terms of the Department's decision to raise the amount of compensation that can be awarded against a barrister from the initial maximum level of £3500 (as outlined in Bain) to £5000 (a figure that was arrived at following an analysis of the consultation). Bain reported nearly 9 years ago, and during the consultation various views were expressed on the lapse of time and other considerations that merited the Department examining the precise proposal. Some consultees argued for a much higher compensation limit, reflecting the schemes in England and Wales (maximum of £50,000), and Scotland (£20,000). Others considered that whilst those schemes were not necessarily proportionate for a jurisdiction of the size and facing different issues as Northern Ireland, some consideration should be given to a modest increase. The Department reflected carefully on those views and felt that on balance, a modest increase of the limit to £5000 was merited. While Bain highlighted during its initial proposals that the excess on the Solicitors Master Policy was as an important factor, it saw no need to distinguish between potential awards against barristers and solicitors. In the same vein, the Department does not accept that a distinction should now be made in terms of the higher maximum suggested. It is worth bearing in mind that in England and Wales, with no distinction between solicitors and barristers, and with maximum levels considerably higher than those being outlined in this Bill, the average award is less than £1000, and the vast majority of those awards fall below the £1000 figure.

The Bar also noted a significant concern in terms of the use of the term "negligence" in clause 19(2) and has recommended a removal of this term. It is worth reflecting on the policy decision to include negligence in the provisions as another element of this Bill. Bain considered that consumers in this jurisdiction 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. The Bar has a concern that such a determination is outwith the skills and expertise of a lay panel and notes the recent Scottish case law in support of that view. However, it is worth reflecting that the complaints committees will be made up of a lay majority, and will therefore have significant professional membership. The Benchers of the Inn of Court 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 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 Bar Complaints Committee will be able to make arrangements for persons it considers appropriate for assistance to be provided to it. This provision was drafted with this issue in mind and will allow, if the BCC considers it requires further help on such matters, for the Bain recommendation that expert help is given to adjudicate on negligence issues. This is therefore not a committee which will examine such matters without recourse to expert advice and assistance, and the Department considers that this should allay that particular concern.

**Schedule 2:** The Department notes the call from the Bar that the chair of the Bar Complaints Committee should not be precluded from being a non-practising or retired member of the legal profession. Similar rationale for the Department's view on this issue applies from our earlier observations relating to the appointment of the LSOC. While not disagreeing that a non practising lawyer or retired member of the profession could provide valuable insight and experience in dealing with the sort of cases that the BCC will examine, we also consider that any level of perception of lawyers looking after themselves needs to be avoided. Lay chairs and lay majorities were the key messages flowing from Bain and the Department considers that any dilution of those messages could also dilute public confidence in using the new system when it is enacted.

The Department notes the summary of the key issues from the Bar, all of which are dealt with above. Finally, it welcomes the commitment of the Bar in terms of implementation of the Bill and its subsequent operation.