

## Assembly Section

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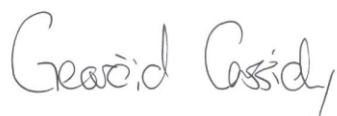
27 October 2015

Dear Shane,

Your letter of 15 October 2015 set out a list of scrutiny issues arising from the Committee's preliminary consideration of the Legal Complaints and Regulation Bill.

I enclose, on behalf of the Department, a response to that request.

Yours sincerely



**GEARÓID CASSIDY**  
Departmental Assembly Liaison Officer

## Clause 2 – General Powers of the Commissioner

The Department notes the Committee's view in relation to the remit of the LSOC. In general terms, the legislation 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. The Committee has specifically asked whether the Commissioner can become involved in individual cases, and whether the postholder will be strategic or operational.

It is not the intention of this Bill to have a Commissioner that becomes involved in individual cases. Such a role is more akin to an Ombudsman, rather than an Oversight Commissioner. The LSOC will be looking at how the professional bodies handle complaints against their members from a strategic perspective, reflecting on plans that those bodies put forward, and analysing how those plans have been made and the targets that are included in them. Those types of powers are set out in the Bill.

From a general perspective, the Department is content to reflect on the narrative contained in the Explanatory and Financial Memorandum in order to make this clearer.

The Committee further sets out some specific points;

Clause 2(a): The Commissioner can require a professional body to make reports/provide information to the Commissioner about the handling of complaints against its members. The Department does not consider it is 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). But the Department does not see much distinction to be made between the Commissioner requiring a professional body to provide this information and compelling them to do so.

Clause 2(b): It is not intended that the LSOC will have the power to re-open investigations in individual cases.

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.

Clause 2 (1)(c): This provision deals with 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 has been given the power 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. It flows from evidence given to the Bain Committee that there was an issue around the induction and training given to lay members in particular participating in the complaints system. It gives the

LSOC an additional, specific power and the Department considers that to be useful.

If the recommendations of the LSOC in this regard are not implemented, the LSOC can take this into account in the context of the wider powers of that office, and in any reports the office holder makes.

Clause 2(2): The purpose of this clause 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 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. The Lay Observer can currently take a sample of complaints files to help inform him, and this power for the LSOC will be used as another tool in informing how the professional bodies are handling complaints. Data protection legislation will apply to the LSOC as it does to any other public body. The Department will examine again whether any additional safeguard is required on the face of the Bill as alluded to by the Committee.

Clause 2(4): It is intended, as per clause 2(9) that money from any penalty will end up with the Department. Protocols and guidelines will determine how this money will be used.

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 professional bodies could, for example, adopt a polluter –pays model to recover any such penalty with an increased fee to those solicitors or barristers who have accrued more complaints, but ultimately this is not a matter for which the Department has control. 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.

Penalties have been used in other systems; in England and Wales, the Legal Services Act 2007 sets out a system for penalties to be applied on approved regulators (including the Solicitors Regulatory Authority the Bar Standards Board), although this relates to their broader regulatory responsibilities, as opposed to complaints handling (which in EW is exercised by an independent body). The Department is not aware of those penalties having been invoked as yet.

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 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.

## Clause 5 – The Levy

The apportionment of the levy as between each professional body will be a matter for further discussion and in reality, negotiation, with the professional bodies. It is not the Department's final view that the levy will automatically be applied on a "per capita" basis, although that is certainly one model that will be under active consideration. It is considered useful that such a provision contained 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 particular provision will be subject to the strictest level of Assembly scrutiny and control, and will be laid in draft before, and approved by resolution of, the Assembly before being made. Having such a clause on the face of the Bill would remove flexibility.

## Clause 6 – The Levy: supplementary provisions

The Department modelled the levy provisions, they being unique prior to the Legal Services Act 2007, on Sections 173-174 of that Act. The detail of the levy will be contained in regulations, under the structure set out on the face of the Bill. The Committee will note that 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 Department does not have a direct example of when a waiver would be appropriate, but it was felt prudent to have that power there, if required, given the read-across to the England and Wales legislation.

## Clause 8: Privilege for certain publications

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.

The Department will reflect on the Committee's observations in relation to the scope of that privilege and the concerns raised by the Law Society for Northern Ireland, and will examine the consideration of any possible amendment to this particular clause.

## Clause 11: Complaints procedures for barristers

The Committee has queried the provisions relating to clause 11. It should be noted that 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 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”. It is, in the Department’s view, 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 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 Bar Complaints Committee. They will be in no way disadvantaged or cut out from the BCC.

The Department is not entirely clear as to the question “does it mean striking off solicitors”. This clause relates solely to the Bar. It will not mean striking off barristers either, conduct matters will undergo a separate process outwith the provisions of this Bill.

Clause 11(3): the professional services provided by a barrister will relate to acts or omissions of the barrister. If for a barrister is for example 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).

#### Clause 12 – Jurisdiction of the Bar Complaints Committee

The Department is not entirely clear as to the gist of the questions raised here. 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 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 Bar Complaints Committee

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

It is the intention of clause 14 that a customer must first use the less formal procedures to be set up under clause 11 by the Bar, as outlined earlier. This is a tried and tested step in any complaints procedure and is in place in other jurisdictions. This step, as noted earlier, 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 Bar Complaints Committee. If they are satisfied, they won't need to progress to this step, and the complaint will be resolved as expeditiously as possible.

The Department 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.

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. The Department 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.

#### Clause 15: Complainants

The Department notes the issue in relation to who can use the BCC. It is not the intention for this legislation to be used by well resourced bodies to make complaints against barristers. Repeat users of 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. The Department 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. Similar drafting is present in the Legal Services Act 2007 (see clause 128). 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.

#### Clause 17 – Procedure for complaints

Clause 17(4) (a) and Clause 17(5) – the Department will consider this apparent conflict with OLC. If an amendment is considered necessary, the Department is content to make same.

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. Examples include where matters have been raised with the complaint that point 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 be appropriate. The Department is happy to reflect on the EFM and to provide explanation where required.

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.

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. The Department considers this should rightly fall for consideration and determination by the BCC.

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. Again, the Department considers that 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.

Clause 17(5) (c) supports, rather than sits in isolation with, 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.

Clause 17 (5)(e) similar observations as noted earlier – for example, 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.

Clause 17(8) it will be a matter for BCC rules to determine whether an award bears interest that may be backdated. This is a fairly standard drafting provision in relation to this aspect.

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).

#### Clause 19 – Determination of complaints

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.

#### Clause 51- Further Provision

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. The Committee is referred to other Bills under consideration in the Assembly that contain similar provision – e.g. Clause 288 Mental Capacity Bill, Clause 45 Justice (No.2) 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. Legislation relating to solicitors is largely set out in the Solicitors (NI) Order 1976 as amended, but there is other archaic legislation that pre-dates it, and while the Department is not aware of having missed anything relevant, it is useful to have the power in case something arises in future.

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.

Any use by the Department of the power to amend an Assembly Act or other primary legislation would be subject to the approval in draft procedure in the Assembly. The Department 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 policy-making process and is not there to enable the Department to reverse any previous policy decisions

### Clause 52 – Minor and Consequential Amendments

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.

### General Points

The Department 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 itself which contains the policy. The Department can explore with the Committee how to best effect that change within the statutory framework of the Bill.

In terms of the Committee's point about the different layers of bureaucracy which it considers are present in the Bill, the Department would argue that the Bill is actually relatively straightforward, and is happy to set out, whether in the EFM or subsequent, the reasons for this analysis.

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 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, and looks forward to continuing that debate with the Committee over the remainder of the Committee stage.