

Submission to the Committee for Finance and Personnel of the Northern Ireland Assembly on the Legal Complaints and Regulation Bill 2013

Introduction

The Legal Complaints and Regulation Bill 2013 (the Bill) is set to reform the manner in which complaints concerning the provision of legal services will be resolved in Northern Ireland, apparently focusing on those of a relatively minor nature, given the compensation limits set out in Clauses 19 (7), (8) and 38 (7), (8), and notwithstanding the provisions in Clauses 20 and 39 respectively. The Bill, which implements some of the key recommendations of the Bain Report, provides for rather minor modifications to the traditional system of self-regulation which pertains in Northern Ireland.¹ It is regrettable 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, for the reasons set out below. As the Bill currently stands, it represents a missed opportunity to bring the regulation of the legal profession in Northern Ireland into line with best practice internationally.

Why Regulate the Legal Profession?

In order to protect consumers within the context of what is often an unequal relationship in terms of both knowledge and power which exists between a legal practitioner and a service user, it is necessary to regulate the legal profession. However, regulation of the profession is also necessary in order to ensure the proper administration of justice, to uphold the rule of law and also to establish legal certainty, all of which are objectives which are not only of benefit to an individual service user, but also to the wider community. Furthermore, there is the role of lawyers in mediating between individuals and the state regarding entitlements and obligations.² Given the ease with which members of the legal profession often integrate within the political community, by virtue of both formal and informal networks, those charged with the task of scrutinising proposals for the regulatory reform of the legal profession should be especially cognisant of the inherently political nature of lawyers' regulation, and of the direct and indirect pressures which may be brought to bear by the profession in seeking to maintain its dominant position within the social order. There is also

¹ G Bain, *Legal Services in Northern Ireland: Complaints, Regulation, Competition* (2006). Available at: <http://www.dfpni.gov.uk/legal_services.pdf>

² M Davies, 'The Demise of Professional Self-Regulation? Evidence from the "ideal type" professions of medicine and law' (2010) *Professional Negligence* 5

the fact that the close knit nature of the legal profession allows it to be a powerful lobbying force in the event that it perceives its own financial self-interest to be challenged.

From an economic perspective, the provision of a legal service is a ‘credence good’, characterised by information asymmetry, whereby its quality is less discernable by the user than by the provider.³ Not alone must a service user rely upon a lawyer to provide a good quality service, he must also rely upon his lawyer to identify the particular service which ought to be supplied, and from this perspective, a lawyer performs dual agency and services functions, a situation which gives rise to the risk of a particular moral hazard in the form of the possible oversupply of services.

Who ought to be Responsible for the Regulation of the Legal Profession: Self-regulation or Independent Regulation?

Traditionally, the professions were afforded the privilege of self-regulation, an arrangement which enabled them to engineer ‘the creation of skills scarcity’ whilst simultaneously maintaining exclusive authority over the application of certain knowledge and techniques.⁴ According to Abel, over the course of the last century, the legal profession, in common with other professions, has suffered a series of crises associated with self-regulation, in response to which; “... lawyers did the least they could get away with”.⁵

It is submitted that the dual regulatory and representative roles of both the Law Society of Northern Ireland (LSNI) and the Bar Council of Northern Ireland (BCNI) are contrary to the public interest, and should be abolished. In light of the inherent conflict which arises in endeavouring to fulfil such a dual mandate, and in view of the substantial body of evidence which supports the proposition that self-regulation serves to further the interests of the legal profession itself rather than those of its service users, it is regrettable that the Department of Finance and Personnel (the Department) has not chosen to bite the bullet on this occasion and to bring an end to the current self-regulatory model, which is more suited to the informal regulation of a ‘gentleman’s club’ than it is for the regulation of a modern, dynamic legal profession in the twenty-first century. The primary concerns of the legal profession in Northern Ireland ought to be as follows: to meet the needs of service users to the best of its ability; to serve the administration of justice and to uphold the rule of law, notwithstanding the many difficulties associated with ‘The Troubles’ and the civil disorder which over the years, have presented challenges for all sectors of society in Northern Ireland, including the legal profession.

³ F Stephen & J Love, ‘Regulation of the Legal Profession’ *Encyclopaedia of Law and Economics* 989. Available at: <<http://encyclo.findlaw.com/5860book.pdf>>

⁴ M Davies, ‘The Demise of Professional Self-Regulation?’ (FN 1) 4

⁵ R Abel, *English Lawyers between Market and State: The Politics of Professionalism* (Oxford University Press, 2003) 488 - 490

Given the dual representative and regulatory functions of the LSNI and the BCNI, it is simply not possible for these bodies to focus exclusively upon their regulatory functions, without potentially impacting negatively upon their representative roles. In its Briefing Paper on the Draft Legal Bill, the BCNI stated that it; "... discharges its regulatory functions through a separate and constitutionally recognised committee [The Professional Conduct Committee (PCC)]".⁶ However it is unclear what is meant by 'separate' in this context, as the BCNI was responsible for the establishment of the PCC, and it also remains responsible for the investigation of complaints against members of the Bar, a function it fulfils by referring the complaints to the PCC.⁷

At this stage, it is unclear what the future holds for the PCC in the event that the Bill is enacted in its current form, and the possibility that it will continue to sit in order to investigate some matters of professional misconduct cannot be discounted. As such, there is nothing of substance in the Bill which will meaningfully address the fundamental regulatory and representative conflict at the heart of the current regulatory framework for the Bar in Northern Ireland. In this regard, I agree with the view which has been expressed by the Benchers of the Inn of Court of Northern Ireland, recommending the exclusion of the BCNI from continuing involvement with regulatory procedures.⁸ It is further submitted that it is high time that the entire regulatory framework for both branches of the legal profession should be put on a firm statutory basis.

Whilst the appointment of the Legal Services Oversight Commissioner (LSCO) is a move in the right direction as far as the independent handling of minor complaints is concerned, the limited nature of Commissioner's powers and functions do not permit him/her impact significantly upon the current self-regulatory regime.

The Bain Report

It is regrettable that the Bain Report of 2006, whilst endorsing the principles and objectives of the Clementi Review, failed to accept its recommendations as appropriate for adoption in Northern Ireland, primarily on grounds of the size of the jurisdiction and the smaller size of its legal community.⁹ It is notable that some of those who have contributed to the Committee's consideration of the Bill have also suggested that the problem of client complaints in Northern Ireland is of a much smaller order than that which has arisen in other jurisdictions, and on this basis, it has been argued that the current system of self-regulation

⁶ The Bar Council, 'Briefing Paper on Draft Legal Complaints and Regulation Bill 2013'. Para 6 (Undated)

⁷ Code of Conduct for the Bar of Northern Ireland. Para 1.8

⁸ The Benchers of the Inn of Court in Northern Ireland, 'Regulation of Legal Services in Northern Ireland: Response of the Benchers of the Inn of Court in Northern Ireland' 3 February 2006.

⁹ G Bain, *Legal Services in Northern Ireland* (FN 1); D Clementi, *Report of the review of the Regulatory Framework for Legal Services in England and Wales* (Dec 2004). Available at: <<http://www.legal-services-review.org.uk/content/report/index.htm>>

has been effective in protecting the interests of the public. However it is apparent from the submissions of the LSNI to the Committee that at least as far as the solicitors' branch of the profession is concerned, the current regulator in the form of the LSNI has no reliable information regarding the numbers of complaints being made by the public with regard to the provision of legal services, and instead, when questioned by the Committee, has cited statistics regarding the rate of complaints which have been made known to the Society, which, it is submitted, may represent only a small proportion of the total number of complaints. The comments to the Committee on 29 January 2014 of Mr James Cooper of the LSNI were instructive in that regard, wherein, in response to a question as to whether the LSNI has a mechanism for measuring the overall level of complaints, he replied, "... I expect that, in our work with the new oversight commissioner, we will develop a system of tracking the type and number of complaints in a more effective way ... Our monitoring has not been invasive in that respect to date".¹⁰ In circumstances where the LSNI does not currently have reliable information regarding the level of dissatisfaction with legal services, it is difficult to accept assurances from that source that the level of complaints arising in relation to the provision of legal services is of a lower order than that which has been recorded in other jurisdictions.

It is also notable that Bain's Recommendation 12, which provided for the establishment of a new disciplinary committee of the Bar, in order to deal with serious conduct issues at first instance and to also serve as an appeal forum for all other complaints, has not been included within the provisions of the Bill.¹¹ It is regrettable that the Bill has focused exclusively on the mechanisms for the resolution of complaints of a minor nature, which are of a similar magnitude to those which might usefully be dealt with by a form of small claims procedure.

Whereas the Bain Report has contended that consumers of legal services in Northern Ireland are in as good, if not a better position than their counterparts elsewhere, both in the UK and also on the island of Ireland, there was no evidence offered in the Report to support this somewhat optimistic position, and the lack of reliable statistics regarding the number and type of complaints about legal services casts further doubt upon its reliability.

Some Concluding Observations on the Legal Complaints and Regulation Bill 2013

In light of the above remarks, and given my overall dissatisfaction with the limited nature of the proposed legislation, I do not think it appropriate to comment in detail upon its provisions. However I would like to bring the Committee's attention to the following points:

¹⁰ J Cooper, 'Draft Legal Complaints and Regulation Bill: Law Society' Committee for Finance and Personnel. Official Report (Hansard), 29 January 2014.

¹¹ G Bain, *Legal Services in Northern Ireland* (FN 1) x

- Clause 17 (4) (a) provides that a complaint may be dismissed by the Bar Complaints Committee without consideration of its merits in certain circumstances, including those set out in Clause 17 (5) (a), namely where the Committee considers that the complaint, or part of it, is frivolous, vexatious or totally without merit. This clause requires amendment, as it is not possible for the Bar Complaints Committee to reasonably form the view that a complaint is either frivolous, vexatious or totally without merit unless it has firstly considered its merits. The deletion of the words; “without consideration of its merits” in clause 17 (4) (a) would rectify this problem.
- Similarly, clause 36 (4) (a) provides that a complaint may be dismissed by the Solicitors’ Complaints Committee, without consideration of its merits in certain circumstances, including those set out in Clause 36 (5) (a), namely where the Committee considers that the complaint, or part of it, is frivolous, vexatious or totally without merit. This clause requires amendment, as it is not possible for the Solicitors’ Complaints Committee to reasonably form the view that a complaint is either frivolous, vexatious or totally without merit unless it has firstly considered its merits. The deletion of the words; “without consideration of its merits” in clause 36 (4) (a) would rectify this problem.
- I propose that the Legal Services Oversight Commissioner (LSOC) should have enhanced power to enable him to compel professional bodies to provide accurate information regarding the total number of complaints received by its members, and also by professional bodies in relation to their members. The LSOC should be under a duty to accumulate such data annually, which should be made available to the Department.

To conclude, independent regulation of the legal profession is the best means of ensuring that consumers receive high quality legal services at a reasonable price; that the administration of justice is facilitated and that the rule of law is promoted and protected. I have every confidence that the Department possesses the requisite expertise to devise a model of independent regulation of the legal profession in Northern Ireland which would be effective, efficient and which would also represent value for tax payers’ hard earned money.