

## **Briefing Paper on Draft Legal Complaints and Regulation Bill 2013**

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### **Introduction**

1. This briefing paper has been prepared to assist the members of Committee for Finance and Personnel in their consideration of the Draft Legal Complaints and Regulation Bill 2013.
2. The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.
3. The Bar Council welcomes the opportunity to respond to the invitation from the Committee and is keen to engage and work constructively with the Committee as the Draft Bill progresses through the legislative process.

### **Background**

4. The Bar Council believes that regulation is of fundamental importance to ensure that the justice system works in the public interest and to retain public confidence in the professionals with responsibility for delivering legal services. It is also vitally important that regulation is effective, proportionate and financially responsible.
5. The Bar welcomed the opportunity afforded to it by the Review Group under the Chairmanship of Sir George Bain to respond to the Government's consultation paper on the Regulation of Legal Services in Northern Ireland. The process was particularly worthwhile as it enabled the Bar to examine the services being provided, possible improvements, its role in the administration of justice and how best to deliver value for money, quality legal services for all.

### **Overview of Current Regulatory Procedures**

6. The Bar Council discharges its regulatory functions, through a separate and constitutionally recognised committee. The Professional Conduct Committee consists of twelve independent practicing barristers and two lay members, supported by a secretary solely responsible for regulatory matters. The Committee meets every month to review fresh and ongoing complaints in line with the Bar Code of Conduct.
7. Complaints can be made in a variety of ways and information is made available on our website to assist members of the public. Complaints can be submitted by a member of the public, a public representative, individual barristers or judicial officers. Under the Code of Conduct, the Professional Conduct Committee has the power to initiate an investigation on the basis of any matter of concern which has come to their attention.
8. Complaints are delegated to a specific member of the Committee for investigation. Each complaint is investigated thoroughly which can include witness statements, interviews, official court reports and judicial input. In light of the evidence presented, the Committee makes a determination as to whether there are charges to answer. The determination is communicated to both the complainant and the barrister under investigation.
9. If charges are recommended, a summary panel is convened which deals with the more straightforward matters involving less serious breaches of the Code of Conduct. For more serious

breaches of the Code of Conduct, a Disciplinary Committee is constituted. The Disciplinary Committee is chaired by a High Court Judge or a Lord Justice of Appeal. It comprises members of the profession representing different levels of seniority and experience at the Bar and two lay representatives. The involvement of individuals holding high judicial office in the disciplinary process ensures objectivity and impartiality. There is an appeal from the Disciplinary Committee to the Disciplinary Appeals Committee. The Disciplinary Appeals Committee comprises three Benchers of the Inn of Court of Northern Ireland and one lay member. The Lord Chief Justice nominates the Chairman, a Judge of no less standing than a Lord Justice of Appeal. In addition, there is a High Court judge representing the Benchers and a senior member of the profession. All disciplinary hearings are in public. In the case of a finding of a breach of the Code of Conduct, the finding is published on a notice board in the Bar Library and in the Great Hall of the Royal Courts of Justice.

10. All those involved from the Bar and Judiciary give their time without any associated cost. Lay representatives are remunerated by the Bar Council. The very best of the Bar's advocates are retained to prosecute these complaints at no cost to the complainant.
11. In comparison to other professions and the number of court proceedings, very few complaints are made against barristers. By necessity, the litigation process produces successful and unsuccessful parties. It can be difficult to distinguish between those who are dissatisfied with the result as opposed to the process. The fact that a litigant does not achieve the results that he or she honestly believes that he or she is entitled to, does not mean that the barrister has failed that particular applicant.
12. It should be recognised that the current procedures represent a rigorous and detailed process. Each complaint is treated very seriously and investigated to the highest degree. Anecdotal evidence from those involved in the disciplinary matters indicates that the members of the profession are far tougher on other members of the profession than lay representatives who sometimes may not appreciate the fundamental nature of the core duties required of a barrister.

### **The Bar's Response to the Bain Report**

13. On the matter of regulation, the Bar largely agreed with the recommendations contained within the Bain Review, namely that:
  - a. The legal profession should continue to discharge regulatory functions, subject to the oversight by an independent Legal Services Commissioner.
  - b. Lay persons should have an increased involvement in relation to general regulatory matters.
  - c. Responsibility for the complaints-handling function should transfer from the Bar Council to the Benchers to achieve functional separation between regulation and representation.

### **Draft Legal Complaints and Regulation Bill 2013 - Initial Observations**

14. The Bar Council is currently reviewing the consultation paper from the Department of Finance and Personnel and the draft Bill. A full response will be submitted to the Department and Committee.
15. In Part 1 of the Bill, clause 2 provides for the creation of a Legal Services Oversight Commissioner for Northern Ireland. The Bar Council accepts the broad principles in relation to the Commissioner but has reservations in relation to the proposed powers and cost.
16. Clause 3 and 4 details the power to be given to the Commissioner to be consulted on future rules/regulations made by the professional bodies. The Bar Council believes the Commissioner could offer an important contribution in the development of future rules in relation to legal services.
17. Clause 5 and 6 outlines the levy provisions which are required in order to fund the work of the Legal Services Oversight Commissioner. The Bar Council has major concerns surrounding the cost of the establishing and operating such an office.
18. Part 2 of the Bill deals with legal complaints and proposes a new statutory scheme against barristers. The Bar Council welcomes the opportunity to give a statutory basis to its complaints procedures. Clause 12 recommends the transfer of complaints handling responsibility to the Benchers of the Inn of Court to achieve functional separation between regulation and

representation. While supportive of this transfer, the Bar Council will have to undertake a fundamental reorganisation of internal structures and make the necessary constitutional changes to enable such a transition to take place. The Bar Council is also working proactively with the Benchers of the Inn of Court.

19. Schedule 2 provides that no member of the Bar Council should be eligible to serve on the complaints committee. Although traditionally the Chairman of the Professional Conduct Committee has been a Bar Council member, this is no longer the case and we agree with this provision.
20. The Draft Bill proposes that in most cases the complainant must first use the respondent's complaints procedures before the complaint is eligible for consideration by the Bar Complaints Committee [s.14(1)]. The Bar Council favours the informal resolution of all complaints where possible and seeks to facilitate a resolution between the complainant and the barrister in the first instance. This approach is preferred as it avoids the potentially lengthy and stressful process of formal proceedings. We are currently considering alternative methods of resolving such complaints including mediation. The Bar Mediation Service may be able to contribute to this work.
21. Clauses 19 and 38 make provision for compensation to be paid in relation to complaints. As currently operated, a Summary Panel or Disciplinary Committee has the power to levy a fine on a respondent and has done so in past cases. Presently, the money is donated to the Bar Charity of the Year.

## **Issues of Concern**

### **Cost**

22. Whilst recognising the need for public confidence in regulation, we must seek to ensure that the profession is not unnecessarily burdened by the weight and cost of regulation. The present system is relatively straightforward and cost effective in its operation.

### **Legal Oversight Commissioner**

23. The Bar Council has no specific objections to the appointment of a layperson as the Legal Oversight Commissioner. However, we do not understand the preclusion of anyone who is or has been a solicitor or barrister.
24. The Bar Council has considerable reservations regarding an oversight body and the potential for regulatory overreaching as evidenced and experienced in England and Wales.

### **Complaints Handling**

25. The Bar Council appreciates the view that an increased lay representation increases transparency and confidence. However, we are concerned that in practice, it will be difficult to properly adjudicate complaints regarding the provision of legal services and potential breaches of professional duties without the experience of practice, knowledge of the legal system and understanding of the law. The Bar Council would be supportive of an equal representation of lay and barrister representatives on Bar Complaints Committee.

## **Conclusion**

The Bar Council welcomes the opportunity to comment on this important area of work. There is considerable work required to give effect to the various provisions contained within the Bill and to educate individual barristers as to the imminent changes and the implications for practitioners. We are therefore continuing to consult with our members and to scrutinise the draft Bill in order to submit our full response in February 2014.