



From: The Chief Executive

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Mr Shane McAteer  
Clerk to the Committee  
NI Assembly  
Department of Finance & Personnel  
Room 428  
Parliament Buildings  
Stormont  
Belfast  
BT4 3XX

Dear Shane

**RE: DRAFT LEGAL COMPLAINTS AND REGULATION BILL (NI) 2013**

Please find attached Law Society of Northern Ireland's submission in response to the consultation of the Department of Finance & Personnel to the draft Legal Complaints and Regulation Bill (Northern Ireland) 2013.

Yours sincerely

Alan Hunter  
Chief Executive

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## **RESPONSE OF THE LAW SOCIETY OF NORTHERN IRELAND TO THE CONSULTATION OF THE DEPARTMENT OF FINANCE AND PERSONNEL TO THE DRAFT LEGAL COMPLAINTS AND REGULATION BILL (NORTHERN IRELAND) 2013**

### **Introduction**

- 1.1 The draft Legal Complaints and Regulation Bill 2013 (the Bill) is the Department of Finance and Personnel's (DFP) outworking of the proposals contained in the report on "Legal Services in Northern Ireland: Complaints, Regulation, Competition" (the Bain Report) published in 2006.
- 1.2 The Bain Group was chaired by Sir George Bain and included members of the profession, lay members and members representing the consumer groups.
- 1.3 The Bain Report, published in 2006 found that Northern Ireland has "*.... a strong and robust legal profession that has provided good service to customers, offered choice and access to justice but which is not perfect*". Based on these conclusions the Bain Report focussed its recommendations on enhanced complaints handling procedures, to strengthen the system in the public interest and, given the relatively few complaints made about lawyers in Northern Ireland, believed the complaints machinery should be subject to several important changes:
  - The Committee to assess complaints was to be functionally separate from the professional body
  - There was to be a lay majority on the Committee
  - Increased oversight to be effected through a Legal Services Oversight Commissioner (LSOC) with wide-ranging powers
  - There should be provision for compensation awards for consumers up to £3,500 for misconduct and poor service and up to £3,500 for professional negligence to be awarded by the Committee.

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

- 2.1 The Society recognised the force of the recommendations arrived at independently and unanimously by the Bain Review Group comprised of a broad section of informed Northern Ireland opinion and experience.
- 2.2 In accepting the proposals, the Society recorded that they would present many challenges for the profession, given the small scale of the profession in this jurisdiction. Although the Society had some reservations, it believed that the recommendations could be made workable and had the potential to bring

general improvements for clients' interests whilst maintaining the confidence of the profession.

2.3 As a demonstration of the Society's commitment to changing the complaints landscape, it undertook to continue reform in a manner consistent with the Bain recommendations.

### **The interregnum**

3.1 Since the publication of the Bain Report in 2006 the political and economic landscape of Northern Ireland has changed with devolution restored in May 2007 just prior to the economic downturn. The downturn has had a huge adverse effect on the Northern Ireland economy across all business sectors including the legal profession.

3.2 Local solicitors' offices, the majority of which are SMEs, have struggled to survive in the challenging economic climate, shedding professional and support staff on occasions and putting many on part time contracts. Pending introduction of this legislation the Society proceeded with its commitment to reforming its Regulations and procedures as far as possible, to comply with the spirit of the Bain proposals in the following ways:

- In 2008 it introduced the Solicitors (Client Communications) Practice Regulations (SCCPRs). The Regulations provide that when tendering for legal services or at the earliest opportunity on receipt of instructions a solicitor must provide the client, in writing, with details of the work to be carried out, the identity of the person dealing with the case, who to contact if concerned about the work, costs information, or if legally aided details of the scheme. In addition the solicitors must have a written complaints procedure which is to be provided to the client as soon as concern is expressed about service and maintain a complaints register of complaints and the outcome thereof.
- All complainants must first complain to the firm to allow the solicitors an opportunity to resolve difficulties directly before raising a complaint with the Society. The Society has developed its website to provide detailed information to the public on its complaints procedures and standards and Regulations. Complaints information and documents are downloadable from the website.
- It has revised the complaints documents and forms to ensure they clearly explain the extent and limitation of the Society's current powers with respect to complaints, to manage expectations of the process, as recommended by the Lay Observer.
- Through a governance review of its procedures and documents carried out by the Client Complaints Committee, it has tightened the requirements on solicitors to provide adequate and detailed responses to the complaints received. It has taken an evidence based approach to complaints, consistent

with the approach taken to complaints by the Legal Ombudsman for England and Wales and the Scottish Legal Complaints Commission (These two organisations are tasked with investigating legal complaints in their respective jurisdictions). The objective is to minimise the investigatory time taken in each case and to have as much detailed information as is required to resolve the complaint.

- Every year the Society runs seminars on the application of the SCCPRs, both free-standing and as part of a comprehensive Risk package of seminars through our Continuing Professional Development programme (CPD) to highlight the importance of the Regulations to the integrated operation of a solicitor's business.
- We have promoted the use of quality marks and an increasing number of firms have taken up quality service marks such as ISO 9001 or LEXCEL, which is a quality scheme for solicitors' businesses, franchised by the Law Society of England and Wales.
- The Society itself acquired ISO 9001 in 2010 including the Complaints Department and has successfully been re-inspected in 2013, which has assisted in reviewing practice and procedures within the Department, for the benefit of the public and the profession.
- The Society has maintained an ongoing dialogue with the Lay Observer on matters relating to client service. He spoke at a series of seminars in 2011 and 2012 organised by the Society on client care related issues, allowing solicitors to avail of a lay perspective on complaints.

### **The outcome of the Society's Work**

4.1 The introduction of the SCCPRS and the requirement that complaints are dealt with in-house first has had a significant impact on the number of complaints received by the Society. The numbers have dropped significantly in terms of the number of files opened and issues raised.

4.2 Where forms have been issued by the Society directly to members of the public, we verify progress by follow-up enquiries to the prospective complainant after one month of the first enquiry. Only a minority of those follow-up enquiries lead to a formal complaint being received at the Society. Most complainants do not respond at all but some acknowledge when matters are resolved.

4.3 Many complainants access the complaints information via the Society's website, thus making the process more accessible.

4.4 The requirement on solicitors to provide more detailed information and supporting documents when responding to complaints benefits the complainant as they receive all this information for further comment. This has allowed for detailed objective assessment of the issues, which enhances confidence in the

process. Further work is being done to help the complainant make the most of the process by submitting all relevant information at the outset of the complaint to the solicitor and subsequently to the Society. This should manifest itself in early 2014.

- 4.5 The Client Care seminars for the profession, which encompass many other client focussed issues as well as the SCCPRs, are part of compulsory 3 hours CPD for every solicitor on Client Care and are extremely well attended.
- 4.6 The Lay Observer reports have reflected what he sees as ongoing improvement in the complaints handling by the Society and by the profession as a whole. In his report of "Continuing Progress" (2012) at 1.5 he states *"It is my opinion until changes are made in the legislation, there is little further development work of a structured nature that can now be tackled"*. In his report "Legislation Awaited" (2011) at 2.8 he states *"The Law Society appears to me to appreciate and value complaints as a window on how the public see the solicitors' profession, and as a way of enhancing performance on the profession"*.
- 4.7 The cumulative picture is of an improving complaints experience within the narrow statutory powers that the Society currently has under the Solicitors (Northern Ireland) Order 1976. We believe that these changes incorporated into a new complaints scheme can ensure that the process is effective and efficient.

### **The Draft Legal Complaints and Regulation Bill (NI) 2013**

- 5.1 The Bill is broadly based on the proposals in the Bain Report. In the first instance the Society would wish to make the point that the rationale of the Bain Review Group is to propose continued co-regulation including a role for this by the Law Society as well as other co-regulators, with increased oversight and enhanced lay participation in the process. That proposal is even more valid in 2014 than it was in 2006, having regard to the complaints experience of the last 6 years and the economic situation since.
- 5.2 The Society is committed to the Bain model (properly set up), as a proportionate, efficient and effective response to concerns about any deficiencies in redress mechanisms for the public.
- 5.3 The model will improve the landscape for the public whilst at the same time, if carefully managed, be a financially viable model for a small profession such as exists in Northern Ireland.
- 5.4 The importance of a cost efficient scheme cannot be over-emphasised having regard to the fact that the cost of regulation per member is high on a per capita basis as in this small jurisdiction, the number of members is low, yet the

monitoring and regulating costs of the profession have an effect in order for the Society to fulfil its statutory functions:

- There are 531 firms in Northern Ireland, 271 being sole practitioners, 225 being 2 – 4 partner firms with only 35 firms larger than 5 partners.
- There are 2195 solicitors in private practice holding practising certificates.

The cumulative costs of practising certificates, compensation fund contributions and insurance is very high and in addition to the normal costs payable by the average SME.

The DFP has assessed the financial impact as £400.00 per Practising Certificate. If that was to prove correct and it may be conservative, it is not inconsiderable additional financial burden to each practising solicitor.

## **General Observations**

6.1 Whilst recognising that as drafted, the Bill broadly follows the model set out in the Bain Report, there are aspects of the Bill about which the Society would have some concerns which we briefly detail below but reserve our position to submit more detailed analysis of the Sections and Schedules at a later date. The Law Society response to the draft continues to be worked on and further points will be developed in our response to the Department. We shall send a copy of our final response to the Department to the Committee when that work is completed and we note that the Department consultation period closes on 14 February.

6.2 In general, the Society would consider that there is a lack of consultation provided for in the Bill on an ongoing basis between the Society and the DFP, the Society, the DFP and the Comptroller and Auditor General (CAG), the Society and the LSOC and the Society and the Solicitors Complaints Committee.

## **The Department of Finance and Personnel**

7.1 The DFP is charged with appointing the LSOC. We consider that provision for an input from the Lord Chief Justice, as head of the legal profession, would enhance the process. There is no such provision in the Bill as drafted. We assume that exercise will be done on Nolan principles with open advertisement and recruitment processes.

7.2 The levy arrangements are a critical part of the Bill and Regulations have to be drafted on the operation of the levy. Whilst there is provision to consult each professional body, on the amount payable by that body, there is no clear provision for consultation on the out-workings of LSOC office in terms of size and staff and location all of which directly affect the costs of the levy to

each professional body. The Society would seek to have a more direct and earlier and ongoing input into such matters through a consultation procedure and to have included a test for reasonableness on the costs.

- 7.3 The Society does not see the rationale for the reporting obligations on the LSOC on the annual expenditure of that office being confined to the DFP and the CAG before laying the accounts before the Assembly about its funds. The funds are provided by the professional bodies and the DFP and CAG should take their views into account at least, when considering the LSOC financial accounts.

## **The LSOC**

- 8.1 We have already mentioned that we consider that recruitment of the LSOC should have input from the Lord Chief Justice.
- 8.2 The ability of the LSOC to recruit staff and professional assistance as set out in Schedule 1 8 should be within an acknowledged test of reasonable expenditure, which practicalities should be agreed with the professional bodies.
- 8.3 The Society has concerns about the mechanisms by which the LSOC may exercise his/her powers. There is no provision for reasonableness or a means for resolving any dispute about the proper exercise of those powers, other than the general default right to seek judicial review. That process is however academic to an extent as, based on the current draft, the Society would be paying for the legal costs of both itself and the Commissioner to test whether there has been some administrative irregularity.
- 8.4 The Society in response to the Bain Report asked for adequate and effective accountability mechanisms to be put in place to ensure the propriety and fairness of the exercise of the functions of the proposed Commissioner, recognising the risks inherent in a singleton post. The current proposals do not meet that request.
- 8.5 The provisions in respect of the removal of an incumbent from office as set out in Schedule 1 3(5) does not provide for real practical issues which may arise such as profligacy or mismanagement of the office.
- 8.6 The Society is concerned that the LSOC now has in effect a veto on who can serve on the Solicitors Complaints Committee (SCC). We detail our concerns in 9.1 below.

- 8.7 The Society has concerns about any proposed changes to who can complain under Section 34. Details are given at 9.4.

### **The Solicitors Complaints Committee**

- 9.1 The Society is concerned that the Bill provides for the consent of the LSOC before the Society can appoint any member of the SCC (Schedule 3.3). The Society notes that this is not part of the Bain Proposals. The Report provided for recruitment on the Nolan principles, including public advertisement and recruitment processes, subject to the scrutiny of the LSOC. We consider this principle should be re-established not least because it frees the LSOC to comment objectively on the operation of the SCC, without concern that the criticism is directed at people to whom he or she gave personal approval.
- 9.2 The requirement of a two-thirds majority of lay persons to solicitor members now provided for in the Bill was not part of the Bain proposals. We consider that the original proposals were sufficient and the changes will have a negative impact on the proposals for the following reasons:
- The effect of reducing the number of professional members is to increase the burden of attendance on them.
  - There could be delays in the process due to non availability of solicitor members on a given date, resulting in cancelled meetings, delays in processing cases and missed targets, resulting in potential fines for the Society from the LSOC.
  - An established Committee, with a small number of very regular attendees (as the minority solicitor members will become) can unintentionally result in an over reliance on that established expertise and trust that undermines the independent input of a majority lay Committee, particularly over a five year term of office.
- 9.3 The Society would be concerned about the limited powers to remove members of the SCC, having regard to the importance of effective and efficient operation of the SCC for public confidence in the scheme and the need to avoid the exercise of powers by the LSOC. The Society considers that if there is to be no change then the term of office should be 3 instead of 5 years.
- 9.4 The Society has concerns about the absence of prior consultation with it before a request can be made to the Department for an order under Section 34. Any change to established recognised legal relationships as provided for in Section 34 on who can complain, without the LSOC and the SCC



consulting with the Society prior to publishing and consulting on such proposals, and therefore having an informed view of the proposals, risks an adverse effect on the core values of the profession, particularly the client's right to confidentiality, which is essential for clients to have trust in the justice system.

- 9.5 The Society also notes the absence of a requirement to consult with it before any rules are made by the SCC. The Society considers that any Committee for which it has statutory responsibility should consult with it on any rules made or changed prior to going to publication. The Society needs to work harmoniously with the Committee and needs to ensure that any actions will not create any adverse effects on the delivery of an efficient complaints scheme.

### **The complaints process and determinations by the Solicitors Complaints Committee.**

- 10.1 Section 31 provides that the complaint relates to the act or omission of a solicitor (the Respondent).
- 10.2 Section 35 provides that ability to make a complaint about an act or omission of a partnership or unincorporated body is not affected by any change in membership of that partnership or body.
- 10.3 Section 48 (3)(a) and (b) extends the SCC powers to professional services by a professional body. There is no reference to the determinations by the SCC extending to a partnership or unincorporated body, yet Section 38 provides for the remedies to include compensation, rectification of errors and reductions of costs. Such remedies are generally against the firm, whether corporate or unincorporated on the basis a client went to a firm, not an individual solicitor. We believe this needs amendment, to reflect the nature of the retainer between the client and the firm of solicitors.

### **The Solicitors Disciplinary Tribunal**

- 11.1 The Society notes the change from a professional majority to a lay majority with a professional Chair. It is anticipated that this change will attract further costs. The Society has to meet the Tribunal costs in full under the Solicitors Order and the additional costs are on top of the costs of the contribution to the levy for the OISC and the costs of the office of the SCC.

## **Conclusion**

12.1. The Society will wish to comment in detail on the provisions of the Bill at a later date to assist in improving the legislation for the benefit of all users. At this point it wishes to emphasise its broad support for the draft Bill but highlight those major issues of concern that will need further discussion.