



Northern Ireland  
Assembly

Committee for Finance and Personnel

# OFFICIAL REPORT (Hansard)

Draft Legal Complaints and Regulation Bill:  
Department of Finance and Personnel  
Briefing

25 June 2014

# NORTHERN IRELAND ASSEMBLY

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**Members present for all or part of the proceedings:**

Mr Daithí McKay (Chairperson)  
Ms Michaela Boyle  
Mrs Judith Cochrane  
Mr Leslie Cree  
Mr Paul Girvan  
Mr Ian McCrea  
Mr Mitchel McLaughlin  
Mr Adrian McQuillan

**Witnesses:**

Mr Michael Foster	Department of Finance and Personnel
Mr Oswyn Paulin	Department of Finance and Personnel

**The Chairperson:** I welcome Mr Oswyn Paulin, the head of legal services in the Department of Finance and Personnel, and Mr Michael Foster, a legal adviser with the Department. Oswyn, do you want to give us a brief overview of where we are at?

**Mr Oswyn Paulin (Department of Finance and Personnel):** Certainly. Thank you, Mr Chairman. Members have received a fairly detailed analysis paper on the draft Bill. In my opening remarks, I propose to summarise the consultation outcome, and then we shall be happy to take questions.

This is our third appearance in front of you to discuss the Bill. On our previous visits, we outlined some of the general policy points both before the consultation process began and during the consultation period. During the consultation, you heard from the Bar Council and the Law Society, and subsequently from the Lay Observer, Alasdair McLaughlin. The written consultation finished at the end of February. Since then, we have held a number of follow-up meetings with key stakeholders, including the Bar, the Law Society and the Office of Fair Trading. We have also examined the responses received in some detail. As this was a consultation on a draft Bill, which enabled consultees to comment not just on the general policy aims but on specific clauses, it is probably not surprising that the analysis paper goes into some depth.

The Department received 15 substantive responses. The sources were fairly evenly split between stakeholders from the legal perspective and those from the consumer perspective. Consultees gave varying levels of detail, but most took the time to consider the specific consultation issues identified in the paper. Virtually all those who responded accepted that the model for reform outlined in the draft Bill was correct. Consultees broadly accepted the proposals and thinking of the legal services review group, chaired by Sir George Bain, and endorsed its findings. There was broad agreement from those

with a legal interest and those with a consumer interest that the draft Bill was the right approach. The analysis paper highlights that, and the Minister has confirmed that he is minded to proceed with that model. That said, the consultation threw up specific points about the detail of the Bill. Most consultees provided constructive comments about aspects of the Bill, which can be broadly divided into two main areas: the creation of the post of a legal services oversight commissioner (LSOC); and reform of the complaints handling processes by the relevant professional bodies. I will deal briefly with those in turn.

In the main, consultees accepted that the creation of a legal services oversight commissioner was proportionate and appropriate. Several responses noted that this jurisdiction has not encountered the same issues as others with the regulation of the legal profession and that the costly structures proposed and, in some cases, enacted in other areas were not required here. That was very much in keeping with the views expressed by the legal services review group when it issued its report seven years ago.

There was general agreement that the powers and responsibilities of the legal services oversight commissioner were measured and would provide strong oversight for the legal profession in its handling of complaints and in other areas of regulation. The legal professions had a number of specific points that they wanted to be considered, and the analysis paper sets those out in some detail. I do not propose at this stage to go through each one individually, but we are happy to take questions in due course. Similarly, consultees believed that it was correct and proper that the office of the legal services oversight commissioner should be funded by the professional bodies through a levy, as recommended by the review group. The legal professions accepted that general principle, but they requested that they be given an enhanced role in the way it would work in practice. The Department has considered their views, and the analysis paper provides more commentary on those points.

The other major limb of the Bill sees the professional bodies being responsible for setting up and maintaining complaints committees, with lay chairs and lay majorities. There was a reasonable amount of consensus that this represented proportionate reform in this jurisdiction. While the Bar and the Association of Personal Injury Lawyers questioned whether those bodies should be chaired by a layperson, and questions were asked about the need for laypersons never to have been lawyers, there was agreement that the model proposed by Bain and his group was the right one. There was a considerable amount of material relating to that area, with a lot of discussion on specific clauses. Those are all set out in the paper, and I do not propose to cover them at this stage. However, we are happy to take any specific questions that members may have.

In summary, the Department has considered all the points raised by consultees during the process, and the paper outlines our proposed response. You will note from the paper that we feel that some points may require further consideration with legislative counsel, with a view to possible amendments to the draft Bill. On other points, the Department is not minded to change.

We are happy to hear the views of the Committee, and our plan is to finalise the analysis paper shortly and to publish it on the departmental website. We also plan to go back to legislative counsel with additional instructions to make modest changes to the draft Bill before we go back to the Executive to seek approval for introducing the Bill in the Assembly. Our hope is that the Bill will be introduced in the autumn.

That concludes my opening remarks. I have tried to be brief rather than go into a lot of detail, but we are happy to answer questions.

**The Chairperson:** Thank you. The amount of consensus in the consultation is interesting. I am not used to such consensus in the Assembly.

The Department is clearly not going to go down the line of a fully independent complaints handling body, as is the case elsewhere. In our previous session, it was acknowledged that complaints dealt with by solicitors and barristers in-house may not be recorded. Do you see any benefit in the new LSOC being in a position to collate comprehensive data on all complaints?

**Mr Michael Foster (Department of Finance and Personnel):** The Bill gives quite broad powers to the legal services oversight commissioner. The commissioner has the power to set targets and plans for the Law Society and the Bar Council on how they handle complaints. We believe that it would be overly prescriptive and perhaps a little bureaucratic to write in a specific clause to that effect, but the LSOC will very much have that in mind in the targets that are set and the plans that the professional

bodies must adhere to with complaints handling. We feel that it would be better if that type of issue were to be addressed by an LSOC as opposed to primary legislation.

**The Chairperson:** In the primary legislation, would it be beneficial to have a statutory duty on solicitors and barristers to notify the commissioner of all complaints? If you do not want to put too much detail in the primary legislation and leave it to regulation, would it not be useful to have a duty in the primary legislation that puts an onus on solicitors and barristers to act appropriately?

**Mr M Foster:** The Department would have to give more consideration to that specific point. You probably heard the Lay Observer's view, which is that there might be difficulties attached to imposing a duty on every solicitor to notify him every time a complaint comes in.

Solicitors are under a fairly tight regulatory regime with the Law Society for its internal complaints handling system. We could take that up with the Law Society and see what steps it could take to bridge the gap, which members mentioned in previous sessions. In the primary legislation, we are reluctant to get involved in trying to set out a statutory duty for each and every solicitor or each and every barrister, not to maintain a register of complaints because they will have to do that anyway, but to notify the oversight commissioner every time a complaint comes in. That will be taken up in a different way through the plans.

**The Chairperson:** It would not be a great burden to notify the commissioner of a complaint, given the lack of complaints in this jurisdiction, as is outlined in some of the consultation responses. Surely it would not be such a great burden to put that into primary legislation.

**Mr M Foster:** I am not sure that the primary legislation is the best place for it. We can certainly look at the issue as we go through the process and will be happy to go back to the Law Society and others to find out their views. It may be that it could be taken up through secondary legislation, but we are reasonably confident that the bigger powers of the LSOC and the much wider remit that he or she will have compared with the Lay Observer will be on the sorts of matters that we feel that the LSOC will be very much at the coalface on. In that capacity, the recommendations that he or she may make will be very useful

**The Chairperson:** To what extent is there a common definition of a complaint?

**Mr M Foster:** There is not a definition of what a complaint is per se. The Law Society provides guidance on the types of complaint it can hear. Complaints against lawyers vary from day-to-day complaints such as a lawyer being rude on the phone or a delay in dealing with a matter to more serious issues that can relate to professional misconduct. The way those are categorised can differ in the sense of the procedures that will be followed. A serious fraud allegation, for example, will be heard as a misconduct case by the Law Society, whereas a case in which somebody has not answered a phone call or has been a week late writing back to a client with information will be categorised as a service complaint. It is very difficult to define a complaint in black and white. Certainly, no jurisdiction has attempted that, and we certainly did not consider that it was necessary to define a complaint in a statutory framework.

**The Chairperson:** The Committee recently considered correspondence about conduct in the Bar, the detail of which I will not go into. DFP pointed out that, while the Bill will oversee complaints related to services, it will require that the commissioner be consulted on future rules and regulations. How could that aspect of the Bill be strengthened to provide for independent oversight of professional conduct in addition to professional services?

**Mr M Foster:** The answer is that clauses 3 and 4 are designed to cover aspects of regulation other than professional services. Those clauses are designed not just for complaints but for other aspects of regulation such as education, training, continuing professional development, conduct and the whole remit of regulation. So, that capacity is in the Bill. As for drilling down to deal specifically with an allegation of misconduct, whether by an individual barrister or solicitor or groups of the same, we do not think that it would be appropriate for an oversight commissioner to deal directly with complaints or issues of that nature individually. England and Wales, and Scotland, have taken different routes on regulation, but issues relating to conduct still rest with the professional bodies. Oversight of those is at a more strategic level, which is what we are trying to produce in the Bill. We are trying to create a situation in which the oversight commissioner has a strategic view on the regulations of the Bar

Council or the Law Society on conduct and their regulations and rules on education and training so that he or she will be able to influence and shape it for future change.

**Mr Cree:** I have a question on the imposition of a penalty, which will, obviously, be a matter of last resort. The Department's response states that this would give the LSOC the teeth for handling complaints, but:

*"that power should only be invoked where it is reasonable to be invoked".*

Who decides what is reasonable? That sounds to me like meat and drink to lawyers. Who will decide?

**Mr M Foster:** The LSOC will determine whether a professional body has met its targets in complaints handling. You could look at it starkly and say that, if the LSOC were of the view that a professional body had not met its targets and that, after a process involving dialogue with the professional body attempting to right any wrong that the LSOC may be in the process of identifying, and the LSOC was still not content, it has the power to impose a penalty.

**Mr Cree:** Can the word "reasonable" be challenged?

**Mr M Foster:** It can be challenged.

**Mr Paulin:** It would be difficult to challenge. Are you asking whether a professional body can challenge the decision of the legal services oversight commissioner?

**Mr Cree:** Yes, if a professional body thought that a decision was unreasonable.

**Mr Paulin:** However, the legal services oversight commissioner is unlikely to come to an unreasonable conclusion.

**Mr Cree:** Are you expressing a faith or a hope?

**Mr Paulin:** It is more than a faith or a hope. It is what I would expect to happen.

**Mr M Foster:** It is also borne out by the experience in other jurisdictions. The model we are looking at has been used in England and Wales, where a legal services oversight commissioner has the power to impose a penalty. We are not aware that that was subject to challenge during that process. We also have a hope/expectation that the penalty will rarely if ever be invoked.

The ultimate aim is to improve the way in which professional bodies deal with complaints. If they deal with them in the manner that we hope and expect — all the signs are positive that they will — this penalty should never have to be invoked.

**Mr Paulin:** To give someone a power that has to be exercised reasonably gives them a wide discretion.

**Mr Cree:** It does.

**Mr Paulin:** It depends on your point of view. If you are coming from the view of the professional bodies and whether they would be able to challenge a decision, they would be able to challenge, but their chances of success would be slight.

**Mr Cree:** What is the scale or scope of the penalty?

**Mr M Foster:** The scale of the penalty will be set by secondary legislation and will be a matter for further consultation once the Bill is well out of the road.

**Mr Cree:** What does the example you quoted look like in England and Wales?

**Mr M Foster:** We will not be comparing like with like because, in England and Wales, it was based, as this Bill is at the moment, on the size of the profession there. The scale of the profession in England and Wales is much bigger than here. I will need to come back to you with confirmation, but my understanding is that, when the scheme was enforced in England and Wales, the maximum penalty was in the region of £1 million, but the scale of the profession is much bigger.

**Mr Cree:** That would certainly focus the mind.

**Mr M Foster:** We are not looking at figures at that level because our profession is much smaller.

**Mr Paulin:** On the basis of population, you would, perhaps, divide by 40.

**Mr Cree:** We could argue whether that is a logical way to deal with the issue given that the problem is the same in each case, irrespective of size.

**Mr Paulin:** There is, however, the question of a body's capacity to meet a penalty. What happens if you impose a penalty on a professional body that it cannot meet? The body becomes insolvent.

**Mr Cree:** That, however, does not change the issue. If there is a case in England and Wales, it does not matter how many practices there are. A similar case here would be just as telling to the people involved.

**Mr Paulin:** Sorry, this is not about an individual case. It is about the complaints process.

**Mr Cree:** I am thinking of the penalty and how it would affect a practice.

**Mr M Foster:** OK, but there is a different debate about compensation, for example, for individual complainants.

**Mr Cree:** Thank you. That is helpful.

**Mr Mitchel McLaughlin:** One respondent queried whether the Bain report was sufficiently up to date, given that statistics from independent bodies in England and Wales, and a comparison of the number of complaints that were upheld, were not available to Bain. The statistics seem to indicate that complaints by independent bodies are higher than with the self-regulatory approach. I would have thought that that was a germane point, but it seems to have been dismissed on the basis of proportionality and cost.

**Mr M Foster:** I will make a couple of points about that. The statistics that were provided in that response were not quite right. The Lay Observer's most recent report highlights the number of complaints that are upheld or are successfully sorted out, whether they are settled, there is an amicable agreement or whatever. With the numbers that are upheld, once you add on the number of cases that have been satisfactorily resolved by both parties, the figures are much closer. They are certainly not as stark.

**Mr Mitchel McLaughlin:** At an earlier session, you might recall that I had concerns about what I thought was an uneven playing field between a complainant who is a member of the public going up against a professional law officer and trying to resolve a complaint in an informal process. It is a very uneven playing field for outcomes.

**Mr M Foster:** These statistics are not the informal playing field. The point you made at our last meeting is slightly different from this one. You are right about the number of cases that are settled before they get into the formal procedure. That might be an issue, but the statistics that I am referring to relate to the formal procedure, when the complaints committee has the complaint in front of it. At the moment, the complaints committee has laypeople on it but not a lay majority, which is what we are aiming for. Those figures relate to a complaint getting into the formal system as opposed to me going to my solicitor and saying that I want a case to be settled.

**Mr Mitchel McLaughlin:** I accept that. It is simple to disaggregate the different forms of redress that are available. Does that mean that the statistics quoted by the respondent are just plain wrong, or are you disputing that he may have overstated the extent to which —

**Mr M Foster:** No. They are right in the sense that he is comparing upheld complaints, but what I am saying is —

**Mr Mitchel McLaughlin:** Is his basic point correct?

**Mr M Foster:** His basic point is correct.

**Mr Mitchel McLaughlin:** Independent bodies reflect higher figures for successful outcomes.

**Mr M Foster:** I think that that is right at this point in the debate, but it is a comparison between the current system rather than the proposed system. The proposed system is different. It will be kept with the professional bodies, but in a very different way.

**Mr Mitchel McLaughlin:** You are enhancing the lay input.

**Mr M Foster:** "Enhancing" is a light way to describe it because, at the moment, one has to bear in mind that the lay representation on a complaints committee can be no more than one third, and in most cases it is normally less than that.

**Mr Mitchel McLaughlin:** Can I be reassured that proportionality and cost were looked at in detail? Can you indicate how disproportionate and expensive it would be to go the same way that other bodies have gone?

**Mr M Foster:** For a fully independent complaints handling body, we do not have the advantage of economies of scale, which we do at the moment. Currently, if complaints are kept with the professional bodies, albeit with the personnel, the processes etc being completely changed, we have, for a start, to find accommodation for an independent complaints handling body. We have to find staff to support such a body. We have the process, from the Department's perspective, to staff —

**Mr Mitchel McLaughlin:** Did the evidence from the Lay Observer not indicate that that issue had to be sorted? He is corralled and boxed in. We will have to address accommodation issues in a professional way.

**Mr M Foster:** Yes, but remember that we are overseeing this with a legal services oversight commissioner.

**Mr Mitchel McLaughlin:** My point is that, if you are to respond and deal with complaints in a more effective and professional way than at present, there will be cost implications.

**Mr M Foster:** An independent complaints-handling body does not stand alone in other jurisdictions. It is not there just as a silo: it is backed up. In England and Wales, the Legal Services Board is the oversight regulator, so there is an additional cost. We are marrying, almost cherry-picking, the England and Wales system, whereby we not only get oversight but take complaints-handling. We are not fusing it as such, but we are doing it in what we believe to be a more proportionate and cost-effective way.

**Mr Mitchel McLaughlin:** However, if I were to ask for a direct comparator of scale, size and requirement, given that we are a smaller region, of doing it one way or the other, could we have that figure in pounds, shillings and pence? We could see from that how disproportionate the cost would be if it were tailored to the size of the market — if I can put it that way — while essentially incorporating the structure and approach in other jurisdictions.

**Mr M Foster:** We do not have a pounds, shillings and pence figure for you, but logic would tell us that it would be significantly more expensive than our proposed model. I accept fully that, under the proposed system, the number of complaints is likely to increase because we hope that the process will be more open, transparent and accessible, and will have redress mechanisms such as compensation, but, last year, there were 106 complainants against lawyers. Even if that rises —

**Mr Mitchel McLaughlin:** I expect it to rise because I think that the uneven playing field has had a chill effect. I know people who do not bother making a complaint because they do not expect to get an outcome.

**Mr M Foster:** I am not disputing that, but finding evidence that even the perception involved —

**Mr Mitchel McLaughlin:** If, for instance, complaints were to increase by 50% — I do not think that that is unlikely — or by 100%, would that affect your cost calculations?

**Mr M Foster:** No.

**Mr Paulin:** You are talking about only 200 complaints, and you are setting up a whole system of —

**Mr Mitchel McLaughlin:** I am being very conservative, as, I think, are other people.

**Mr M Foster:** The independent body in England and Wales deals with, I think, more than 8,000 complaints a year. From a cost proportionality size, it has no issues. In Scotland, the number of complaints heard by the independent complaints body is well over 1,000.

**Mr Mitchel McLaughlin:** If, however, we were talking about a business, and our projection on complaints — this is just to illustrate my point — was that we do not know whether there will be a significant uplift, but we expect that there would, could we not set the figure at 200 and then model out the costs of doing it as it is done in England and Wales against the cost of doing it as in your model? If there were twice as many complaints as I am projecting, there is incrementally more of a financial risk.

**Mr M Foster:** That is certainly one angle to come from. During a year's work on the Bain report, the consultation after it was published and the current consultation, we were expecting more organisations and individuals to suggest that, but they did not. Only one individual respondent suggested that we should go down the independent complaints handling route. All the representative bodies — the Consumer Council, the Federation of Small Businesses, Citizens Advice and the Office of Fair Trading — accepted that the response was proportionate to issues in this jurisdiction.

**Mr Mitchel McLaughlin:** I read that.

This is my final point. Is there any arrangement for a review period, other than putting it in primary legislation? Could that be done by regulation, or will that be —

**Mr M Foster:** It would be unusual to have that in primary legislation, but —

**Mr Mitchel McLaughlin:** You are changing the landscape. Generally speaking, I accept that, and I am prepared to go along with this. I think that it could be supported, but I see the possibility that the statistics could change quite radically in a relatively short time, and we should be prepared to look at it again.

**Mr M Foster:** That is the point that I was just about to make. The Minister has indicated that this is the model that he is minded to proceed with at the moment, but it is not a case of saying never to different change. Our view in the Department is that we should give it a chance. It has been recommended by Bain, who did a lot of work on it for a year.

**Mr Mitchel McLaughlin:** Seven years ago.

**Mr M Foster:** Yes, but the consultation is current, and it has thrown up the same views.

**Mr Mitchel McLaughlin:** But the recommendations are seven years old and do not have the statistics that might actually affect those recommendations. To be honest, in some ways, I am being devil's advocate, but I do think that you might have cracked it open a bit and that we should give ourselves the facility to revisit it again. I do not think that this is the ultimate solution, I have to confess.

**Mr M Foster:** There is no difficulty with that. In fact, we believe that that in itself is a huge incentive for the professional bodies to get it right now that they have been given the opportunity. If, in four or five years' time, we look at it and say that it has not worked in the way we envisaged it, there is nothing to stop whoever has the responsibility for it at that time from saying that we need to reflect.



**Mr Mitchel McLaughlin:** We had a debate yesterday — this is me finished now, Chair — on the Justice Bill, and the two contributions that sank my heart most were from the two practitioners that we had in the Chamber. It is a very conservative profession.

**The Chairperson:** Obviously the levy is going to be funded from the legal profession. Have you done any forecasting of what the scale of that levy is going to be?

**Mr M Foster:** There was some slight confusion, I think, from some of the responses. We see the legal services oversight commissioner as a relatively modest organisation, perhaps supported by one or two members of staff and with a fairly modest budget. We do not anticipate that the costs of that through the levy will be much more than £70, £80 or £90 for each practitioner in this jurisdiction. The bigger costs will be —

**The Chairperson:** Will that vary from the bigger firms to the smaller ones?

**Mr M Foster:** It will in the sense that it will be for each solicitor, so a 30- or 40-solicitor firm will pay 30 or 40 times whatever the contribution is. For a sole practitioner in a rural area, the figure is going to be much more modest. The slightly bigger cost will be in the changes that the professional bodies will have to make internally to their complaints-handling system. There will have to be much greater funding of that. The professional bodies have come back with a figure of between £300 and £400 for each practising certificate. We imagine that the overall cost will be reasonably well contained. The lower end might be £400 for each practitioner and the higher end might be something around £500 or £600. It is difficult to be specific at this stage, but we do not consider that a figure of perhaps £10 to £15 each week on an individual practitioner is cumbersome.

**Mr Paulin:** You will have noticed in the response to the consultation that the Public Prosecution Service raised a point about the levy, in the sense that it does not have clients. This is essentially about clients complaining about solicitors. It does not have clients, so why should it contribute to this? That is something that we will examine as we go through.

**The Chairperson:** What is the up-to-date timetable for the passage of the Bill?

**Mr M Foster:** We are content to hear any final views that the Committee has on the consultation. There are a number of points that we will have to go back to legislative counsel on, which we have identified and the Minister has agreed require change. They are fairly modest. We do not anticipate that there will be a huge amount of work involved in that. We hope to do that over the summer, with a view to having the Bill in its pre-introduction shape in the early part of the autumn. We will then need to go back to the Executive for approval to introduce it. With a fair wind, we are hopeful of introducing the Bill sometime in the autumn.

**The Chairperson:** When will the responses that we have before us be published?

**Mr M Foster:** Now that we have had the opportunity to come before the Committee, we aim to publish those, along with the analysis, quite soon.

**The Chairperson:** Thank you very much.