

## **Appendix One: Response to Draft Bill**

### **General Points**

1. 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.
2. The Bar Council welcomes the opportunity to respond to consultation on the Draft Legal Complaints and Regulation Bill 2013 and to work constructively with the Department of Finance and Personnel. We greatly welcome and value the engagement to date.
3. The Bar Council is committed to a transparent and accountable complaints procedure for clients. This consultation response focuses on the procedure for complaints which relate to the professional services provided by barristers to their clients.
4. All references within the draft legislation to the Executive Council of the Inn of Court of Northern Ireland should read the General Council of the Bar of Northern Ireland.
5. By way of assistance, we have included an outline of the present system of complaints handling at Appendix One.

### **Part 1 of the Bill: Legal Services Oversight Commissioner**

#### **Issue 1: Consultees are invited to comment upon the powers available to the Legal Services Oversight Commissioner**

*1(2) The Commissioner must be appointed by the Department of Finance and Personnel.*

6. It is proposed that Clause 1(2) should read that the Commissioner is appointed by the Department in consultation with the Lord Chief Justice. We understand that the Commissioner will be selected following a public appointment process. The Bar Council would propose that the Chair of the Bar Council and the President of the Law Society be involved in the recruitment process.

*1(3) The Commissioner must not be, and must never have been, a solicitor or barrister.*

7. The Bar Council disagrees with this preclusion. We do not believe that previous experience of legal practice would be a hindrance to the role of the Commissioner and may in fact provide a beneficial understanding of the nature of the professional services provided by the legal profession. This appointment may be one of significant interest to those presently serving in or retired from judicial office, a non-practicing solicitor or barrister or an in house/employed barrister. A balance needs to be achieved between transparency and ensuring complaints are dealt with efficiently, and cost effectively, and the appointment of such persons would in our view achieve those goals. In the event that a barrister or solicitor is appointed to the position he/she shall cease to practise on appointment.

*2(1) The Commissioner may—*

*(a) require a professional body to provide information, or make reports, to the Commissioner about the handling of complaints about its members;*

8. The remit of Clause 2(1)(a) is currently drafted too widely. It is proposed that “complaints about its members” should refer solely to those complaints which relate to professional services provided by a barrister, as envisaged in Clause 11(3) and Clause 13(1).
9. It is proposed that this requirement would be satisfactorily discharged by way of the relevant professional body filing an annual return with the Commissioner. The return would outline in detail the handling of

complaints which relate to the professional services provided by a barrister including: key statistical information; the action taken; method of disposal; and use of informal resolution.

*2.—(1) The Commissioner may—*

*(b) investigate the manner in which complaints about the members of a professional body are handled by that body;*

*(c) make recommendations in relation to the training of members of—*

*(i) the Bar Complaints Committee;*

*(ii) the Solicitors Complaints Committee;*

*(e) make recommendations in relation to the handling of complaints about the members of a professional body;*

10. In Clause 2(1)(b), it is proposed that the Commissioner may “engage in consultation” with the professional body in relation to the complaints handling procedure rather than “investigate”, following the submission of the annual return [see paragraph 9]. Similarly, in Clause 2(1)(c) and Clause 2(1)(e), the phrase “make recommendations” should be replaced with “engage in consultation” with the professional body.

*2.—(1) The Commissioner may—*

*(d) set targets in relation to the handling of complaints about the members of a professional body;*

11. Clause 2(1)(d) refers to the setting of targets. The Bar Council notes that the complaints procedure may be delayed for a variety of reasons, including delay caused by the complainant. The complaints procedure will require balancing due expedition with due process which will inevitably vary depending on the circumstances, including the complexity and gravity of the complaint. For these reasons, the Bar Council proposes that the complaints procedure should not be subjected to target setting but rather that the focus will be on the quality of service offered to the complainant and the barrister involved, dependant on all the circumstances of a particular case. The Bar Council is committed to investigating complaints thoroughly within a reasonable period of time and to this end, sets its own service

guidelines. We propose that the performance according to these service guidelines will form the basis of the annual return to the Commissioner. The Bar Council would then welcome constructive engagement with the Commissioner and consider any recommendations flowing from the same.

*2.—(1) The Commissioner may—  
(f) require a professional body to submit to the Commissioner a plan for the handling of complaints about its members;*

12. Clause 2(1)(f) should require the professional body to “consult” with the Commissioner in relation to its plan for complaint handling. As expected in an open and transparent system of regulation, the Bar Council will engage with the Commissioner and ensure that he or she is well informed on the complaints handling system operated by the Bar.

*2.—(1) The Commissioner may—  
(g) do any other thing which the Commissioner has power to do by virtue of this Act or any other statutory provision.*

13. The Bar Council does not agree with Clause 2(1)(g) as it is currently drafted too widely. Such a clause would render the Department, the representative bodies and legal practitioners in Northern Ireland vulnerable to regulatory overreaching, an issue which has proven very concerning in the neighbouring jurisdictions of England and Wales and the Republic of Ireland.

*2(2) Where the Commissioner requires a professional body to submit a plan for the handling of complaints about its members but the body—  
(a) fails to submit a plan which the Commissioner considers adequate for securing that such complaints are handled effectively and efficiently; or  
(b) submits such a plan but fails to handle complaints in accordance with it,  
the Commissioner may require the body to pay a penalty.*

14. Clause 2(2) permits the Commissioner to require a professional body to pay a penalty if it fails to submit adequate plans for complaint

handling or fails to handle complaints in accordance with its plan. In the course of operating an open and transparent system of regulation, the Bar Council would intend to engage constructively with the Commissioner, sharing relevant information and consulting where appropriate.

*2(3) Before requiring a professional body to pay a penalty under subsection (2) the Commissioner must consult with the body and afford it a reasonable opportunity of appearing before the Commissioner to make representations.*

15. In Clause 2(3), it is proposed that the reference to “appearing before the Commissioner” is omitted. It is proposed that “the Commissioner must consult with the body and afford it a reasonable opportunity to make oral and/or written representations to the Commissioner”.

*2(4) The Department must by order specify the maximum amount of any penalty under subsection (2).*

*2(7) A penalty under subsection (2) must be paid to the Commissioner who must pay it to the Department.*

16. The Bar Council has concerns regarding the legitimacy of the Department’s powers to both set the maximum amount for the penalty and ultimately receive the penalty, as envisaged in Clause 2(4) and Clause 2(7).

*2(5) No order shall be made under subsection (4) unless a draft of the order has been laid before, and approved by resolution of, the Assembly.*

*2(6) In determining the amount of any penalty which a professional body is to be required to pay under subsection (2) the Commissioner must have regard to all the circumstances of the case, including in particular—*

*(a) the total number of complaints about members of the body and, where the penalty is imposed in respect of a failure to handle complaints in accordance with a plan, the number of complaints not so handled; and*

*(b) the assets of the body and the number of its members.*

17. Clause 2(5) and 2(6) are contingent clauses relating to the penalty, which also require closer review. The Bar Council proposes that Clause

2(6)(b), which links the penalty to the assets of the professional body and the number of its members, should be removed.

18. The issue of penalty payments will also need to be addressed by the Benchers.

**Issue 2: Consultee's views are welcomed on the provisions in Clauses 3 - 4 that will give the Commissioner the power to be consulted on future rules/regulations made by the relevant professional bodies, and to potentially examine existing rules relating to the professional bodies.**

*3.—(1) Where any body listed in subsection (2) has power to make any rules or regulations (however they may be described) which apply to or in relation to barristers, other than those made for the purposes of any functions that that body has to represent or promote the interests of barristers, that body must consult the Commissioner before making those rules or, as the case may be, those regulations.*

19. The remit of Clause 3(1) is currently drafted too widely. The duty to consult should be limited to the rules and regulations which apply to complaints relating to a barrister's provision of professional services, as defined in Clauses 11(3), 13(1) and 15.

*3(2) The bodies referred to in subsection (1) are—*  
*(a) the Benchers of the Honorable Society of the Inn of Court of Northern Ireland;*  
*(b) the Executive Council of the Inn of Court of Northern Ireland;*  
*(c) the General Council of the Bar of Northern Ireland.*

20. The precise terminology of Clause 3(2) will change depending on the restructuring of the Bar Council and the Executive Council.

*4.—(1) At the request of the Department, and within such time as the Department may specify, the Commissioner must review, and submit a report to the Department on, such matter or matters relating to the organisation or regulation of the professional bodies as the Department may specify.*

21. The remit of Clause 4(1) is currently drafted too widely. The Commissioner's duty to review should be limited to the regulations which apply to complaints relating to a barrister's provision of

professional services to his or her client. The Commissioner's powers should not be extended to include the duty to review the "organisation" of the professional bodies, as is currently envisaged in this clause.

**Issue 3: Consultees are invited to offer their views on the levy provisions contained at Clauses 5-6 of the Draft Bill.**

*5.—(1) The Department must make regulations providing for the imposition of a levy on each professional body for the purpose of raising an amount corresponding to the expenditure of the Legal Services Oversight Commissioner incurred under or for the purposes of this Act or any other statutory provision.*

*(2) A levy imposed under this section is payable to the Commissioner.*

*(3) Before making regulations under this section, the Department must satisfy itself that the apportionment of the levy as between each professional body will be in accordance with fair principles.*

*(4) No regulations shall be made under this section unless a draft of the regulations has been laid before, and approved by resolution of, the Assembly.*

*6.—(1) In this section—*

*“the levy” means the levy payable by virtue of section 5;*

*“the levy regulations” means the regulations made in accordance with that section.*

*(2) The levy is to be payable at such rate and at such times as may be specified in the levy regulations.*

*(3) Any amount which is owed to the Commissioner in accordance with the levy regulations may be recovered as a debt due to the Commissioner.*

*(4) The levy regulations must include provisions requiring the Department—*

*(a) to calculate the amount of the levy payable by each professional body;*

*(b) to consult each professional body on the amount of the levy payable by that body;*

*(c) to notify each professional body of its liability to pay an amount of levy and the time or times at which it becomes payable.*

*(5) Without prejudice to subsections (2) to (4), the levy regulations may—*

*(a) make provision about the collection and recovery of the levy;*

22. The Bar Council is committed to a levy system governed by the principle of proportionality. The Bar Council would appreciate more information on the source of the figures used in relation to the levy cited on pp.83-84 of the Consultation Paper.

23. The Bar Council notes that in 2013, the PCC dealt with a total of 34 complaints. In comparison, the Law Society received a total of 280 complaint enquiries in 2013.
24. The provisional costing of restructuring the current complaints system to facilitate the new regulatory scheme is approximately £100,000. This cost will be borne by the members of the Bar, in addition to the annual levy.
25. To ensure social mobility within the profession, the Bar Council operates a professional fees subsidy system, whereby fees are increased on a graduated scale. During their first seven years at the Bar, barristers pay an annual fee which increases incrementally, year on year, until they reach their eighth year. The Bar Council is concerned that an additional onerous annual levy would impact significantly on social mobility within the profession.

**Issue 4: Consultees are invited to comment on Clauses 8 - 9 and on Part 1 of the Bill generally**

*10. In this Part—*

*“the Bar Complaints Committee” means the committee established under section 12;*

*“the professional bodies” are*

*(a) the Honorable Society of the Inn of Court of Northern Ireland;*

*(b) the Law Society of Northern Ireland;*

*“the Solicitors Complaints Committee” means the committee established under section 30.*

26. In Clause 10 (a), the professional body is the General Council of the Bar of Northern Ireland, not the Inn of Court.

**Part 2 of the Bill: Complaints against Barristers**

**Issue 5: Consultees are invited to give views on the manner in which the Bar Complaints Committee will be appointed and maintained**

*11.—(1) The General Council of the Bar must make provision requiring every barrister to participate in, or make arrangements to be subject to, procedures for the resolution of relevant complaints established and maintained by such person or body as may be specified by the General Council of the Bar, and provision must be made by the Council for the enforcement of that requirement.*

27. Clause 11(1) requires the Bar Council to establish a procedure for the resolution of complaints.
28. Both the Bar of England and Wales and the Faculty of Advocates in Scotland are regulated by an approach which favours the informal resolution of all complaints where possible. Both the Legal Ombudsman for England and Wales and the Scottish Legal Complaints Commission insist that the complainant must attempt to resolve the problem with the barrister in the first instance before lodging a complaint. Where a complaint relating to the service provided by a barrister is lodged in England and Wales or Scotland, there is still the opportunity to resolve the issue informally during either the mediation [Scotland only] or investigation stage of the process. It is only when the investigation stage has produced no informal resolution that the matter is passed to an Ombudsman or Determination Committee for formal consideration.
29. It is submitted that this approach has much to commend it as it avoids the potentially lengthy, costly and stressful process of formal proceedings. It is submitted that such an approach should be adopted by the Bar of Northern Ireland's internal complaints procedure. In particular, careful consideration should be given to the proposal of offering mediation to the parties at the initial stage of the complaints process with the aim of a prompt resolution.

*14.—(1) A complaint is excluded from the jurisdiction of the Bar Complaints Committee if the complainant has not first used the respondent’s complaints procedures in relation to the complaint.*

30. 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 [Clause 14(1)]. Thus the internal complaints procedure will be the gateway for all complaints relating to barristers i.e. complaints relating to conduct issues and complaints relating to the service provided by a barrister. It is only when the internal procedure is unable to reach an accepted resolution about a complaint which relates to “professional services provided by a barrister” that the complaint will be transferred to the Bar Complaints Committee.
31. Only complaints which relate to “professional services provided by a barrister” will be transferred to the Bar Complaints Committee if the internal complaints procedure is unable to reach a resolution.
32. It is submitted that rather than having two separate complaints procedures for service complaints and conduct complaints, both types of complaints should be subject to the same process within the internal body, although the disciplinary penalties will vary depending on the nature of the complaint.

*11(2) Before making the provision mentioned in subsection (1), the General Council of the Bar must consult the Legal Services Oversight Commissioner.*

33. Clause 11(2) should read that the General Council of the Bar and the LSOC “will engage in consultation” before making the provision mentioned in subsection (1).

*11(3) In subsection (1) “relevant complaint” means a complaint which relates to professional services provided by a barrister.*

34. Clause 11(3) defines “relevant complaint” as “a complaint which relates to professional services provided by a barrister”. It is proposed that the definition of “relevant complaint” requires further clarification. In particular, the term “professional services” requires definition.
35. It is proposed that the explanatory notes accompanying the legislation should give some guidance on how to identify a complaint relating to the provision of professional services. The same guidance should also be provided by both the internal complaints body and the Bar Complaints Committee within their rules, publications and websites.
36. It is proposed that such guidance should define a professional services complaint as “a complaint which relates to the quality of work a barrister has carried out, or which the complainant thinks should have been carried out, during the course of providing professional services”. This definition is similar to the wording used by the Scottish Legal Complaints Commission.
37. It is further proposed that the guidance should also include some examples of complaints relating to professional services. Such examples might include complaints arising from:
- a. the exercise of rights of audience on behalf of the complainant;
  - b. the conduct of litigation on behalf of the complainant; and
  - c. the provision of legal advice to the complainant.

**Issue 6: Consultee’s views are invited in relation to the conditions set out in Clauses 14-16 relating to the jurisdiction of the complaint committee and the eligibility to make a complaint.**

- 15.—(1) A complainant (“C”) is within this section if C*
- (a) meets the first and second conditions; and*
  - (b) is not excluded by subsection (4).*
- (2) The first condition is that C is*
- (a) an individual; or*

*(b) a person (other than an individual) or body of a description prescribed by order made by the Department in accordance with a recommendation made under section 16.*

*(3) The second condition is that*

*(a) the services to which the complaint relates were provided by the respondent to C;*

*(b) the services to which the complaint relates were provided by the respondent to a solicitor who procured them on C's behalf; or*

*(c) C satisfies such other conditions, in relation to the services to which the complaint relates, as may be prescribed by order made by the Department in accordance with a recommendation made under section 16.*

38. Clause 15(3)(c) is currently drafted very widely and potentially allows for further, unspecified, categories of complainant. It is proposed that this clause is removed.

*15(4) C is excluded if, at the time when the act or omission to which the complaint relates took place*

*(a) C was a solicitor and the services to which the complaint relates were procured by C on behalf of another person;*

39. The wording of Clause 15(4)(a) is unclear. The clause should simply exclude a barrister's instructing solicitor from making a complaint.

*15(4) C is excluded if, at the time when the act or omission to which the complaint relates took place*

*(b) C was a person or body of a description prescribed by order made by the Department in accordance with a recommendation made under section 16.*

40. Clause 15(4)(b) is unclear as to what persons or bodies might be excluded from making a complaint.

**16.—(1) An interested body may recommend to the Department that the Department make an order under section 15(2)(b), (3)(c) or (4)(b).**

**(2) An interested body must, if requested to do so by the Department, consider whether or not it is appropriate to make a recommendation under subsection (1).**

**(3) An interested body must, before making a recommendation under subsection (1)**

**(a) publish a draft of the proposed recommendation;**

**(b) invite representations regarding the proposed recommendation; and**

**(c) consider any such representations which are made.**

*(4) Where the Department receives a recommendation under subsection (1), the Department must consider whether to follow the recommendation.*

*(5) If the Department decides not to follow the recommendation, the Department must publish a notice to that effect which includes the Department's reasons for the decision.*

*(6) In this section "interested body" means*

*(a) the Bar Complaints Committee; or*

*(b) the Legal Services Oversight Commissioner.*

41. Clause 16 allows for the Bar Complaints Committee and the LSOC to make recommendations to the Department to extend or restrict the categories of complainant. The rationale informing this clause is unclear. It is proposed that this clause is unnecessary. The category of complainant should be restricted to clients to whom the respondent barrister has provided a professional service.

**Issue 7: Consultee's views on the proposed schemes for the procedures for the Bar Complaints Committee are welcomed.**

42. Clause 17, which focuses on the procedures to be adopted by the Bar Complaints Committee, raises issues which must also be addressed by the Benchers.

*17(4) Rules under subsection (1) may (among other things) make provision*

*(h) for the Committee to award costs against the complainant in favour of the respondent if, in the opinion of the Committee, the complainant acted so unreasonably in relation to the complaint that it is appropriate in all the circumstances of the case to make such an award;*

*(i) for the Committee to award costs against the complainant in favour of the Committee for the purpose of providing a contribution to resources deployed in dealing with the complaint if, in the opinion of the Committee, the complainant acted so unreasonably in relation to the complaint that it is appropriate in all the circumstances of the case to make such an award;*

43. Clauses 17(4)(h) and 17(4)(i) allow the Committee to award costs against a complainant where the complainant acts so unreasonably that it is appropriate to do so. It is proposed that this threshold is too high.

Instead, the Committee should retain a general discretion to award costs against an unsuccessful complainant.

*17(4) Rules under subsection (1) may (among other things) make provision:*

*(a) for the whole or part of a complaint to be dismissed, in such circumstances as are mentioned in subsection (5), without consideration of its merits;*

*17(5) The circumstances referred to in subsection (4)(a) are the following:*

*(b) the Committee considers that the complaint or part of the complaint would be better dealt with by arbitration or by legal proceedings;*

*(d) the Committee is satisfied that the matter which is the subject of the complaint or part of the complaint has previously been dealt with by the Committee or by legal proceedings;*

44. Clause 17(4)(a) provides for circumstances in which the Committee may dismiss a complaint in whole or in part without consideration of its merits. The circumstances in which such a dismissal may occur include complaints which the Committee considers would be better dealt with by arbitration or by legal proceedings and complaints which have previously been dealt with by the Committee or by legal proceedings [s.17(5)(b)(d)].

45. It is proposed that the Committee should also be able to dismiss complaints in the following circumstances:

- a. it considers that the complaint would be better dealt with by the internal complaints procedure;
- b. it is satisfied that the matter has previously been dealt with by the internal complaints procedure.

These circumstances should be added to Clause 17(5).

*17(7) An amount due under an award made in favour of the Committee by virtue of any provision made under subsection (4)(g) or (i) shall be payable to the Executive Council of the Inn of Court of Northern Ireland.*

46. Clause 17(7) should read that awards made in favour of the Committee shall be payable to the General Council of the Bar of Northern Ireland, not the Executive Council.

**Issue 8: Consultee's views on the proposed determination provisions available to the Bar Complaints Committee are welcomed.**

*17(4) Rules under subsection (1) may (among other things) make provision:*  
*(f) for the Committee to award costs against the respondent in favour of the complainant;*  
*(g) for the Committee to award costs against the respondent in favour of the Committee for the purpose of providing a contribution to resources deployed in dealing with the complaint;*

*19(2) A determination by the Committee upholding a complaint may contain one or more of the following:*  
*(c) a direction that the respondent pay compensation to the complainant of such amount as is specified in the direction in respect of any loss which, in the opinion of the Committee, has been suffered by the complainant as a result of the respondent's negligence;*  
*(d) a direction that the respondent pay compensation to the complainant of such amount as is specified in the direction in respect of any loss (other than such loss as is mentioned in paragraph (c)), inconvenience or distress which has been caused to the complainant as a result of any matter connected with the complaint;*

47. The Bar Council notes that financial awards can be made against the respondent barrister on several grounds within Clause 17(4) and Clause 19(2). It is suggested that there should be an upper limit on any combined financial awards imposed.

48. It is proposed that any financial awards made against a respondent barrister are governed by the principle of proportionality. It is important to note that any payments which the respondent barrister is directed to make should be compensatory in nature rather than punitive. The Bar Council wishes to eliminate the possibility of onerous financial penalties on its members.

*19(2) A determination by the Committee upholding a complaint may contain one or more of the following:*

*(c) a direction that the respondent pay compensation to the complainant of such amount as is specified in the direction in respect of any loss which, in the opinion of the Committee, has been suffered by the complainant as a result of the respondent's negligence;*

*(d) a direction that the respondent pay compensation to the complainant of such amount as is specified in the direction in respect of any loss (other than such loss as is mentioned in paragraph (c)), inconvenience or distress which has been caused to the complainant as a result of any matter connected with the complaint;*

*19(7) The amount of any compensation specified in a direction under subsection (2)(c) must not exceed £3,500.*

*19(8) The amount of any compensation specified in a direction under subsection (2)(d) must not exceed £3,500.*

49. Clause 19(2)(c) and Clause 19(2)(d) allow for compensation payments to be made to the complainant from the respondent barrister for negligence and also for any other loss, inconvenience or distress. The compensation payments are capped at £3500 each, as outlined in Clauses 19(7)-(8).

50. The Consultation Paper notes at p.83 that the figure of £3500 was derived from the excess paid by solicitors under a master insurance policy. The paper also notes that no excess exists for the Bar. It is proposed that this difference provides a basis for lowering the maximum amount payable by a barrister for compensation awards.

51. The Bar Council is concerned that the legislation allows for an award of compensation for negligence and other losses, together with an award for costs, to be made against a barrister outside the jurisdiction of court proceedings. It is unclear from the Consultation Paper whether or not the Legal Services Review Group consulted with insurers regarding indemnifying barristers in light of the Committee's powers to award payments for negligence.

52. We have concerns about what criteria would be employed to assess how and when an award of compensation should be made. It is plausible that an insurance company might decline to indemnify a barrister for future work after a finding of negligence by the

Committee. As professional insurance is mandatory, this could preclude a barrister from remaining in practice.

53. The Bar Council notes that findings of negligence are not available in either the Scottish or the England and Wales regulatory schemes. Instead, the regulator may direct for compensation to be paid for loss, inconvenience and distress [Legal Profession and Legal Aid (Scotland) Act 2007 s.10(2)(d) and Legal Ombudsman Scheme Rules 5.38].
54. For these reasons, the Bar Council proposes that the word negligence should be removed from Clause 19(2)(c). Instead, the respondent barrister may be directed to pay compensation to the complainant for failure to provide an adequate level of professional services.
55. Further, it is proposed that a finding by the Committee would disbar any further legal proceedings grounded on the Committee's finding. Such a provision would reflect the position in Scotland [LPLA Scotland Act 2007 s.14(1)].
56. It is also proposed that the legislation should contain an express provision precluding a complainant from pursuing further legal proceedings after the complainant has accepted a resolution or determination by the Committee. Such a provision would reflect the position in England and Wales [Scheme Rule 5.50].

*20.—(1) The Department may by order subject to negative resolution amend subsection (7) or (8) of section 19 in accordance with a recommendation made by an interested body under subsection (2).*

*(2) An interested body may recommend to the Department that subsection (7) or (8) of section 19 should be amended so as to substitute the amount specified in the recommendation for the amount for the time being specified in subsection (7) or, as the case may be, (8).*

*(3) An interested body must, if requested to do so by the Department, consider whether or not it is appropriate to make a recommendation under subsection (2).*

*(4) An interested body must, before making a recommendation under subsection (2)*

*(a) publish a draft of the proposed recommendation;*

*(b) invite representations regarding the proposed recommendation; and*

*(c) consider any such representations which are made.*

*(5) Where the Department receives a recommendation under subsection (2), the Department must consider whether to follow the recommendation.*

*(6) If the Department decides not to follow the recommendation, the Department must publish a notice to that effect which includes the Department's reasons for the decision.*

*(7) In this section "interested body" means*

*(a) the Bar Complaints Committee; or*

*(b) the Legal Services Oversight Commissioner.*

57. Clause 20 allows for the alteration of the compensation limit. It is proposed that the compensation limit should only be altered in certain circumstances. The legislation should state what factors would trigger an alteration of the compensation limit.

*25.—(1) The Bar Complaints Committee may, if it considers it appropriate to do so in any particular case, publish a report of the investigation, consideration and determination of a complaint made to it.*

*(2) A report under subsection (1) must not (unless the complainant consents)*

*(a) mention the name of the complainant; or*

*(b) include any particulars which the Committee considers are likely to identify the complainant.*

58. Clause 25(2)(a) states that the complainant's name will not be mentioned in any published report by the Committee, unless the complainant consents. The legislation does not provide any justifiable grounds to support withholding the complainant's name. In legal proceedings, anonymity is granted only to vulnerable witnesses, for example, children or complainants in cases dealing with charges of a sexual nature. It is proposed that the complainant should not be offered anonymity under the scheme.

**Issue 9 Consultee's views on these provisions and the scheme for complaints against barristers generally are welcomed.**

*Schedule 1 2.—(1) The Commissioner may do anything, apart from borrowing money, which the Commissioner considers is*

*(a) appropriate for facilitating; or*

*(b) incidental or conducive to,*

*the exercise of the Commissioner's functions.*

*Schedule 1 2(2) That includes in particular*  
*(a) acquiring, holding and disposing of real or personal property;*  
*(b) entering into contracts.*

59. Schedule 1 2(1) states that the Commissioner “may do anything”, apart from borrow money, in the exercise of the Commissioner’s functions. It is proposed that this power is too wide and should be removed. Further, any acquiring of real or personal property, as envisaged under Schedule 1 2(2)(a), should be subject to approval by the Department.

*Schedule 1 3.—(1) Subject to the provisions of this paragraph, a person shall hold and vacate office as the Commissioner in accordance with the terms of that person’s appointment.*

*(2) An appointment as the Commissioner shall be for a term of 3 years.*

*(3) A person who ceases to be the Commissioner on the expiration of that person’s first term of office shall be eligible for re-appointment, but a person who has been re-appointed by virtue of this sub-paragraph shall not be eligible for appointment or re-appointment as the Commissioner at any time after the end of that person’s second term of office.*

*(4) A person may at any time resign from office as the Commissioner by notice to the Department.*

*(5) The Department may remove a person from office as the Commissioner if satisfied that that person has*

*(a) been convicted of a criminal offence;*

*(b) become bankrupt or made an arrangement or composition with that person’s creditors;*

*(c) without reasonable excuse, failed to discharge the functions of the Commissioner for a continuous period of 3 months; or*

*(d) become unfit or unable to exercise the functions of the Commissioner.*

60. It is submitted that the Commissioner’s tenure of office, as outlined in Schedule 1 Clause 3, should be subject to a performance review on an annual basis by the Department and the relevant professional bodies.

*Schedule 1 4.—(1) The Department may appoint a person to exercise the functions of the Commissioner where*

*(a) the Commissioner’s office becomes vacant; or*

*(b) the Commissioner is incapable of exercising those functions or considers that it would be inappropriate to exercise any of those functions in connection with a particular matter (because of a possible conflict of interests or for any other reason).*

61. Schedule 1 4(1)(b) should read where the Commissioner is “unable to perform the functions of the office” .

*Schedule 1 5.—(1) The Department may pay to or in respect of the Commissioner—*

*(a) such remuneration and allowances, and*

*(b) such sums for the provision of a pension, as the Department may determine.*

62. Schedule 1 5(1)(a) should read “such reasonable remuneration...as the Department may determine in consultation with the Bar Council and the Law Society”. The Commissioner’s salary should not exceed an upper limit, to be determined by the Department in consultation with the professional bodies.

*Schedule 1 5(2) Where a person ceases to hold office as Commissioner otherwise than on the expiration of that person’s term of office and the Department determines that there are special circumstances that make it right for that person to receive compensation, the Department may make to that person a payment of such amount as the Department may determine.*

63. It is proposed that the Commissioner should only receive compensation from the Department in circumstances where the Commissioner successfully pursues a legal action against the Department. The payment of compensation to the Commissioner should not be a matter of concern for the relevant professional bodies.

*Schedule 1 6.—(1) The Commissioner may appoint such number of officers as the Commissioner may determine.*

64. The current clause allows for the appointment of “such number of officers as the Commissioner may determine”. This power to appoint unlimited numbers of staff is too wide and should be restricted.

65. The Consultation Paper, at p.84, states that the costs of the Commissioner will be in the region of £200k per year. The Bar Council

would appreciate further information as to how this figure was reached.

*Schedule 1 13(3) The Commissioner must, within such period after the end of each financial year as the Department may direct, send copies of the statement of accounts relating to that year to*  
*(a) the Department; and*  
*(b) the Comptroller and Auditor General.*

*Schedule 1 13(4) The Comptroller and Auditor General must*  
*(a) examine, certify and report on every statement of accounts sent to him or her by the Commissioner under this paragraph; and*  
*(b) send a copy of the report to the Department.*

66. Schedule 1 13(3) should read that the Commissioner must send a copy of the annual statement of accounts to the relevant professional bodies. Schedule 1 13(4) should read that the Comptroller and Auditor General must send a copy of his or her report on every statement of accounts to the professional bodies.

*Schedule 1 14.—(1) As soon as practicable after the end of each financial year, the Commissioner must send to the Department a report on the carrying out of the Commissioner’s functions during that year.*

67. Schedule 1 14(1) should read that a copy of the Commissioner’s annual report must be sent to the relevant professional bodies as soon as practicable after the end of each financial year.

*Schedule 2 3. The Benchers may not make any appointment under paragraph 1 without the consent of the Legal Services Oversight Commissioner*

68. Schedule 2 clause 3 should read that the Benchers may not make any appointment “without consulting the Commissioner”.

*Schedule 2 4.(1) In appointing members of the Bar Complaints Committee, the Benchers must ensure that*  
*(a) at least two thirds of the members of the Committee are lay persons;*

69. Schedule 2 4 (1)(a) should read “the majority of the members of the Committee are lay persons”.

70. The Bar Council notes that in the Scottish Legal Complaints Commission [SLCC], where a determination is made by a Determination Committee, it is chaired by a legal member. Determination Committees usually consist of three members of the SLCC, although committees of five, seven or nine members may also be convened. When determining issues in their committees, there is always a majority of lay members. This arrangement thereby allows for a majority of lay committee members together with a legal chair.

*Schedule 2 4(2) The chair of the Bar Complaints Committee must be a lay person.*

71. It is proposed that some consideration should be given to the adoption of the Scottish model for the Bar Complaints Committee. Schedule 2 4(2) currently states that the chair of the Committee must be a lay person. It is proposed that a lay chair should not preclude a retired member of the legal profession or a non-practicing member of the legal profession [see paragraph 7].

*Schedule 2 5(6) A member (including the chair) may only be removed from office under sub-paragraph (4)(b) with the consent of the Legal Services Oversight Commissioner.*

72. Schedule 2 5(6) should read that a member of the Committee may only be removed from office following consultation with the Commissioner.

*Schedule 2 6(2) If*

*(a) a person ceases to be a member of the Committee; and*

*(b) it appears to the Benchers that there are special circumstances which make it right that that person should receive compensation, the Benchers may make arrangements for that person to be paid such amount as the Benchers may determine.*

73. Schedule 2 6(2) allows for compensation to be paid to a Committee member after that person ceases to be a Committee member. It is proposed that this clause is removed.

*Schedule 2 8(4) At least two thirds of the members of a sub-committee must be lay persons.*

74. It is proposed that Schedule 2 8(4) should read that “a majority of the members of a sub-committee must be lay persons”.

## APPENDIX ONE

### Regulation – The Present Position

1. The Bar Council discharges its regulatory functions through a separate and constitutionally recognised committee. The Professional Conduct Committee [PCC] consists of twelve independent practising barristers and two lay members. The present structure involves complaints being considered by the PCC, which may deal with matters itself or it may prefer charges to a Summary Panel or a Disciplinary Committee of the Executive Council.
2. A Summary Panel deals with more straightforward matters involving less serious breaches of the Code of Conduct. A Summary Panel consists of a senior barrister, a junior barrister and a lay person. 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. An appeal lies from the Disciplinary Committee to the Disciplinary Appeals Committee of the Benchers.
3. 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. The involvement of individuals holding high judicial office in the disciplinary process ensures objectivity and impartiality.
4. The Appeals Committee has the powers of the Disciplinary Committee to admonish, reprimand, censure, fine, order repayment of fees, suspend or expel from membership of the Bar Library, disbar or

suspend from practice, impose conditions on practice or deal with the barrister in such other manner as may appear appropriate. In a recent case, for example, a costs award was made against the respondent barrister to cover the costs of the hearing. All disciplinary hearings are in public. In the case of a finding of a breach of a 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.

5. There is also a review panel who consider complaints which have been dismissed by the PCC. The complainant must demonstrate promptly that the PCC did not consider relevant evidence. The review panel is independent of the PCC and consists of a chair, usually a former Chair of the PCC or a nominee of the Chair of the Bar Council, one member of the Bar and a lay person.
6. Complaints can be made in a variety of ways and information is available on the Bar Library website to assist members of the public. The information available on the website includes downloadable versions of the Code of Conduct, a guide to the complaints process and a complaint form. The Bar Library website is currently being upgraded which will further enhance the transparency of the complaints process.
7. Complaints can be submitted by a member of the public, a public representative, individual barristers or judicial officers. Complaints can also be made through a solicitor or an MLA, which has occurred in the past. The PCC is supported by a member of staff who is solely responsible for regulatory matters and may be contacted at the Bar Library. The PCC dealt with 25 complaints in 2012 and 34 complaints in 2013. These figures are comparatively low when compared to other professions and when considering the high number of court proceedings each year.
8. The PCC is proactive as well as being reactive:
  - it advises members of the Bar through the issuing of memos;
  - it provides barristers with one-to-one advice; and

- it has the power to initiate an investigation on the basis of any matter of concern which has come to its attention.
9. 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.