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# Legal Complaints and Regulation Bill

Committee Stage - Written Submissions

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## Introduction

This briefing paper has been prepared to assist the members of the Finance and Personnel Committee in their consideration of the Legal Complaints and Regulation Bill 2015.

The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.

The Bar Council welcomes the opportunity to submit written evidence and is keen to engage and work constructively with the Committee as the Bill progresses through the legislative process.

## Context

The Bar Council believes that regulation is of fundamental importance to ensure that the justice system works in the public interest and to retain public confidence in the professionals with responsibility for delivering legal services. It is also vitally important that regulation is transparent, effective, proportionate but also cost effective.

The Bar Council currently discharges its regulatory functions through a separate committee known as the Professional Conduct Committee (PCC) which consists of two lay members and a cross section of 12 independent practising barristers. No member of the Bar Council can sit as a member of the PCC to ensure a complete separation of powers. Under the present structure, all complaints are investigated by the PCC. Depending on the type and seriousness of the complaint, the PCC may deal with matters itself or it may refer charges to a Summary Panel or Disciplinary Committee, as appropriate.

A Summary Panel deals with more straightforward matters involving less serious complaints. A Summary Panel consists of a senior barrister, a junior barrister and a lay person. For more serious complaints, a Disciplinary Committee is constituted which is chaired by a High Court Judge or a Lord Justice of Appeal. The Disciplinary Committee comprises two lay representatives and members of the profession representing different levels of seniority and experience at the Bar.

Appeals from a Disciplinary Committee are heard by a Disciplinary Appeals Committee, comprising of 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.

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Members should be aware that these Committees have extensive powers 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. All Disciplinary Committee and Disciplinary Appeal hearings take place in public as comparable with other judicial proceedings. (Further information can be found in the consultation response contained in Appendix One).

## The Bain Review

In terms of background to the development of the Bill, the Bar Council welcomed the opportunity afforded to it by the Review Group under the Chairmanship of Sir George Bain to respond to the Government's consultation paper on the Regulation of Legal Services in Northern Ireland. The process was particularly worthwhile as it enabled the Bar to examine the services being provided, consider improvements, our role in the administration of justice and how best to deliver value for money, quality legal services for all.

On the matter of regulation, the Bar largely agreed with the recommendations contained within the Bain Review, namely that:

- a. The legal profession should continue to discharge regulatory functions, subject to oversight by an independent Legal Services Commissioner;
- b. Lay persons should have an increased involvement in relation to general regulatory matters;
- c. Responsibility for the complaints-handling function should transfer from the Bar Council to the Benchers to achieve functional separation between regulation and representation.

## Draft Legal Complaints and Regulation Bill 2015

The Bar Council submitted a detailed response to the consultation on the draft Bill to the Department of Finance and Personnel in February 2014. The full consultation response is contained in Appendix One. Our position on the main clauses contained in the Bill can be found below.

### Part One: Legal Services Oversight Commissioner

#### Clause One

In Part 1, the Bill provides for the creation of a Legal Services Oversight Commissioner for Northern Ireland. The Bar Council accepts the broad principles in relation to the Commissioner but there are a number of concerns which merit further consideration.

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Clause 1(2) relates to the appointment of the Commissioner by the Department of Finance and Personnel. The Bar Council believes that the Commissioner should be appointed in consultation with the Lord Chief Justice with the Chair of the Bar Council and the President of the Law Society also involved in the recruitment process.

The Bar Council welcomes the Department's amendment which will place a responsibility on the Department to consult with the Lord Chief Justice on the appointment of the Commissioner. However, the Bar would contend that the Chair of the Bar Council and the President of the Law Society should play a role in the appointment process.

Clause 1(3) highlights that the Commissioner must be a lay-person and must never have been a solicitor or barrister. The Committee should reconsider this provision as the preclusion of someone with a legal background ignores the fact that previous experience of legal practice could provide a beneficial understanding of the nature of the law and legal professional services. The Bar would challenge any implication that any legally qualified professional could not be impartial and able to act in the public interest on matters pertaining to that same profession. Currently it is the case that, within the courts system, judges will be involved in deciding cases involving claims against lawyers. They do so with full impartiality and rigour despite previous backgrounds as practising lawyers.

The Bar would stress that any appointment must be made on merit and no individual with previous experience of legal practice should be excluded provided that they can serve the functions of the office to the required standard. The Bar believes that this aspect of the Bill therefore is an unnecessary and unwarranted preclusion.

Furthermore, a balance must be achieved between transparency and ensuring that complaints are dealt with efficiently and cost effectively. The Bar Council notes that a Commissioner with previous experience of legal practice would achieve these goals.

## Clause Two

Clause 2 provides for the general powers of the Commissioner and outlined below are a number of points which should be included in the draft Bill. These have a focus on transparency whilst also ensuring regulatory overreaching is avoided in Northern Ireland, an issue which has proven very concerning in England, Wales and the Republic of Ireland.

Clause 2(1)(a) deals with how complaints will be handled by the Commissioner. The Bar Council maintains that this clause is presently constructed too widely. The phrase "complaints about its members" should refer solely to those complaints which relate to the professional services provided by a barrister. The Bar welcomes the Department's clarification that it is not the intention for the Commissioner to examine conduct complaints but the clause must be amended to reflect this.

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The Bar Council believes that clauses 2(1)(b)-(f) raise a number of issues around the manner in which the Commissioner engages with the professional bodies. Clause 2(1)(b) should allow for the Commissioner to “engage in consultation” with the professional bodies in relation to the complaints handling procedure rather than “investigate”. This represents a more equitable approach to engagement with the professional bodies.

In addition, clause 2(1)(d) refers to target setting by the Commissioner. The Bar Council notes that the complaints procedure can be delayed for a number of reasons, including delay caused by the complainant. The complaints procedure should instead be focused on the quality of service offered to the complainant and barrister involved. Consequently, performance should be measured according to our service guidelines which would form the basis of an annual return to the Commissioner. The Committee may wish to consider whether the setting of targets represents the most appropriate means for the handling of complaints.

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. The Bar Council intends to engage constructively with the Commissioner, sharing relevant information and consulting where appropriate, as part of an open and transparent system of regulation.

The Bar welcomes the Department’s focus on the importance of maintaining dialogue by affording the professional bodies with a reasonable opportunity of appearing to make representations to the Commissioner on plans for complaint handling. However, members should consider that concerns remain around the probity of the Department both setting the maximum amount and ultimately receiving the penalty.

## Clauses Three and Four

Clauses 3 and 4 of the draft Bill relate to the input of the Commissioner into the other regulatory objectives of the professional bodies. The Bar Council agrees with the need for transparency and openness within the regulatory structures as this represents a key tenet of the Bain review. However, there are concerns that these clauses are currently drafted too widely by the Department as the Commissioner’s role in terms of rules and regulations should relate to those which apply to the provision of professional services by a barrister.

The Bar Council believes that the Commissioner’s powers should not be widened beyond this to include the duty to review the other aspects such as education, training, entry to the profession and competition. These clauses appear to potentially allow the Commissioner unrestricted access to review the regulatory objectives of the legal profession. The Bar strongly advises that the Committee should question the purpose of the drafting of such wide permissions and the potential this could create for regulatory overreach by the Commissioner.

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Furthermore, the drafting of clauses 3 and 4 is linked to the current requirement in clause 1(3) for the Commissioner to be a layperson. The Bar notes that it would not be beneficial for the professional bodies to be required to consult with an individual who is not legally qualified about matters other than complaints which relate to the professional services provided by a barrister. The drafting of clauses 3 and 4 further highlight that individuals with involvement in the legal profession should not be excluded from the post of Commissioner given the need for the rules governing the regulatory objectives of the profession to be drafted by those with relevant experience.

## Clauses Five and Six

Clauses 5 and 6 deal with the Department's proposal that the cost of the Legal Services Oversight Commissioner should be met by a levy on the professional bodies. The Bar Council has a number of concerns surrounding the cost of establishing and operating such an office and the subsequent burden to be met by the profession.

The Bar Council believes that the levy framework must be proportionate. The Bar has made a number of internal changes to support the objectives of the Bill. This has included comprehensive changes to the Constitutions of the Inn of Court and the General Council of the Bar of Northern Ireland, approved at the 2015 AGM. These changes will require internal restructuring and reorganisation. The Bar is confident that the planned changes will embed a rigorous and independent system of regulation in keeping with the aspirations of the Bill. The provisional cost of restructuring the current internal complaints system is approximately £100,000. This significant cost will be borne by members of the Bar, in addition to the annual levy at a time of increasing financial pressure upon the profession with significant reductions in the availability and remuneration of publicly funded work.

The Bar is concerned that an additional onerous levy will impact significantly on social mobility within the profession. The Bar Council operates a professional fees subsidy system with fees increased on a graduated scale during the first eight years in practice. The imposition of another substantial fee will only serve to impact negatively on the profession, particularly on those commencing their careers at the Bar.

In addition, there is a significant variance in the number of complaints dealt with by the professional bodies which must be recognised in the outworkings of the draft Bill. Due to a greater number of practitioners, the Law Society receives a greater number of complaints than the Professional Conduct Committee. Clarification from the Department is essential on how issues around cost allocation will be addressed in the subsequent subordinate legislation to ensure that the barristers are not disproportionately impacted. Further clarity is required on how any such levy will be applied to barristers who appear in individual cases in Northern Ireland but reside in another jurisdiction.

The Bar has a number of concerns in relation to accountability for the costs of the Commissioner's office. The Department has estimated that this will be in the region of

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£200,000 per year. We require further information on the basis of this figure. The Bar strongly believes that there must be the highest standards of accountability and probity around the costs of the office. Any expenditure must be justified on the basis that it will deliver a directly correlated improvement over the current system. The Bar would expect strict parameters to be set on any initial budget afforded to the office to ensure that it cannot be increased without full consultation.

The Committee should ensure that there are express responsibilities placed on the Accounting Officer, charged with ensuring that the Commissioner's office represents value for money. The Bar takes the view that this must be measured and demonstrable through prompt reporting.

## Part Two: Complaints against Barristers

### Clause Eleven

Part 2 of the Bill sets out the proposed process for complaints handling for barristers as defined in Clause 11(1). The Bar Council welcomes the Department's preferred model for this which sees the professional bodies maintaining the responsibility for complaints handling but cautions that there are concerns around some of the proposed changes in relation to the membership and appointment of the Bar Complaints Committee and the methods of redress available.

Importantly, the Bar Council highlights to Committee members that the independent referral bar model represents a key cornerstone of the justice system in Northern Ireland and that dealing with a "complaint which relates to the professional services provided by a barrister" will have some wholly distinct characteristics that will be different from complaints that may pertain to professional services provided by a solicitor. For example, a complaint could not arise in relation to financial wrongdoing as barristers never receive or hold any client money. This ensures complete protection for clients and is in the public interest. However, the construction of any levy and the setting of the scope for the Commissioners' office will require a clear understanding of the very different features of the solicitor and barrister professions in Northern Ireland.

The definition of a "relevant complaint" in clause 11(3) of the draft Bill as a "*complaint which relates to the professional services provided by a barrister*" requires further clarification from the Department with the term "*professional services*" needing explanation. The Bar Council contends that further guidance from the Department must be developed in conjunction with the relevant stakeholders and included within the rules, publications and websites.

The Bar Council highlights that significant work has already been undertaken to consider how the complaints handling system will be structured internally. This reform will see a subcommittee of the Professional Conduct Committee established which will conduct an

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initial assessment of the type of complaint received, namely whether it represents a service or conduct complaint. This will not involve any adjudication on the substance of the complaint but rather represents a means of ensuring that every complaint is filtered to the appropriate channel.

The Bar Council considers that this is an enhancement upon the system that operates in Scotland as we feel it is imperative that anyone submitting a complaint has confidence that it will be subject to a review by people with the relevant context and expertise to determine the nature of the complaint. The Bar Council also contends that members should consider whether complainants might be required to pay a fee when initially applying in an effort to discourage unmeritorious claims with this being returned if the complaint is upheld.

The prioritisation of service complaints represents a key feature of this new structure with a focus on mediation where possible. It is important to consider practice in other jurisdictions with the Bar of England and Wales and the Faculty of Advocates in Scotland which favour the informal resolution of complaints where possible. The Bar Council contends that this approach can avoid the potentially lengthy, costly and stressful process of formal proceedings. The Bar welcomes the Department's recognition of the importance of a system which permits complaints to be dealt with swiftly. This will see the establishment of a mediation panel by the Bar Council which will attempt to resolve service complaints in the first instance.

The Bar would highlight the benefits of the Scottish Legal Complaints Commission procedure, under which complaints must be brought within a specific timeframe. This means that unless there are exceptional circumstances, a complaint will not be entertained if it has been received outside the period of one year from the relevant events giving rise to the complaint, from the date of knowledge of them or from the cessation of the conduct or services provided. The Bar Council considers that a similar limit for complaints must be implemented in Northern Ireland.

## Clause Fourteen

The Bar Council welcomes view expressed by clause 14(1) that the Bar's internal complaints procedure must be the gateway for all complaints. However, it is our view that as outlined above, all complaints must initially be considered by a subcommittee of the Professional Conduct Committee simply to classify them as a service or conduct complaint, with no adjudication being made on the merits of the complaint. Having done so, there will be an initial attempt to resolve all service complaints within the Bar's internal complaints procedure in the first instance. We envisage that this will afford an opportunity for mediation and early resolution of issues. When the internal procedure is unable to reach a resolution on a complaint relating to the professional services provided by a barrister, it will be transferred to the Bar Complaints Committee.

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The Bar Council has accepted that responsibility for this part of the complaints handling function should transfer to the Benchers to ensure that functional separation is achieved. Consequently, the Benchers will be charged with administering the work of the Bar Complaints Committee. The Constitutions of both the General Council of the Bar of Northern Ireland and the Inn of Court were amended in May 2015 to reflect this separation and our Code of Conduct (see Appendix Two) has been structured accordingly. Therefore the requirements to establish the rules and procedures that will pertain to the Bar Complaints Committee are already in development.

## Clause Fifteen

This clause relates to the jurisdiction of the complaints committee. The Bar Council believes that a number of points within this clause are drafted too widely, particularly around the categories of complainant. The Bar understands that the Department's aim is to ensure that the barrister's own client is the complainant. The Bill and supporting regulations should therefore reflect this.

## Clause Nineteen

Clause 19 makes provision for compensation to be paid in relation to complaints. It should be recognised that civil remedies already exist for anyone to pursue in relation to compensation and the Professional Conduct Committee has the power to levy a fine on a respondent and has done so in past cases. The Bar Council has argued for a proportionate punitive levy with an upper limit of £3,500. However, the Department is proposing to increase the maximum payable to £5,000. We maintain that this figure is disproportionate for barristers.

Significant concerns arise due to the drafting of clauses 19(2)(c) and 19(2)(d) which allow for compensation payments to be made to the complainant from the respondent barrister in respect of alleged negligence and also for any other loss, inconvenience or distress.

The use of the term 'negligence' poses major difficulties for the profession. The Bar recommends that the reference to negligence should be removed from clause 19(2)(c). A finding of professional negligence is the express purview of legal proceedings. The Complaints Committee is an inappropriate forum for such a finding to be made.

The potential ramifications are severe as under strict rules of professional indemnity, such a finding would result in an insurance company declining to indemnify a barrister for future work. It is therefore highly unlikely that any barrister would accept a finding of negligence without appealing the decision to the Courts.

Findings of negligence are not available in either the Scottish or the England and Wales regulatory schemes. A recent court case arising from a determination by the Scottish Legal Complaints Commission highlights the potential difficulties of lay panels determining matters of professional negligence. In *Bartos v Scottish Legal Complaints Commission*

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[2015] CSlH 50, an advocate appealed a decision on a service complaint which was heard by a lay panel and resulted in a finding against the advocate. The court was critical in its judgement of the approach of the lay panel, highlighting that it has a “statutory quasi-judicial function” as it is adjudicating on disputes which would have previously been directed to the courts on issues around professional negligence. The court highlighted that the Commission must be “independent, objective and impartial” in order to maintain the confidence of the parties involved and pointed to the need to ensure that the professionals on the panel have the appropriate background and standing to deal with the complexities that can arise in cases. The Bar Council believes that this case presents a situation which could be replicated in NI under the provisions contained in the Bill as it is currently drafted.

## Schedule Two

Schedule 2 details further information on the appointment and maintenance of the Bar Complaints Committee. The Bar Council argued against the proposed 2/3rds lay majority as this would reduce the expertise on the committee, highlighting that this should be amended to provide for a simple lay majority. The Bar welcomes the acknowledgement that a reduction in professional membership on the committee could lead to practical difficulties.

However, the Committee should give further scrutiny to the Department’s proposal that the complaints committee must be chaired by a layperson. The Bar Council proposes that this should not preclude a non-practising or retired member of the legal profession. The Bar appreciates the need for complainants to have confidence in the system and lay involvement is a vitally important part of this. However, our considerable experience of running the Professional Conduct Committee over the last number of years has shown the benefit of having a legally qualified chair with an understanding of the profession.

Members should consider that the current regulatory procedures carried out by the Professional Conduct Committee, comprising twelve independent practising barristers and two lay members, represents a rigorous and detailed process. Each complaint is treated very seriously and extensively investigated with both written and oral evidence.

## Issues

In summary, there are a number of key issues which members should address:

### Levy Cost

Whilst recognising the need for public confidence in regulation, there is a need to ensure that the profession is not unnecessarily burdened by the weight and cost of regulation. The Bar Council is committed to a levy system governed by proportionality for the legal profession. The Professional Conduct Committee dealt with 54 complaints in 2013 and 70 in 2014. By comparison, the Law Society dealt with 280 complaint enquiries in 2013. There is a need for any levy system to reflect the differences in complaint numbers between the

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two professions. The Bar notes that a key feature of the independent referral bar model is it is not possible for a complaint to arise in relation to alleged financial wrongdoing with client money as barristers never receive or hold any client money.

## Legal Services Oversight Commissioner

The Bar Council contends that anyone who is or has been a solicitor or barrister should not be excluded from appointment as the Legal Oversight Commissioner. The pre-condition for the Commissioner to be a lay person is a concern as we do not believe that previous experience of legal practice would be a hindrance to the role of the Commissioner and would provide a beneficial understanding of the nature of the services provided by the legal profession.

Furthermore, the Bar Council has considerable reservations regarding the potential for regulatory overreaching as evidenced and experienced in England and Wales. This relates specifically to the power to be given to the Commissioner to be consulted on future rules or regulations made by the professional bodies. The Bar Council believes that the Commissioner could offer an important contribution in the development of future rules in relation to legal services. However, the Commissioner's role in terms of rules and regulations should be restricted to those which apply to the provision of professional services by a barrister. The Commissioner's powers should not be extended to include the duty to review the "organisation" of the professional bodies, nor the manner in which professional conduct issues or the interpretation of the Code of Conduct are dealt with that are not related to issues around scrutiny of the professional services provided by the barrister to his or her own client.

## Bar Complaints Committee: Lay Representation

The Bar Council accepts that increased lay representation is important to maintain transparency and confidence in the complaints handling process. However, difficulties could arise in practice as it will be difficult to properly adjudicate complaints regarding the provision of legal services and potential breaches of professional duties without the experience of practice, knowledge of the legal system and understanding of the law. In terms of the membership of the complaints committee, the Bar urges the Committee to reconsider the provision that the Chairman must be a layperson. Our experience has shown the benefit of having a legally qualified chair who can understand the issues and has the confidence of the profession.

## Compensation Cost

Clause 19 of the Bill makes provision for compensation to be paid in relation to complaints. As currently operated, the Bar's Professional Conduct Committee has the power to levy a fine on a respondent and has done so in past cases. The Bar argued strongly for a proportionate punitive levy of £3,500 maximum. The Department has accepted that there is no need for a large increase to the levels applied in England and Wales as this would not

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be appropriate for this jurisdiction. However, the Department has now given consideration to a further increase with an extension to £5,000. The figure of £3,500 is derived from the excess paid by solicitors under a master insurance policy and no excess exists for the Bar. Consequently, the Bar asserts that this difference provides a basis for lowering the maximum amount payable by a barrister for compensation awards. Alongside the level of compensation payable, the Bar has considerable concerns around the potential for this Committee to make a finding of professional negligence against a barrister which is outside the jurisdiction of the court system.

## Conclusion

The Bar Council welcomes the opportunity to submit evidence to the Committee on this important area of work and is committed to the implementation of the Bill. There is considerable work required to give effect to the various provisions contained within it and to educate individual barristers as to the imminent changes and the implications for practitioners. This work is already underway and the Bar will continue to engage with the Committee as the Bill progresses through the legislative process.