
CHIEF EXECUTIVE

David Mulholland

Section 6 Consultation
Legal Services Regulatory Authority
P.O. Box 12906
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27 July 2018

Dear Sir/Madam,

Review of the Operation of the Legal Services Regulation Act 2015

Many thanks for your correspondence dated 08 June inviting the Bar of Northern Ireland to comment on the public consultation in relation on the operation of the Legal Services Regulation Act 2015. Whilst the Bar of Northern Ireland is not directly impacted by the Act, we believe that this provides a useful opportunity to draw comparisons and highlight common themes between the arrangements governing regulation of the profession across the Republic of Ireland and Northern Ireland. Consequently, our response below focuses on recent legislative changes in this jurisdiction enacted under the Legal Complaints and Regulation Act (Northern Ireland) 2016.

There are approximately 650 barristers practising within the jurisdiction of Northern Ireland. This compares to approximately 2300 solicitors. The Bar Council of Northern Ireland is the professional body for barristers and by way of background information, the regulatory activity of the Bar Council is overseen and discharged on behalf of the Bar Council by a Professional Conduct Committee (PCC) which operates independently from the main Bar Council and also incorporates input from independent lay members.

In addition, to overseeing regulatory rules and procedures the PCC has, until now, considered all complaints received in relation to either the conduct or services performed by a barrister in this jurisdiction. On average the PCC has dealt with approximately 40 complaints each year, the majority of which have related to conduct matters. If, following investigation and consideration of a complaint, a Disciplinary Committee is required to be established, the Lord Chief justice will be asked to appoint a High Court judge to chair such a committee which will comprise a cross-section of barristers sitting alongside independent lay people to determine any findings in relation to the complaint.

The regulatory system in Northern Ireland has been the subject of extensive and independent review by Government and has been structured in accordance with the

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recommendations of Sir George Bain’s 2006 report for the Department of Finance and Personnel, entitled ‘Legal Services in Northern Ireland: Complaints, Regulation, Competition’. This concluded that Northern Ireland merited being considered as different from the regulatory regime in England and Wales: “It is different in size, different in the nature and structure of its legal professions, different in its history of regulation... The professions have also discharged their regulatory responsibilities in a reasonable manner” and accordingly found that “the legal profession in NI should continue to discharge regulatory functions, subject to enhanced oversight arrangements and increased lay participation”.

The Review also praised the legal professions’ relatively good regulatory record compared with their counterparts in England and Wales, highlighting the considerable opportunity that exists for the “representative and regulatory roles of the professional bodies to inform one another”.¹

The Bar of Northern Ireland welcomed the validation provided by the Bain Review as we have always taken the view that our representative and regulatory objectives are complementary, ensuring that the quality and standard of service offered to clients remains consistently high. Whilst the number of complaints dealt with by the Bar has historically been low, we believe that regulation is of fundamental importance to ensure that the justice system works in the public interest and are supportive of moves to improve public confidence in the professionals with responsibility for delivering legal services. Therefore we also agreed with the Bain recommendations for the introduction of more transparent oversight mechanisms through legislation in the Northern Ireland Assembly, subject to these being effective, proportionate and cost effective.

Significant developments have taken place in this area since the publication of the Bain Review with the creation of a Legal Services Oversight Commissioner to oversee new structures for complaints handling across both the solicitor and barrister professions under the provisions of the Legal Complaints and Regulation Act (Northern Ireland) 2016. During the passage of the Bill through the Assembly in 2015-16 the Bar engaged with the Department of Finance and Personnel, Minister and scrutiny Committee. We believe that the resulting system, which has yet to take full effect, has the potential to be of interest to the LSRA given that it has broadly adopted appropriate delineations of responsibilities

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¹ Legal Services Review Group, ‘Legal Services in Northern Ireland: Complaints, Regulation, Competition’, (2006) at https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/legal_services.pdf

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and has also already dealt with the imposition of a levy on the professional bodies which is referenced as a matter for consideration in Part 7 of the 2015 Act.

Some of the main features of the Legal Complaints and Regulation Act (Northern Ireland) Act include:

- New obligations upon the Bar to generally consult with and have its service complaints procedure overseen by the Legal Services Oversight Commissioner;
- Provision being made 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;
- A new mechanism being created to deal with Service complaints (conduct complaints remaining with the professional bodies to oversee);
- An obligation being placed upon the Bar to attempt to resolve in the first instance any service complaints received but the creation also of a Bar Complaints committee which is to be chaired by a layperson and with a layperson majority - to hear any complaints that were unable to be resolved at the earlier stage;
- The Bar Complaints Committee having the power to make various financial awards in favour of the complainant and the power to give a direction that the respondent make an apology (which shall not, of itself, amount to an admission of negligence for the purpose of any civil proceedings) to the complainant.

We would draw the attention of the LSRA to a number of points which the Bar highlighted in relation to the outworkings of the Legal Complaints and Regulation Act (Northern Ireland) 2016, particularly around the use of a levy for funding new methods of regulation. We recognise the need for public confidence in regulation but it is important to ensure that the profession is not unnecessarily burdened by the weight and cost of this. The Bar of Northern Ireland has always been keen to ensure that, prior to considering a levy mechanism, there must be effective safeguards and controls in place to ensure that the costs associated with the expenditure of the systems required to administer the LSRA are subject to proper scrutiny and must be proven to be kept tightly controlled, benchmarked and open to challenge on grounds of necessity and proportionality.

The Bar would in general also contend that the costs of administering such a system could reasonably be argued to be borne by government as they designed and are one of the main beneficiaries of the system; it is unreasonable to apply a series of levies to the profession and the independence of the profession must be preserved.

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Where a levy system must apply, the Bar has been committed to ensuring that any such levy system is governed by proportionality for the legal profession and has repeatedly stressed the need for any levy system for funding the Legal Services Oversight Commissioner to reflect the greater number of members and complaints overseen by the solicitor profession than the barrister profession. It is also worth noting that we are an independent referral Bar with no form of direct public access in Northern Ireland and barristers are not permitted to hold or handle client money. Whilst the necessary secondary legislation to give effect to the levy has yet to be brought forward due to the lack of a functioning Assembly in Northern Ireland, the Bar has welcomed the Department of Finance's intention to proceed with a per capita split based on the number of members of each professional body to be covered by the regime.

In addition, there were a number of additional concerns which the Bar raised in relation to the Legal Complaints and Regulation Act (Northern Ireland) 2016 which may be of interest to the LSRA. For example, the pre-condition in the legislation for the Commissioner to be a lay person to the exclusion of legal professionals is not reasonable or fair as previous legal experience would provide a beneficial understanding of the nature of the services provided by the profession. In addition, the Act also sets out the process for complaints handling with the establishment of a Bar Complaints Committee to be administered by the Benchers of the Inn of Court in dealing with service complaints against barristers. However, we remain concerned that once this system is operational it will be difficult to differentiate between service and conduct complaints which could result in delays in the assessment process. Our practitioners could also face the negative implications of a finding by both the Bar Complaints Committee and potential civil proceedings in relation to service complaints.

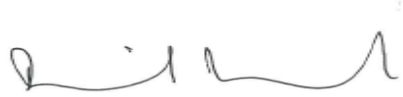
Whilst we are committed to ensuring that the complaints process becomes more transparent in Northern Ireland, the Bar also observes the nature of the wide-ranging provisions in the Act which could allow the Legal Services Oversight Commissioner to conduct reviews into the organisation and regulation of the professional bodies. Unless proportionately applied, this creates the potential for future regulatory overreach given that this could apply to a very wide range of matters, including education, training, entry and admission criteria.

The Bar hopes that this provides a useful overview of the recent changes to the system of regulation of legal professionals in Northern Ireland which will be of broad relevance to the review of the Legal Services Regulation Act 2015. If I can be of any further assistance in this matter, please do not hesitate to contact me.

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Yours sincerely,



David Mulholland
Chief Executive