



# **The Levy: funding the Legal Services Oversight Commissioner**

*Consultation on the proposed regulations to be made under  
Sections 5 and 6 of the Legal Complaints and Regulation (Northern  
Ireland) Act 2016*

## INTRODUCTION

- 1.1 The Department of Finance is required by Sections 5 and 6 of the Legal Complaints and Regulation Act (Northern Ireland) 2016 (the Act) to make regulations providing for the imposition of a levy on each professional body, defined in the Act as the Honourable Society of the Inn of Court of Northern Ireland (for the Bar) and the Law Society (for solicitors), for the purpose of raising an amount corresponding to the expenditure of the Legal Services Oversight Commissioner (LSOC) incurred under or for the purposes of the Act, or any other statutory provision.
- 1.2 Section 6 (2) of the Act provides that the levy is to be payable at such rate and at such times as may be specified in levy regulations. Those regulations must contain provisions requiring the Department to calculate the amount of the levy, consult each professional body on the amount of the levy, and to notify each professional body of its liability to pay an amount of levy, and the time or times at which it becomes payable (Section 6(4)).
- 1.3 In addition, before making regulations, the Department must satisfy itself that the apportionment of the levy as between each professional body will be in accordance with fair principles.
- 1.4 By way of background, the Department issued a discussion document to the Law Society and to the Bar on 26 September 2016 inviting consideration of various options for the apportionment of the levy as between the two organisations. The document also gave an indication as to the likely overall costs of the LSOC office, upon which the levy will be based. The professional bodies asked for, and were granted, an

extension of time to consider their responses to this document, and both responded by the revised deadline of 18 November 2016.

- 1.5 It was the Department's preferred outcome that the two professional bodies, as the two affected parties in relation to payment of the levy, would come to an agreed position as regards the apportionment of any future levy between the two bodies. The Department had indicated that it would give full consideration in facilitating any agreed position in the subsequent regulations.
- 1.6 Unfortunately an agreed position has thus far not been reached, and the responses submitted by the professional bodies highlighted a gap in relation to their analysis of how the levy should be apportioned in line with fair principles. The Law Society has called for an equal division of the levy between it and the Bar. The Bar has suggested that the levy should be gauged in relation to the number of complaints raised against the respective professions.
- 1.7 Accordingly, the position in relation to the split between the respective professional bodies remains open. The Department does have, at this stage, a preferred option in mind, and this paper set out our thinking at present. The paper also examines other issues to be taken into account in the delivery and recovery of the levy. Matters including the timing of recovery of the levy, consultation with the professional bodies and other administrative matters are considered. The Department will work with the professional bodies to ensure that what is being proposed is workable and has the minimum impact on their mechanisms and timings for collecting their practising certificate and other fees.
- 1.8 Consultation on the levy proposals, and the questions posed herein, will run until 5th April 2017. The Department has a preference to receive responses electronically, but hard copy responses by post are also welcome, and should be sent to

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To support transparency all responses to this consultation will be made public. This will include the name of the responding organisation (if applicable). However, individual names will only be published if you give consent. Your contact details will not be published.

(Please be aware that any information provided in response to this consultation could be made publicly available if required under a Freedom of Information request).

## **CALCULATING THE LEVY – APPROACH**

2.1 Section 5(3) of the 2016 Act requires the Department, before making regulations in relation to the levy, to satisfy itself that the apportionment of the levy as between each professional body will be in accordance with fair principles.

2.2 It is the Department's view that fair principles should ensure that

- There is transparency about the way in which the levy is apportioned. The professional bodies and all solicitors and barristers need to know what they are paying for
- There is accountability, with no hidden costs. The Annual Report of the LSOC will detail the activities taking place during the course of the year
- The size of the levy and its apportionment should be proportionate. Collection of the levy should not place on the professional bodies, or the LSOC, any undue burden, and the Act has not in any way removed the choice of the professional bodies to recoup their share of the levy from their members in whatever manner they see fit
- There is consistency in how the levy is apportioned, so that it is done in a manner that is based on the most appropriate elements of other similar models
- The methods for apportioning the levy are targeted and efficient to avoid unnecessary costs for the professional bodies in providing the relevant data.

### **The Department welcomes views on the interpretation of fair principles**

2.3 Different options have been considered in this consultation with regards to the levy mechanisms for the LSOC. Section 5(1) of the 2016 Act indicates that the levy on each professional body is imposed for the purpose of raising an amount corresponding to the expenditure of the LSOC incurred under or for the purposes of the Act, or any other statutory provision.

2.4 The Department is proposing that the annual levy will be based on firstly an estimate of operational budget for the LSOC from 1 April – 31 March in each successive year following the first full year of operation in 2017-18, and the levy itself will be payable in arrears after the end of each financial year so that it is based on actual expenditure. This approach should give clarity and certainty to each professional body of the amounts they will need to raise from their members at the earliest possible stage.

2.5 Unlike models elsewhere, including the independent complaints handling models currently operating in England and Wales, and In Scotland, the LSOC costs will not be demand led and as such the professional bodies should not experience exceptional in year increases to costs (which can occur for bodies that deal with complaints where the volume of complaints received may increase unexpectedly).

2.6 The Department, in conjunction with the LSOC, will undertake an annual review of the practical arrangements and commits to undertake a fundamental review of the options relating to the levy by 2020. This review will allow the Department to reflect on, inter alia, arrangements relating to the apportionment of the levy. By then, the LSOC will be able to provide the Department with data and an assessment on the split of their responsibilities

**The Department welcomes views on this approach**

## **COSTS OF THE LEGAL SERVICES OVERSIGHT COMMISSIONER**

3.1 The Department anticipates that the LSOC will be appointed in early 2017. There are a number of anticipatory functions that the LSOC must undertake before the Department commences the substantive provisions of the Act. The levy regulations will not come into effect before the Act is commenced. There will therefore not be a start up or establishment cost for the LSOC, and the levy will cover the ongoing operational expenditure of the LSOC for the relevant part of 2017-18, and each financial year thereafter.

3.2 Consideration of the potential costs of the office of the LSOC was conducted during the Assembly's scrutiny of the Legal Complaints and Regulation Bill. In the consultation document that accompanied the draft Bill, the Department had suggested that the cost of the LSOC would likely be around £200,000 per annum. During evidence sessions before what was the Committee for Finance and Personnel, this figured was explored with officials and an estimate of the costs to the professional bodies and its members was considered.

3.3 The Department has spent some time over the preceding months in considering the cost of the LSOC. The Department's aim has been to ensure that the office is dealt with in a proportionate manner, in line with the spirit of the legislation. It is difficult to assess with accuracy what the total expenditure will be for the LSOC in its first full financial year of operation, but early estimates point to an overall figure significantly lower than the Department's early projections during consideration of the draft Bill

3.4 Taking advantage of shared services within the Department, and determining that the LSOC, given the nature of the powers and responsibilities of the office, should be a part time position, and supported by one member of

staff, the Department believes that the cost in a full year will not exceed £150,000 and may, in fact, be lower still.

3.5 Those estimates form the basis for consideration of the various options as to how these projected costs should be apportioned against each professional body, taking into account the requirements of the 2016 Act and the issue of fair principles.

3.6 A discussion document issued to the Law Society and to the Bar in September 2016 invited consideration by the professional bodies on how the levy should be apportioned as between each of them. The Department noted the approaches taken elsewhere, including the models already established in England and Wales, in Scotland, and the plans set out for the Republic of Ireland. It also invited any different approaches.

3.7 The professional bodies were also encouraged to reach an agreed position on the apportionment of the levy. The Department understands there was some discussion between the Law Society and the Bar, but that no agreement was reached. Accordingly, the Law Society and the Bar submitted responses to the Department that were received by 18 November 2016. The Department has had the opportunity to consider and reflect upon those submissions, and refers to the points raised in our analysis set out below.

3.8 The position of the professional bodies following from this exercise is that the Law Society believes the levy should be split equally between itself and the Bar (the Inn of Court of Northern Ireland being the professional body for the purposes of the legislation). The Bar has indicated that the levy should be apportioned on the basis of the number of complaints made against members of each professional body. We examine those proposals below.



## **LAW SOCIETY**

3.9: The Society set forward in its submission a comprehensive analysis of its views on the legislation, the various models available for comparison in these islands, and its commentary on the options suggested by the Department in its earlier discussion document. The outcome of this consideration was its recommendation that the levy should be split equally between itself and the Bar/Inn of Court. The amount of the expenditure of the LSOC should therefore be divided in 2, with equal bills being footed by the Law Society and the Inn. In support of its position, the Law Society made the following points

- The LSOC role is strategic, and the postholder will not investigate individual complaints. On that basis, there should not be disproportionate resources applied to either professional body
- The statutory function includes the power to routinely review the complaints handling procedures of each professional body, to be consulted on the appointment of committee members and structures, and to set measurable targets for both.
- It is clear that the statutory powers and duties of the office will be engaged equally between both professional bodies and it is therefore not apparent why one body should pay a greater proportion of the levy when the functions of the office are equally applied under the legislation.
- There is no reference in the 2016 Act to the imposition of a cost on a per capita, or other, basis

3.10 The Society considered the other options initially flagged by the Department that were characteristics of models in England and Wales, Scotland and proposed for the Republic of Ireland. Option 1, the “per capita” approach, was noted by the Department as the model used to meet the cost of the Legal Services Board in England (LSB) under the Legal Services Act 2007.

The LSB is the oversight body for providers of legal services and it was noted that it does not deal with individual complaints.

3.11 However, the Society made reference to the scale and nature of the LSB as being much broader than that envisaged for the LSOC, and that those obvious differences make a comparative study difficult. Notwithstanding that point the Society felt that the matters noted at 3.9 above were sufficient in themselves to conclude that apportionment of the levy should not be on a per capita basis. It opined that the levy is applied to the professional body, and not on the individual solicitor or barrister, and that there is no reference in the 2016 Act in relation to the imposition of a levy on a per capita basis. It concluded that it was unclear how the apportionment of a levy on this basis, when absent from the legislation, could sit comfortably with fair principles. It did go on to note that a review mechanism could be applied to monitor operational costs.

3.12 In relation to basing the levy based on the number of complaints received by each professional body annually, the Law Society again observed that the LSOC will not investigate individual complaints, and that the strategic aspect to the role will include advice, target setting, reviewing of procedures and auditing of protocols. It concluded that as the LSOC will not have direct investigatory involvement with complaints, the number of complaints received will not have an impact or bearing on the role of the LSOC, and therefore the levy should not be apportioned on this basis.

3.13 The Society also referred to the model in Scotland, noting that the approach adopted there appears to satisfy the functions in existence in that jurisdiction. The Society again highlighted the clear differences between the LSOC and the mechanisms employed in Scotland.

3.14 In summary, the Society was of the view that determining the levy apportionment should be conducted in a manner that is equitable, takes into account the specific strategic role and functions of the LSOC, and satisfies the “fair principles” requirement. It concluded that the powers and duties of the LSOC did not sit readily with any other UK jurisdiction, or with the Republic of Ireland, and that the responsibilities of this postholder would apply equally to both professional bodies.

## **THE BAR**

3.15 The Bar Council took a different approach. It accepted that the specific number of complaints may not have a direct bearing on the costs of the LSOC given that the LSOC will not be personally tasked with handling complaints, but went on to say that there is an indirect connection and an activity based measure that would reflect the level and nature of public satisfaction with the service being offered. It noted that the complaints activity would thus influence how the LSOC will need to allocate their time and resources, proportionate to the extent to which the relevant complaints process is being assessed.

3.16 The Chairman of the Bar Council concluded that he found it difficult to contemplate any justification for the Law Society proposal of a 50/50 split between the two professions. He backed up this view by noting that

- Solicitors have an enormously greater engagement (and therefore susceptibility to complaints) with the public than barristers
- There is a vastly greater number of solicitors than barristers in Northern Ireland, and therefore a 50/50 split could not in any way be considered as remaining faithful to the criteria of delivering a fair and proportionate system.
- It is wholly at odds with mature systems deployed in any of the other comparator jurisdictions

3.17 The Bar also noted that there is a prohibition on barristers holding clients' money. Barristers also do not hold on their behalf of their lay clients valuable documents such as wills or titles to property. It therefore suggested that solicitors manage the relationship and financial dealings of clients and that this is a significant factor in limiting the source and the nature of complaints received by barristers.

3.18 The Bar's favoured model is therefore to base the costs of the LSOC on the number of complaints made to each professional body. The Department has not been privy to the nature of the negotiations that were entered into by the respective professional bodies in their consideration of these issues, but it does appear that the Society and the Bar are significantly far apart on this matter that an agreed position will remain an unlikely outcome. The Department therefore sets out its analysis of the various positions adopted by the Bar and the Society, and offers its own preferred approach, and invites comments on it during this consultation process.

## **THE RESPONSE OF THE DEPARTMENT**

3.19 The Department is charged with the responsibility of satisfying itself that the apportionment of the levy as between each professional body is done in accordance with fair principles. An overview of how the Department interprets this statutory duty is outlined above at paragraph 2.2 of this document.

3.20 The Department has noted the approaches taken by both professional bodies in their respective submissions. It is regrettable that an agreed position could not be reached – the Department had signalled that it would be able to implement such an agreement. Nevertheless, the Department welcomes the contributions received to date and is committed to working with all to ensure that the implementation of the 2016 Act remains faithful to the debate around

these matters, which have been ongoing for 10 years, and that any decisions taken are fair.

3.21 In terms of the various positions reached, there are a number of points highlighted in the submissions that the Department can offer view upon. First, it should be noted that in Scotland, and for the new processes being prepared for the Republic of Ireland, the precise nature of the levy arrangements was set out in the respective primary legislation. In the Scottish model, the annual complaints levy and the specific complaints levy were set out in detail on the face of the Bill. Similarly, the recent Irish statute outlined the model to be used.

3.22 During the consideration of the Legal Complaints and Regulation Bill the Department made it clear, on several occasions, that decisions relating to the levy would be more appropriately dealt with in secondary legislation. As has been noted by both professional bodies, the model outlined in the 2016 Act is different both in scope and nature to those implemented elsewhere. The Department could, had it chosen to, have included specific levy provisions on the face of the Bill to deal with the apportionment and nature of the levy, but there was a consensus from interested parties, from the Executive and from the legislature that such an approach, given the largely untested nature of the envisaged role of the LSOC, may not be the most suitable one.

3.23 The distinct advantage in dealing with the levy and its apportionment in secondary legislation was discussed during that process, and it was highlighted by the Department that regulations would allow the levy to be judged in a fairer and more flexible way. In the absence of information, both on the size of the office of LSOC, and the precise breakdown of that postholder's responsibilities, it was felt that regulations, which can be much more easily amended than primary legislation, served as a preferable vehicle to consider the detail of any proposed scheme. Therefore the 2016 Act only outlines the

statutory framework, without providing the detail that is now being worked out and taken forward.

3.24 The Law Society has made the point in its submission that legislators attached the levy in relation to the professional body, and not individual solicitors, and suggested that therefore the legislators did not take the opportunity to impose a cost on a per capita (or presumably other) basis. However, the legislation does indicate that the Department is responsible for ensuring the apportionment of the levy will be in accordance with fair principles. The key word is “apportionment”, and there is an inextricable link, to be found elsewhere in the relevant levy sections, that the Department, and the legislature, recognised that there would be a split in the levy that was unlikely to be a 50/50 split. Otherwise, the primary legislation would simply have indicated that the levy be divided equally between the Law Society and the professional body for the Bar. It is therefore clear to the Department that it can use regulations to adopt a model that will allow an apportionment to be effected.

3.25 Support for this can be seen elsewhere. In England and Wales, the Legal Services Act 2007 did not prescribe the nature of the levy but rather left decisions on the apportionment of the levy to be taken using alternative methods. There is similarly no reference in the 2007 Act to the levy being apportioned in reference to the number of practitioners, or the number of complaints raised. This detail was left to the rules to be made by the Legal Services Board, agreed by the Lord Chancellor, and authorised by Parliament. The Department sees a clear read across between the process adopted in England and Wales, and the process it is engaged in now to develop the levy regulations.

3.26 Turning now to the respective submissions of the professional bodies. The Bar Council has concluded that the levy be apportioned with reference to the number of complaints raised with each professional body. The Law Society

has concluded that the levy be split equally between the Law Society and the Bar. The Department has considered both options carefully.

3.27 The Law Society submission focuses on the fact that the LSOC has a strategic oversight role that will be applied equally between both it and the Bar. It has indicated that an equal split arrangement can be safeguarded with a review to ensure that disproportionate resources are not being exhausted on either professional body. In effect, the Society is suggesting that the levy be applied based on the volume of activity generated by each professional body, which the Society contends will be the same as the LSOC has the same oversight role in relation to both bodies.

3.28 Calculating the volume of activity that is generated by each professional body clearly excites a different view from the respective body. A theme in the submissions from each organisation noted they had considerably different expectations of the time that the LSOC would devote to each of them in relation to the discharge of the postholder's statutory obligations.

3.29 From the Department's perspective, calculating the levy on activity assumes that the LSOC will be focussing their work on those aspects of the professional body that pose the greatest risk in not meeting the requirements of the Act and that therefore the postholder would be able to distribute costs on an "amount of work generated" basis. This approach could only be done with any degree of accuracy on a retrospective basis.

3.30 The LSOC is charged with various responsibilities, some of which could be argued as attracting similar levels of activity (for example, one might expect the LSOC's responsibilities in relation to the appointment of the Solicitors Complaints Committee and the Bar Complaints Committee under Schedules 2 and 3 to the 2016 Act to be broadly similar) and others which could be argued as being difficult to determine the levels of likely activity. For example, analysis

of the respective professional body's plan to deal with complaints may require more or less work on the LSOC part for one body over another. If there are particular problems raised in relation to one branch of the profession this could lead to a much greater amount of the LSOC's time being devoted to those issues.

3.31 So while the benefit of this option is that it could align the work generated by each professional body to the direct costs incurred by the LSOC, to make this work the LSOC would be required to provide detailed records of the time and type of work that it has undertaken, and attribute same to a particular professional body. The Department does not consider that the nature and scope of the role, and the fact that the Department has taken a view on the size and nature of the office, lends itself to the administrative burden that would be required to be undertaken at this stage.

3.32 The Department also has a query over the perceived fairness of such an approach. The 2016 Act imposes the same oversight functions on each professional body, irrespective of the numbers of members in their ranks. The LSOC must ensure that the professional body is meeting those requirements and therefore there is no obvious correlation between the amount of work undertaken by the LSOC and the size of the membership of the professional body.

3.33 Therefore it is likely that the impact of the levy judged on this basis would be more acute for a barrister who is a member of the smaller Bar, and could be much greater than that for a solicitor who is a member of the much larger Law Society.

3.34 The Bar's approach, that the levy should be apportioned based on the number of complaints received by the relevant professional body, also causes the Department some problems. We accept the agreed view that the LSOC will



not investigate individual complaints and will perform a different role to that carried out by the Scottish Legal Complaints Commission and the Legal Ombudsman in England and Wales. Both organisations are paid for by the professional bodies (or their defined equivalents) by a levy based on the number of complaints received, and/or the number of complaints upheld. Scotland adopts a partly polluter pays approach, and the English model also reflects the front line complaints handling function carried out by the Legal Ombudsman.

3.35 The Department further accepts that the statutory function of the office includes the power to review the complaints handling procedure of each professional body. While this function may be more or less onerous as between one professional body or the other, the Department does not believe that at this stage it is possible to draw any correlation between the discharge of this function in line with the number of complaints received by the professional body. The number of complaints received may have a bearing on the targets to be set by the LSOC, the nature and scope of the plan for the handling of complaints developed by the professional body, or how the LSOC interacts with the body in terms of future actions, but the Department can see no clear evidence that a link between the numbers of complaints and the apportionment of the levy meets the test laid out in Section 5(3) of the 2016 Act.

3.36 It is the Department's view that the two proposals submitted by the Bar and the Law Society represent opposite ends of the scale in relation to a fair apportionment of the levy. We believe that a 50/50 split would not be a reasonable outcome for the Bar, and that to base the levy with reference to the number of complaints received is likely to place an equally onerous outcome on the Law Society.

3.37 The Department believes that the fairest approach, one which is relatively simple to administer, is to base the levy on the number of

members of each professional body, and to share the burden equally between the members. This is the per capita approach. It is one that has been flagged by the Department during debate on the draft Bill. When asked about the cost of the levy, this was the model that was referred to most often in terms of highlighting the potential costs to the professions. Figures of up to £100 per lawyer were discussed, and the Department signalled that this would be its anticipated maximum liability on any one practitioner. During consideration of the Bill, the generally accepted figure was that the costs would more likely be around £60-£70 per head.

3.38 The Law Society has indicated in its submission that there are some 2800 solicitors currently practising in Northern Ireland. We understand from the Bar that there are around approximately 650-700 barristers in private practice. With costs now expected not to breach the £150,000 barrier, and likely to be lower still, the Department now estimates that using this model would lead to an approximate average levy payment of between £35-£45, assuming the professional bodies choose to recoup the levy charges equally from their members. The Law Society and the Bar are, of course, at liberty to determine how they retrieve this cost via their members in whichever way they desire. For example, the most junior members of the Bar are currently subsidised to an extent by their professional body, and there is no reason why that situation would need to change.

3.39 This approach will also be relatively simple to administer. It will require a minimum amount of data collection for both the professional body and the Department. The LSOC, through the Department, can clearly define the costs for each professional body from the outset. This meets the definition of fair principles in being transparent and clear to the professional bodies, as the Department will follow a clear methodology that will not place extensive burdens on either the professional body, the LSOC or the Department.

3.40. More importantly, the Department believes that it is a proportionate outcome for each member of the legal profession. It takes account of the relative sizes of the Law Society and the Bar, and uses a consistent methodology between them. Ultimately, the LSOC will be carrying out statutory functions that have, at their heart, the aim of being of benefit not only to consumers, but also to each and every legal practitioner in this jurisdiction. Accordingly, the Department believes that this is the fairest model for apportionment of the levy at this juncture.

3.41 That said, the Department recognises the need to reflect and review on the levy and its apportionment. This is a new post, one which is untested in the context of the regulation of legal services in Northern Ireland, and the Department will be keen to monitor how that postholder works and their impact on the professional bodies. Accordingly, we plan, in addition to the normal review processes, to include a formal review mechanism in the regulations to assess how the levy is being applied no later than 31 March 2020. England and Wales adopted a similar exercise and made changes to the 2010 Rules in 2013/14, and the Department is content to undertake a similar review to ensure the principle of fairness continues to be met.

**The Department welcomes views on the apportionment of the levy as between each professional body**

## **TIMING FOR COLLECTION OF THE LEVY**

4.1 The Department is committed to ensuring that both professional bodies are given the best possible indication of the costs that they need to pay at an early juncture, so that they can incorporate those costs into their planning cycles for recouping fees from their members. A clear approach to the collection of the levy will help the professional bodies to manage the administration of these matters.

4.2 Accordingly the Department is proposing to base the levy on actual expenditure and to recover from the professional bodies as soon as practicable after the end of the financial year. The Department will first consult with the professional body on the budget for the LSOC in advance, and then provide an estimate of the forecast spend for each financial year at an agreed time, before notifying the professional body of the final account before the end of March.

4.3 The benefit of this approach is that the professional bodies will have a high degree of certainty in order to calculate and set their fees for members in advance.

**The Department welcomes views on the timing of the recovery of the levy.**

# **REGULATORY IMPACT ASSESSMENT**

## **INTRODUCTION AND BACKGROUND**

The Legal Complaints and Regulation Act (NI) 2016 sets out a statutory scheme for the handling of complaints against solicitors and barristers by their respective professional bodies. Underpinning this new scheme is the creation of a statutory oversight body, the Legal Services Oversight Commissioner (LSOC). The LSOC will have new powers in relation to complaints handling by the professional bodies. The postholder will oversee how the professional bodies handle complaints against their members, be able to make recommendations and will have the power to penalise the professional bodies in certain circumstances.

Sections 5 and 6 of the Act provide that the office of the LSOC will be paid by way of a levy on the professional bodies. Those directly impacted by the levy will be the Law Society of Northern Ireland and the Honourable Society of the Inn of Court of Northern Ireland.

## **SCOPE OF THE IMPACT ASSESSMENT**

The scope of this impact assessment is narrow. The decision to fund the LSOC by way of a levy has already been dealt with by the report of the Legal Services Review Group chaired by Professor Sir George Bain, by the consultation document issued by the Department relating to the draft Legal Complaints and Regulation Bill, and by the consideration by the Executive and the Assembly of the Bill itself. The Act now requires the Department to ensure that the apportionment of the levy as between the professional bodies is carried out in accordance with fair principles. This Impact Assessment deals solely with the apportionment mechanism for the costs incurred by the LSOC for the purposes of this Act or any other statutory provision, as set out in Section 5 of the 2016 Act.

## **SCOPE OF THE PROPOSALS**

Readers are directed to the consultation document relating to the proposed regulations for details of the proposal. The two professional bodies will pay the levy.

## **COST/BENEFIT ANALYSIS**

The options that the Department has focussed on in the consultation document relate to how the Department will apportion the costs of the LSOC as between the Law Society and the Inn of Court. The Act requires that the expenditure of the LSOC be recovered via the imposition of a levy and that the Department must satisfy itself that the apportionment of the levy as between each professional body will be in accordance with fair principles. The impact assessment therefore only looks at the fairness of the different options. There will be no difference in relation to the actual levy itself, which is expected to be contained to amounts lower than anticipated during the consideration of regulatory impacts during the consultation on the draft Bill and during the scrutiny of the Bill in the Assembly.

A discussion document was circulated in September 2016 to the Law Society and the Bar for consideration of various options for the levy. An examination of the approaches taken elsewhere (England and Wales, Scotland, the Republic of Ireland) was presented and the professional bodies were asked for their views.

They responded by 18 November 2016 with different conclusions as to the best options. In the absence of agreement between the professional bodies, the Department is undertaking this exercise to reach a final determination on the matter.

## **OPTION 1 – LAW SOCIETY RECOMMENDATION – SPLIT LEVY**

The Law Society has proposed that the levy be split equally between itself and the Bar (Inn of Court). It has argued, *inter alia*, that there is no differentiation in the Act in relation to the powers of the LSOC as between the Law Society and the Bar. It has also correctly noted that the LSOC will not have front line

complaints handling responsibilities. It concludes therefore that its strategic role will be relatively equally split across the two branches of the legal profession.

The Bar has suggested that while the LSOC has no direct complaints handling responsibilities, the volume of activity generated by the Bar in relation to the LSOC's duties will be significantly less than that generated by the Law Society.

### **Costs**

Adopting this approach would see the Law Society and the Bar, through the Inn of Court, pay an equal amount of the expenditure incurred by the LSOC. Taking the Department's estimate that the LSOC will cost no more than £150,000 in its first full financial year of operation, each professional body would pay no more than £75,000.

It is anticipated that the professional bodies, which are non profit making organisations, with limited external income streams, will seek to recoup the charges associated with the levy by way of a charge on their members. The Law Society is likely to increase the costs of practising certificates, the Inn of Court, through its Executive Council, is likely to recover the cost by way of increased Bar Library subscriptions.

According to the Law Society's response to the discussion document, there are approximately 2800 solicitors in Northern Ireland. The Department does not have a precise figure for the numbers at the Bar but it is estimated to be between 650-700.

Using these figures as a guide, this option could see (and the Department accepts that as each professional body is free to defray the costs in whatever way they see fit) the £75,000 estimated maximum levy per body in the following way

Law Society - £75,000 divided amongst 2800 solicitors = approx £27 per solicitor

Bar - £75,000 divided amongst 650/700 barristers = approx £107-115 per barrister

### **Benefits**

This approach would be easily measured and require no additional work for the Department or the LSOC.

This approach would be of benefit if it transpired that the LSOC equally divided their time between the two PBs. The LSOC would only be able to do this with any accuracy on a retrospective basis over a period of time.

## **OPTION 2 – BAR OF NI RECOMMENDATION – COMPLAINTS RECEIVED BY THE RELEVANT PROFESSIONAL BODY**

The Bar of NI has proposed that the levy is apportioned by taking into account the number of complaints made against the members of each professional body. While accepting that the LSOC will not have a direct front line responsibility in relation to the determination of complaints, it argues that complaints activity would influence the LSOC in how they allocate their time and resources proportionate to the extent to which the relevant complaints process is being accessed.

The Law Society has reiterated that the LSOC holds a strategic oversight role in relation to complaints and therefore the number of complaints generated against each professional body is not relevant in relation to the activities undertaken by the LSOC.

### **Costs**

The data on the number of complaints made against solicitors is readily available from Lay Observer reports, but the number of relevant complaints made against barristers has not been publicly available. The Professional Conduct Committee of the Bar does not, as the Department understands it, differentiate complaints made by clients, from those made by other legal professionals, in the way in which the new legislation is couched

The Act sets out new powers for complaints committees, some of which, including the power to award compensation, have not been available to clients in the past. This therefore makes any realistic assessment of the number of complaints generated against solicitors and barristers going forward a very



difficult one to attempt. It may take 2-3 years before such data would be available and reliable.

In addition, the LSOC will not deal with individual complaints.

In the absence of reliable data related to the numbers of complaints that would be relevant under the provisions of the 2016 Act, it is difficult to assess how the levy would be split between the 2 bodies, but it is likely that the Law Society would be responsible for a significant majority of the costs.

### **Benefits**

This method would, indirectly, reflect the principle of “polluter pays”

### **OPTION 3 – THE DEPARTMENT’S RESPONSE – PER CAPITA APPORTIONMENT**

This option apportions the costs relating to the LSOC based on the number of members of a profession who hold practising certificates or who are recognised as being entitled to practise.

### **Costs**

This method does not reflect the polluter pays principle, and it is difficult to ascertain the actual percentage of time the LSOC will spend in activities between the two branches of the profession.

Based on the numbers outlined above, a levy of £150,000 would be split as shown

Law Society – approx 2800 members – cost per practitioner, approx £43 – total cost to Law Society – approx £120,000pa

Bar/Inn of Court – approx 700 members – cost per practitioner, approx £43 – total cost of Bar/Inn – approx £30,000pa

### **Benefits**

The Department does accept that there is a probability that the LSOC work may not be divided in the same proportion as a per capita split. However, this approach is simple, it requires a minimum amount of data to be collected by

the professional bodies, the Department and the LSOC, and the verification of the data by the Department should be relatively straightforward.

Using this method, costs can be clearly defined for each professional body from the outset, which will enable them to adjust practising fees and their internal processes as part of normal business planning cycles. The levy would not need to be based on retrospective information and would relate to the numbers in the profession in any given year.

Such an approach would satisfy the definition of fair principles in that it is clear and transparent, and does not place any extensive administrative or regulatory burden on the professional bodies in terms of data collection. In terms of proportionality it takes account of the relative sizes of the solicitors' profession and the barristers' profession. It is also consistent with approaches in England and Wales in terms of the oversight body in that jurisdiction.

The Department also concludes that the LSOC has a responsibility towards not only consumers but to each and every legal professional in this jurisdiction. It therefore appears fair that, in theory at least, each and every legal professional should share the cost of that service (subject to the recovery of the costs by their own professional body).

## **CONCLUSION AND SUMMARY OF OPTIONS**

It is the Department's view that Option 3 is the fairest approach for apportioning the costs of the LSOC for the reasons outlined above.