Submission from Franks Macadam Brown for the Legal Profession and Legal Aid (Scotland) Bill

The Scottish Legal Complaints Commission

The present Law Society of Scotland system involves the sifting out of inappropriate complaints: Report writing on complaints that have been accepted: with resultant Reports going to Committee for final decision.

Reporters and Committee members are, nowadays paid, but at a “token” rate. This is because there is a substantial amount of goodwill between solicitors and non-solicitors who are involved, who were willing to provide their services gratuitously.

It is presumed that when matters devolve onto the new Scottish Legal Complaints Commission, that the Commission will not be able to expect people to provide services to it for free, or even at a token rate.

It follows that either the Commission will be hugely more expensive than the existing Law Society structure, or some entirely new and cheaper structure will need to be created.

So far as we can see, the main way in which a new structure that can be created that will be cheaper than the old would be for the decision-making progress to be an amalgamation of (a) the Report writing process (b) doing away with the need for a Committee stage.

This appears to us to be feasible, subject to a number of caveats. Firstly, Reporters, though mostly good, are of uneven quality, and even on the best day it is possible for a Reporter to get things badly wrong. In our submission any Reporter-decision should be subject to review, before any decision is made final. Even then there is still the opportunity for error, and in our submission there should be an appeals machinery capable of correcting such errors. At the moment the Bill appears to be conspicuously silent on any appeal structure.

Indeed, any sophisticated jurisdictional structure should have inherent within it an appeals machinery.

We have concerns that the proposed machinery may in any event not be human rights compliant, in terms of EU Legislation, and this requires to be addressed.

Costs: we can see that the new structure will require to be funded from the legal profession, as indeed is the case at the moment: though we express concern and reservation that there be careful budgetary and cost controls, so that costs do not escalate unnecessarily. The profession should not be expected to be held to ransom on an “open chequebook” basis.

We express grave concerns about the proposal to charge solicitors against whom complaints are made £500 “per case”. Where a solicitor has been found blameless, we can see that nevertheless the solicitor will have paid for the exercise. That is hardly a level playing field.

We suggest that it may not be inappropriate for solicitors to pay, probably on a sliding scale, expenses where their services have been found to be inadequate.

Conversely, where it appears that a complaint might be baseless, but the complaint is nevertheless ruled “in”, we feel that it would not be inappropriate for the complainer to have to pay a deposit to the Commission, refundable in the event of a complaint being substantially upheld, but being forfeit if it does indeed prove that the complaint is baseless.

Experience: it is unclear to us how the Commission is to be manned. Whilst we note that it is intended that the majority of those involved will be non solicitors, we presume that there will be solicitor involvement, firstly in that members of the legal profession are probably more familiar with the concepts and requirements of justice than are lay people, and secondly,
because there will inevitably be technical issues involved where legal knowledge will need to be deployed to deal with those issues.

Further: recruitment: we can see that it will probably be deemed desirable for the new Commission to be seen as a radical departure from the existing structure, and that the new structure will not wish to be seen as being peopled by the “same old faces”, albeit under a fresh guise.

However: a considerable expertise has been built up with the Law Society both with the administrative staff, solicitor and non solicitor Committee members and Reporters, and it would seem to be the waste of a valuable resource if some at least of these people were not to be engaged in the new system.

We trust that the foregoing observations and points are seen as being constructive, as they are intended.

We have no particular observations to make with regard to Legal Aid, having withdrawn from the system some years ago, due to the rates of pay: the amount of bureaucracy involved: and the arbitrary decision making practices of the Scottish Legal Aid Board.

Supplementary Submission

Further to our submissions by e-mail on 14th March (which you have been good enough to acknowledge per e-mail of 15th March), and in particular with regard to Paragraphs 10-12 thereof, we have had further discussions with other practitioners, who have endorsed the view that we have expressed therein.

We might express particular concerns should the following circumstances arise - which, in our submission, are likely to arise with quite some frequency.

If a particular piece of work is done for a given client, the fee might be £375, say. If the client was then to indicate a complaint, the client would be in the position of putting it to the solicitor that the client would be willing to settle the alleged (and possibly completely spurious) “dissatisfaction” for a payment of £400. If the solicitor was going to have to pay £500 to the Commission, there would be economic sense in the solicitor settling with the client in the lower sum of £400: but the economic impact of this would be that the solicitor had actually paid the client, net, £25, for doing a job of work for the client that might have been perfectly satisfactory.

The way matters are currently proposed, the legislation effectively amounts to being a “complainant’s charter”.

We accordingly endorse our three-pronged proposal:

1. That the solicitors should not have it imposed upon them that they should pay £500 in the event of a complaint being accepted into Process.

2. That in the event of a complaint being upheld, that solicitors should be liable to the Commission in expenses, in our suggestion on some form of sliding scale, depending upon the degree to which the complaint had been upheld, and the seriousness (or otherwise) of any inadequacy.

3. In the event of a complaint being accepted from a complainer and admitted to Process, where the complaint was felt likely to be “thin”, that the complainer should pay a deposit to the Commission, to be refundable all or in part, depending upon the complainer’s ultimate degree of success.

That, we feel, is fair to both sides.
There is an additional access to justice issue here. Some types of work attract more complaints than others: if solicitors were obliged to pay £500 simply on the acceptance of a complaint (before it even fell to be determined), then solicitors might simply decline to do certain types of work, given the economic considerations referred to in our illustration, above. If that were to happen, then members of the public might find that they could not get solicitors to represent them, in certain areas of law.

Franks Macadam Brown