Submission from Steven Waters for the Legal Profession and Legal Aid (Scotland) Bill

I neither have the time, nor the inclination to draw up my own detailed submissions. Therefore, I append a copy of the Law Society's summary, with which I am broadly in agreement. My firm will soon stop doing Legal Aid Work. It is not remunerative. We get less than £50 per hour.

I am presently the subject of a complaint to the Law Society, because I did not introduce myself to someone's wife (although she knew who I was) who was present in a client's house when I carried out a home visit. I kid you not! Why on earth should I fund that?

Cost

There is no proper cost or cost-benefit analysis of the proposed new Scottish Legal Complaints Commission. However, it is likely to cost more than the Society's existing Client Relations Office, particularly as the work currently carried out largely on a voluntary basis by committee members and Reporters will be conducted by paid employees. This will be met by a general levy on the legal profession as well as fees charged to solicitors for every case considered, whether upheld or not.

Compensation

The increase in compensation for Inadequate Professional Service from £5,000 (a level which was raised from £1,000 just last year) to £20,000 is excessive and no explanation for such a large rise is given. The English white paper on complaints handling introduced the £20,000 figure - it appears that an English solution is being imported to resolve a perceived Scottish problem, despite the promise of Scottish solutions for Scottish issues.

No-fault liability

The charging mechanism for the Commission is based on the principle of "polluter pays". Yet the system would be more accurately described as one based on the principle of "solicitor pays" as the practitioner will be expected to pay case fees whether or not a complaint is upheld. In addition, the solicitor will pay the full costs of mediation through the Commission. The Society would rather that where a complaint is upheld the solicitor pays a higher case handling fee rather than a flat handling fee applying to all cases.

Conduct issues

The Commission will have the power to force the Society to action Certain conduct issues. Losing control of conduct goes right to the heart of what it means to be a profession.

Guarantee Fund/Master Policy

The Bill gives the Commission the power to oversee the running of both the Master Policy and the Guarantee Fund. The justification for such powers is not clear and there was no mandate for their introduction in the Scottish Executive's consultation. The administration of the Master Policy and claims made under that policy are not decided by the Society. These
are unique and robust public protections. However, they also represent a further expense to solicitors - in addition to regulatory costs and potential compensation pay-outs - which will have to be taken into account when carrying out risk management audits.

Issues Affecting Solicitors and their Clients

"Access to Justice"

The Bill may cause particular problems for legal aid practitioners. Firstly, practices with marginal profit levels would not be able to absorb the increased costs. Secondly, risk management considerations may lead practitioners to conclude that certain types of work present too much of a risk for too little return. In other words, a routine piece of civil legal aid work bringing in £150 may not be worth taking on when it could attract a complaint fee of several hundred pounds and, potentially, a compensation claim of up to £20,000. Also, the bread and butter of High Street firms around Scotland - conveyancing, matrimonial and family matters - often involve demanding clients and are more likely to lead to complaints than other types of work.

There is the prospect that a combination of the above factors - general costs, excessive compensation levels, the high-risk/low pay of Legal Aid Work and the general unfairness of the proposed new system - could lead to a number of firms either ceasing to trade or deciding not to do particular types of work which traditionally have brought complaints. This could mean, particularly in rural areas with small firms, that the number of solicitors decline and that in some areas it might be difficult for clients to get advice about particular types of business. Law Centres could be hit harder than most as their workload is based on this type of work and often involves the most difficult clients. In other words, "advice deserts" would be created. This would clearly not be in the public interest.

Issues Affecting Solicitors, Clients and the Wider Public

Economic Impacts

In addition to the damaging effect on access to justice, a downturn in the solicitors’ profession could have potentially serious economic impacts, particularly in rural areas. The turnover of the profession approaches £1 billion per annum and solicitors’ businesses employ around 20,000 people.

Yet the profession is more than 99% complaint-free.

Independence

The Commission will not be considered independent if, as proposed, appointments to its board are made by Scottish Ministers.

Human Rights

It is unlikely the new system will comply with the European Convention on Human Rights because: the board will be appointed by Ministers and will not guarantee solicitor representation; case fees will be paid even if a solicitor is exonerated; there will only be an internal right of appeal for the public or the profession about a decision by the Commission on a service complaint.
Negligence

The Commission will take on the functions of the courts in negligence matters where the claim is less than £20,000, even though there is no consultation mandate to do so. Again, this is likely to raise issues in relation to ECHR compliance. The Society believes negligence should remain a matter for the courts.