Submission from Graeme Duncan for the Legal Profession and Legal Aid (Scotland) Bill

I am a solicitor engaged in private practice in Edinburgh. I refer to the above Bill in respect of which I would make the following representations. My main concerns over the proposed bill are as follows:

- The automatic levy on a practitioner when a complaint is made, even if the practitioner is found to have acted properly.
- The lack of the right of appeal and other human rights issues
- The overall cost and the control of that cost.

The automatic levy on a practitioner when a complaint is made, even if the practitioner is found to have acted properly

This is unfair. There appears to be no good reason why I as a solicitor acting reasonably and providing a service in an adequate and professional manner should be expected to pay an additional levy for a complaint that is made against me where the complaint is held unfounded? It is naïve to think that there are not complaints made that have no merit and when such complaints are made, the innocent party would be punished.

If this levy is in place there will be no incentive for solicitors to offer low cost or low profit services to clients as the costs of any complaint would mean removing any sort of profit margin. The direct consequence of this is that firms will be reluctant to open themselves to such potentially non-profitable business and therefore members of the public will be denied access to justice.

There is also a similar detrimental consequence for legal aid work. The profit margins in all types of legal aid work are sufficiently low that even now many practitioners have decided that it is no longer profitable to take that type of work on. The effect of this is that any unfounded complaint could have a serious impact on the profitability of legal aid work and lead to more firms deciding not to carry on that work. Consequently members of the public will be denied access to justice, especially in more rural areas and smaller towns and cities where there are less firms.

It is therefore not in the best interests of the public for this levy to be added as they may find themselves in a position where they cannot find a solicitor to carry out a piece of essential work under the legal aid scheme.

A far more equitable approach would be to impose a levy only on those solicitors or firms who are found to be guilty of providing an inadequate service.

The lack of the right of appeal and other human rights issues

I would refer you to the opinion of Lord Lester of Herne Hill QC which was produced by the Law Society. It should be relatively straightforward to remedy these problems by allowing an avenue of appeal to the Sheriff Court which would be the preferable forum to minimise the costs of such appeal.

The overall cost and the control of that cost

Regulated professionals will have no control over the costs of the Commission. However, there is a real concern that the Commission is not accountable for the costs of its proposed operation. The reason why there are concerns is that there is insufficient information as to
how it is to be run. It is essential the Commission is subject to external financial controls. There should be auditing of its costs, perhaps by Audit Scotland.

The bill recognises that matters should be dealt with in-house within the solicitors practice in the first instance. I am an employment lawyer. Employment Tribunals procedures require that an employee must submit a letter of grievance to their employer and give them 28 days to respond, before that employee is entitled to submit a claim to the employment tribunal. Any application made without to the Tribunal where no grievance procedure has been invoked is automatically rejected by the Tribunal clerks at the outset. This ensures that the employer is given sufficient time and opportunity to deal with an employee’s claim with a view to achieving a resolution before incurring the time of the Tribunal.

A similar procedure here could provide a number of benefits to the Commission, the profession and to the public:

- The complainer gets a written response to their complaint in a short time frame.
- The solicitor gets fair notice that a complaint is likely as well as the nature of the complaint and the opportunity to resolve the issue.
- The Commission does not receive claims that could otherwise be dealt with at source.
- The Commission can be provided with a letter of complaint and a response at the outset, making it easier for them see what the issues are and to identify frivolous and malicious complaints and also complaints manifestly lacking in merit.

I would envisage it being mandatory to provide a copy of the letter of complaint with any application to the Commission as well as a copy of any reply.

The difficulty of determining issues of negligence

The reference to “negligence” in section 34 should be deleted. A tribunal with a lay majority cannot be expected to apply the whole jurisprudence of the law of reparation. The delict system presently deals with this issue satisfactorily. In the event that negligence is not excluded then this emphasises the need for an independent appeal structure. The client can effectively “appeal” a refusal by the commission to award compensation for alleged negligence (or a decision that their award should be reduced by reason of contributory negligence) by simply raising a court action for reparation in the local Sheriff Court. The solicitor can only raise an action of Judicial Review in the Court of Session to contest a finding of negligence were this to be made. This is not the purpose of the process of Judicial Review.

Financial limits

I can see no justification in the Scottish economy for the limits which are suggested. The Scottish Small Claim limit is £750.00: the English counterpart is £5000.00. The Scottish Executive has been unable for over a decade to secure consensus on raising the Small Claim limit. How can the State justify free negligence actions against solicitors by means of a complaint system for any client no matter how wealthy up to the value of £20,000.00 when the general public cannot pursue an accountant, optician, a business, or a local authority for their neglect for more than £750.00 without taking court action involving means tested legal aid or other funding. Furthermore, the crafting of claims for negligence and appropriate quantification of loss requires knowledge the ordinary client does not have. The client will therefore be denied access to justice as professional advice would be available were negligence claims to remain as claims in the field of delict where there are many firms of solicitors willing and able to provide advice to client’s for such claims.

Conclusion

I would also add that I am in agreement with the submissions made by the Law Society of Scotland and the Solicitors for the Supreme Courts and although I am concerned by all the
points raised by them, my main concerns are those outlined above. In addition, I hope my comments regarding the statutory requirement to submit a complaint in writing and allow 28 days before approaching the Commission would be taken on board. It has worked well in the sphere of employment law and should also work well in this context.