Dear Sir

Legal Profession & Legal Aid (Scotland) Bill – Stage I

I have recently endeavoured to study the provisions of this Bill, and wish to make the following submission in my personal and professional capacities.

I was admitted as a solicitor in Scotland in 1996. I am currently an in-house solicitor dealing with property issues, but have previously (and may have considered in the future) working in private practice in the fields of conveyancing and private client including the fields of legal aid work, elderly client advice and adults with incapacity. I am also well aware of the intrinsic nature of the local practice of solicitors in the local communities throughout Scotland.

I am deeply saddened that the perception – and let us be clear it is not the reality and I am unsure as to who holds this perception – that solicitors policing themselves is so disadvantageous to the public that the ramifications of this Bill are considered necessary, measured and appropriate to deal with this perception.

I appreciate that the Law Society of Scotland will make its own response but I would ask you to take time to read my principal concerns.
Justice, fairness and equity

Solicitors provide advice and assistance to some of the poorest and most disadvantaged members of society. We represent people who have mental health issues; require guardians; have difficulty in understanding legal concepts; and who have unrealistic expectations of outcomes. It is inevitable that legal practices will revise radically their policy of accepting clients whose circumstances or the type of work involved suggest that there is a risk or likelihood of there being a complaint. Of course those least affected will be large corporations for whom the complaint process or compensation are of little significance whilst the more vulnerable will be most prejudiced. And those who have relied on a pro bono service offered by many Scottish solicitors will be badly prejudiced as how could any solicitor risk taking on such a case for fear that may still result in a complaint. But this is a necessary and direct consequence of the Bill located within the current economic structure of Scotland and a free and competitive marketplace.

An analogy has been mentioned in various circles recently. If a was greengrocer selling an apple at 10p knowing that if the person complained to the greengrocer’s commission then, regardless of the quality of that apple, he would automatically have to pay a penalty of £10 then he would think seriously about stopping selling apples. If that applied to all of his products then he would seriously require to consider shutting up my shop or providing his apples to only certain customers and at a much higher price. This Bill appears to relieve individuals of their responsibilities for themselves in favour of imposing unreasonable burdens upon solicitors by punishing solicitors financially even when there is no basis of complaint. Indeed nowhere does the Bill seek to protect the solicitor from unreasonable complaints, the hassle, stress and worry of a complaint process arising from unrealistic expectations, mischief or malevolence by clients.

This issue will require to be considered by every practice in Scotland. Firms will close, staff will lose their employment, solicitors will suffer and those clients who can least afford to go without representation will be most disadvantaged. This is clearly not in the public interest. I would ask you to ponder carefully on these ramifications.

The proposed levy on all solicitors will affect those not in private practice. This is unfair as in-house solicitors are employed by the organisation and ac: only for them thus the likelihood of a complaint is negligible but they must bear a proportion of the cost of this system.

Economic Impacts

The closure of solicitors’ firms this will have serious economic impacts in many areas such including some of the poorest areas in Scotland. A consequence will be for local businesses who need local legal advice at affordable costs; for individuals for whom it is impractical or impossible to travel to major towns or cities to queue to see one of the few practitioners for their issue and the practise of law private practice, serving the people of Scotland, will become an unattractive career option.

The Gershon Report urges the public sector to make efficiencies and to downsize in favour of the private sector. The Bill’s proposals will have the opposite effect. Not only will 36 private sector jobs be lost in the Law Society and transferred into 60 public sector jobs with the Commission; solicitors will be forced out of private practice and, at best, in to public sector jobs. This is in direct contravention of Government policy.
Human Rights

It is surprising that the office of the Presiding Officer declared this Bill ECHR complaint and continues to do so in the face of the expert opinion of Lord Lester of Herne Hill, QC, that it is not. All the more so given the ongoing pension dispute and the Executive’s perception of compliance with European Law. Not only does it lack the basic provision of an external appeal; it is clearly not independent of the State as the Board will be appointed by Ministers and the majority will be “lay people”. What will that mean in practice? What guarantees can be given that there will even be an attempt to appoint fair minded and impartial persons with appropriate qualifications? If I wish to make a complaint about a plumber I would not expect an electrician to be giving his opinion on whether or not plumbing work had been adequately carried out. I see also that there is no guarantee of solicitor representation so I am unable to see how reasonable decisions can be expected to be arrived at nor how accountable this body will be.

Usurping the functions of the Court

The last time the Government set up a body which usurped the functions of the Court it was called the CSA which has proved to be costly, bureaucratic and wholly ineffective in achieving its primary purpose. Might I suggest that the Committee thinks carefully before sanctioning CSA mark 2. The legal court has been a pillar of justice and fairness in many cultures for hundreds of year. And it has been for good reason. The denial of access to a court, such as this bill proposes, is not only a retrograde step but deeply worrying. It is ironic that the promoters of the bill would seek to deny access to the courts of solicitors – practitioners of law and “Officers of the court.” A judicial review, the only judicial remedy available does not appear to be a form of appeal.

Conduct Issues

I feel very strongly that in a democratic society there should be a clear division between the Executive, the legislature and the Judiciary. As part of the structure, I consider that a strong independent legal profession which is able, where necessary, to “take on” the power of the State is of paramount importance. What is proposed in this Bill – namely that the Commission will be able to enforce its views on the Society in respect of its members – means that, ultimately, the State will control the solicitor profession. What is the Executive’s intention with this proposal? A further deeply worrying measure.

Costs of Commission

Apart from the unfairness of the “solicitor pays” levy and “case fee” payable by solicitors regardless of the outcome, I am deeply concerned that there has been no proper cost/ benefit analysis carried out. It is unclear to me at this stage exactly what structure the new body will adopt; how decisions are to be made; how quality is to be assured and how accountable this body will be in terms of finance and fairness. I find it especially disappointing that the cost of oversight of the Society’s complaints mechanism, which is currently borne out of the public purse, will be transferred to the solicitor profession and, naturally, onwards to the wider client base. Why should clients who are perfectly happy with the service received from their solicitors bear the cost of handling the gripes of the few?
Compensation

On 31 March 2005 the maximum compensation which could be ordered by the Law Society was £1,000. In a mere three years this will increase twentyfold. This of course can be compared to the failure to increase levels in Small Claims actions and thus raises the question as to the basis for not raising civil limits but so substantially increasing claims at a particular section of society, namely solicitors. Where is the mandate for this twentyfold increase? Where is the need for this? Where is the research concluding that this is the appropriate amount? I note that the White Paper produced in England has the same figure. Are we to have English ideas carte blanche adopted in Scotland? If so I suggest the Committee consider at the English complaints system where it can take up to two years simply to be assigned a case manager and reference. The Law Society of Scotland does this within one working day. The economics of the South East and London are very different from those in Scotland, yet the Executive suggest that the same level of compensation is applicable. No evidence has been produced which identifies this as an appropriate level after taking all relevant factors into account.

Conclusion

Even if the perceived problems thought to arise where solicitors police themselves needed to be dealt with otherwise than by the massive strengthening and improvements in throughput and consistency of decision making which the Law Society of Scotland have put in place over the past two or three years, this Bill is not the answer. It is a measure dictated by what the Executive perceive as pleasing the public and therefore good for votes. I would suggest that such measures rarely succeed. Indeed, the Executive will have taken upon itself responsibility for a quango which will face exactly the same problems which are faced by the Law Society of Scotland namely that there will always be people who are unhappy when it is found that there is no validity to their complaints. When that happens instead of lambasting the Law Society for a lack of independence it will instead lambaste MSPs for producing a body which does not give them the results they want with the inevitable political backlash both from them, the legal profession and satisfied clients of the legal profession suffering as a consequence of the measures contained in the Bill. If there needs to be change, it is the responsibility of the Executive to produce a body which is as fair, properly composed, properly structured and has sufficient powers to meet the reasonable expectations of the Scottish Public whilst at the same time allowing the Profession to work independently and profitably in the interests of all sectors of the Scottish Public as the Law Society of Scotland’s present system. I would suggest this Bill comes nowhere near to meeting that challenge.

Yours sincerely

Gordon T Barclay