Submission from C J Sandison for the Legal Profession and Legal Aid (Scotland) Bill

The Bill proposes to establish a new regulatory body to deal with complaints about lawyers that will be independent of the legal profession. The Executive maintains that, though professional bodies have made significant improvements in relation to complaints handling, ‘there has remained a public demand for greater independence and oversight’. This opinion was based on the responses to the consultation exercise leading up to the preparation of the Bill.

The Executive believes that less than 5% of responses to the consultation came from solicitors, despite a submission being made by the Law Society of Scotland. For the avoidance of doubt, this submission - although confined to three issues – adopts and endorses the points made in the response to the Bill by the Law Society of Scotland.

Cost

While the principle of independent complaints handling is to be welcomed, the system proposed will cost substantially more than the present system, which is subsidised by the profession itself - the work currently carried out for the Client Relations Office is largely on a voluntary basis by committee members and Reporters.

This additional funding will require to be met and nowhere in the Executive’s plan is there an adequate cost/benefit analysis of the proposals. Any such analysis should take into account the extremely small percentage (relative to the volume of business undertaken per annum) of dissatisfied clients.

A proper cost benefit analysis ought to be undertaken prior to the Bill being considered further.

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1 see para 2.6 of the Regulatory Impact Assessment of the Bill J2/S2/06/11/2
2 see para 3.3 of the Regulatory Impact Assessment of the Bill J2/S2/06/11/2
Negligence

The Bill proposes an increase in compensation for Inadequate Professional Service (IPS) from £5,000 to £20,000. I can find no adequate explanation for such a rise in any papers connected with the consultation process. At the very least, I would have thought the Executive ought to be able to produce an evidence base for indicating how on any rational view a disaffected client could assert that IPS (as currently defined) had occurred justifying that level of award.

However, the Bill as proposed blurs the line between IPS and negligence claims. For claims less than £20,000, it seems that the Commission would take on the functions of the courts in negligence matters.

Commission decisions would be internally reviewable but thereafter a decision would require to be judicially reviewed.

There is not a system of ‘no-fault’ compensation in Scotland. Just because a client believes a solicitor has been negligent does not mean that is, in fact, the case. A client must show that a duty of care existed, that the duty was breached by the solicitor and as a result the client suffered loss. Solicitors, as much as claimants, require to have their interests protected. The proposals as submitted do not do this.

This element of the Bill is flawed in terms of process and cost.

Clients who believe their solicitor has been negligent can – ultimately – sue for the loss they have incurred through the courts. A remedy already exists (through the courts, by the same process as any other dispute can be settled) for clients who have a claim against their solicitor for alleged negligent actings.

Why does the Executive believe that a parallel system is of benefit? If the Executive believes that the Courts are too slow, then that is a matter which ought to be addressed by properly funding the Court Service, not by the creation of ‘quango justice’ without a proper appeal process.

3 Section 34 defines IPS to include professional services which are in any respect not of the quality which could reasonably be required of a competent advocate, solicitor or firm of solicitors, and includes any element of negligence
Further, I cannot see on what basis the Executive would seek to introduce an element of ‘fast tracking’ small negligence cases. The Executive has not obtained any evidence base on which to support this proposal, other than anecdotal evidence as to the time taken to resolve certain claims.

In any event, simply because a negligence claim takes time to resolve does not indicate any flaw with the system at present. There are many perfectly legitimate reasons why such claims may take time to settle, not least because there has been no negligence in law. The introduction of s34 as drafted will not help resolution of such claims.

The Bill should not allow the Commission to make determinations on matters of negligence.

Regulatory oversight

The Bill gives the Commission the power\(^4\) to oversee the running of the Law Society of Scotland’s Master Policy for Professional Indemnity Insurance.

Every solicitor in private practice pays a premium additional to his or her Practising Certificate subscriptions to be covered under the Master Policy.

The policy is arranged by the Society by employing insurance brokers. The brokers are appointed by competitive tender process. The brokers, as part of their duties, monitor and audit the policy, its effectiveness and the performance of the insurance companies. That includes ensuring the insurers adhere to a claims handling philosophy which recognises the element of public protection inherent in the arrangements.

The policy covers claims up to £1.5m\(^5\) for clients if there has been negligence by the solicitor.

The Bill seems to misunderstand where the insurance arrangements operate in relation to the public. The public cannot claim on the Master Policy. All that a claimant may do is sue their solicitor. The public benefit of the insurance arrangement is that a successful claim will be paid. (A tiny proportion of claims are actually taken to court – most are settled by negotiation between the claimant’s representatives and insurers). The Society itself does not become involved in the handling of claims – the negotiation and settlement of claims is undertaken by the insurers.

There is no place for an oversight provision relating to the Master Policy. The existing arrangements\(^6\), outlined above, provide more than adequate public protection.

- Is the role of the Commission somehow to supplant that of the Society in the appointment and monitoring of brokers?
- Is the Commission’s role to be second guessing the broker’s decisions?

The proposal, as drafted in relation to monitoring, serves to increase cost without improving monitoring and should, to this extent, be deleted from the Bill.

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\(^4\) s29
\(^5\) This is for each and every claim made against a solicitor, not £1.5m per insurance year.
\(^6\) under s44 of the Solicitors (Scotland) Act 1980