Submission from Derek Livingston for the Legal Profession and Legal Aid (Scotland)

Bill

For some years now I have had the view that it would be preferable if another body dealt with complaints relative to inadequate professional service against solicitors and I am pleased to note that this has been recognised. The main reason for my view however is not because I consider that the Law Society of Scotland were doing a bad job but simply the perception was one whereby complainers considered that they would not obtain a fair result from a body which was also "the Lawyers Trade Union".

Having made the above point I am however dismayed at some of the provisions contained within the Bill. The first of these is the provision whereby solicitors complained against, no matter how unjustified that complaint may be, will require to pay for the matter to be dealt with by the Commission whether by way of a decision or mediation. I can see no reason why solicitors who are found to be blameless should end up having to pay £300, which I understand to be the expected rate, relative to a complaint which is wrongly brought against them whilst the complainer pays nothing. Indeed it is perhaps fair to say that it is not beyond the realms of possibility that complainers might make a complaint of inadequate professional service, not because they reasonably consider they have any justification for it but, simply with a view to reducing their bill knowing that the alternative for the solicitor will be having to justify his or her position and at best pay £300 for the privilege of doing so. It does seem to be a rather strange system whereby making a complaint would be a completely free bet for a complainer whilst the solicitor will always lose. What steps are going to be taken against people who have a history of complaints? Why should solicitors have to pay, in addition to the flat rate levied, simply to justify their position? Would any MSP find it acceptable that he or she had to pay whenever a constituent or other party made a complaint against him or her no matter that the complaint could be found to be groundless?

A further issue which arises relates to the £20,000 maximum award in relation to inadequate professional service. It seems to me that at least part of the problem here has been for some time that again there is a perception that somehow because only £1000, and latterly £5,000, could be awarded as a maximum for inadequate professional service that this was also the maximum that a person complaining of negligence could obtain. That is of course not the case. It is perfectly open to any party who wishes to sue a solicitor to do so provided he or she can either afford to do so or alternatively is eligible for legal aid. That is no different from suing anyone else. There has also been a perception that it is difficult to find a solicitor who will sue for professional negligence. That in my experience is simply untrue. This firm has acted in a number of cases against other solicitors for professional negligence. What I suspect is more the problem is that it is difficult to find a solicitor who will sue for professional negligence where there is no evidence of same or insufficient evidence. It has to be borne in mind that with any profession the test for professional negligence as set out in Hunter -v- Hanley is a high one. Accordingly the aggrieved client who considers that he or she should sue his or her solicitor because something has gone wrong may have a perception that no solicitor will act but it is my experience that solicitors are perfectly happy to act in this type of case subject to there being a case. Obviously no solicitor is going to act against a close colleague but there should be no difficulty in finding a solicitor in Glasgow who will sue someone in Edinburgh or vice versa. Indeed it is fair to say that many solicitors might actually be delighted to take such action!

Why £20,000? I am aware that this is the figure in England but I am unclear about the circumstances there and why it was felt to be necessary and I am certainly well aware of the fact that devolution was not meant to simply be the unthinking following of statutes. It seems to me that the IPS situation really amounts to a form of arbitration and I can see no reason why if we are going to have a relatively informal arbitration system it should be relative to such a large amount. I am unaware of anything similar in any other profession or indeed trade. As I understand it, assuming the present system whereby files are examined by an independent reporter continues, matter will be dealt with by written submissions and not by oral evidence with there therefore being little opportunity to a reporter to consider the
demeanour of a complainer or solicitor or indeed for cross examination except by letter. Rules of evidence will effectively become null and void for what seems to be an extremely large amount of money.

As I understand it in addition there is no appeal to the Court for either the aggrieved client or the solicitor from the decision of the Commission and I am aware that Lord Lester has already expressed the view that this is a contravention of the ECHR.

I should be grateful if you could consider these points in dealing with this legislation.